MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

August 20, 2009, through March 31, 2010

CORBIN R. DAVIS
CLERK OF THE SUPREME COURT

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FIRST EDITION

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SUPREME COURT

	Term Expires January 1 of
Chief Justice	
MARILYN KELLY	2013
Justices	
MICHAEL F. CAVANAGH	2015
ELIZABETH A. WEAVER	2011
MAURA D. CORRIGAN	2015
ROBERT P. YOUNG, Jr.	2011
STEPHEN J. MARKMAN	2013
DIANE M. HATHAWAY	2017

Commissioners

MICHAEL J. SCHMEDLEN, Chief Commissioner
SHARI M. OBERG, Deputy Chief Commissioner

JOHN K. PARKER[1]	DANIEL C. BRUBAKER
TIMOTHY J. RAUBINGER	MICHAEL S. WELLMAN
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NELSON S. LEAVITT	FREDERICK M. BAKER, Jr.
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DON W. ATKINS	SAMUEL R. SMITH
JÜRGEN O. SKOPPEK	ANNE E. ALBERS

State Court Administrator: CARL L. GROMEK

Clerk: CORBIN R. DAVIS
Crier: DAVID G. PALAZZOLO
Reporter of Decisions: DANILO ANSELMO[2]

[1] Through August 31, 2009.

[2] Through October 23, 2009.

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
HENRY WILLIAM SAAD	2015[1]
WILLIAM B. MURPHY	2013[2]
Chief Judge Pro Tem	
CHRISTOPHER M. MURRAY	2015[3]
DAVID H. SAWYER	2011[4]
Judges	
DAVID H. SAWYER	2011[3]
WILLIAM B. MURPHY	2013[1]
MARK J. CAVANAGH	2015
KATHLEEN JANSEN	2013
E. THOMAS FITZGERALD	2015
HENRY WILLIAM SAAD	2015[2]
RICHARD A. BANDSTRA	2015
JOEL P. HOEKSTRA	2011
JANE E. MARKEY	2015
PETER D. O'CONNELL	2013
WILLIAM C. WHITBECK	2011
MICHAEL J. TALBOT	2015
KURTIS T. WILDER	2011
BRIAN K. ZAHRA	2013
PATRICK M. METER	2015
DONALD S. OWENS	2011
KIRSTEN FRANK KELLY	2013
CHRISTOPHER M. MURRAY	2015[4]
PAT M. DONOFRIO	2011
KAREN FORT HOOD	2015
STEPHEN L. BORRELLO	2013
ALTON T. DAVIS	2015
DEBORAH A. SERVITTO	2013
JANE M. BECKERING	2013
ELIZABETH L. GLEICHER	2013
CYNTHIA DIANE STEPHENS	2011
MICHAEL J. KELLY	2015
DOUGLAS B. SHAPIRO	2011

Chief Clerk: SANDRA SCHULTZ MENGEL
Research Director: LARRY S. ROYSTER

[1] To November 9, 2009.

[2] From November 10, 2009.

[3] To December 31, 2009.

[4] From January 1, 2010.

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ADMINISTRATIVE ORDER No. 2009-6

A COURT SHALL SUBMIT A LOCAL ADMINISTRATIVE ORDER TO SCAO WHEN APPOINTING MAGISTRATES AND REFEREES

Entered September 9, 2009, effective January 1, 2010 (File No. 2009-09)—REPORTER.

On order of the Court, effective January 1, 2010, a court shall submit local administrative orders to the State Court Administrative Office to identify individuals appointed as magistrates or referees in that court.

Courts are authorized by statute to appoint magistrates and referees to positions that allow those magistrates and referees to perform various functions. As the entity charged with supervision of the state's courts, it is essential that the State Court Administrative Office of the Michigan Supreme Court be aware of the identity of each of these appointed individuals. In addition, because the law with regard to magistrates allows the court that appoints the magistrate to establish the scope of the duties the magistrate will perform, and because immunity for the magistrate's actions extends only to those actions that are performed within the scope of the authority established by the court that appoints the magistrate, it is also essential that the Supreme Court be notified of the scope of authority granted by each court to its magistrate or magistrates. Further, the Michigan Court Rules grant courts the

authority to determine the specific types of hearings and proceedings to be heard by referees, and this information should likewise be submitted to the State Court Administrative Office.

Accordingly, on order of the Court,

A. Each court that appoints a magistrate or referee shall submit a local administrative order to the State Court Administrative Office that identifies an individual appointed as a magistrate or referee. The local administrative order shall include the name and contact information for the individual and the date the appointment is or was effective.

B. Further, each court that appoints a magistrate or referee shall describe the scope of the authority conferred by the court on the magistrate or referee.

C. It is the responsibility of a magistrate or referee to notify the State Court Administrative Office of changes in the individual's contact information during the course of the appointment.

Staff Comment: Administrative Order No. 2009-6 requires a court to submit a local administrative order to the State Court Administrative Office regarding the identity of magistrates and referees, as well as a description of the scope of the authority of magistrates and referees. These requirements provide the State Court Administrative Office necessary information about who these individuals are and what functions they perform in the trial court. It is the magistrate's or referee's responsibility to update his or her contact information.

The staff comment is not an authoritative construction by the Court.

ADMINISTRATIVE ORDER No. 2009-7

ADOPTION OF A PILOT PROJECT IN THE 46TH DISTRICT COURT TO STUDY THE EFFECTS OF PROPOSED RULE 8.119 OF THE MICHIGAN COURT RULES

Entered October 13, 2009, effective immediately (File No. 2005-32)—REPORTER

On August 11, 2009, the 46th District Court submitted a letter to the Court in which the 46th District Court proposed revision of MCR 8.119 to implement a process that would allow a court clerk to return to a litigant a document that the clerk has identified as nonconforming with the Michigan Court Rules, requirements contained in the Michigan statutes, or the Michigan Supreme Court records standards. Upon receipt of the returned document, the litigant would have several options: the litigant could correct the nonconformity identified by the clerk, submit documentation in support of the document, request the clerk to submit the paper as it was initially submitted for immediate review by the court, or withdraw the document. On order of the Court, the 46th District Court is authorized to implement a pilot project in its court to study the effects of proposed Rule 8.119, limited to cases that involve garnishments and consumer debt collections.

The purpose of the pilot project is to determine whether the proposed language represents a feasible and practical procedure for courts to follow in screening documents that are submitted for filing in cases that involve garnishments and consumer debt collections. The Court is interested in learning whether this procedure will increase efficiency within the court (including assessing its effect on the clerk and the judges of the court), and determining what effect the procedure will have on litigants. The 46th District Court will operate under the following rule for the period of the pilot project, which will begin on the date this order enters and continue for one year or as otherwise ordered by the Court. The 46th District Court will provide a report to the Court within three months of the conclusion of the pilot project regarding the court's assessment of the feasibility of the procedure described below. In addition, litigants will have an opportunity to provide feedback on the pilot project through a survey to be included when documents are returned by clerks, and through polls conducted of those who participate in the judicial review procedure. The 46th District Court shall keep a list of litigants who request that the submitted document be reviewed by a judge.

RULE 8.119. COURT RECORDS AND REPORTS; DUTIES OF CLERKS.

(A)-(B) [Unchanged.]

(C) Filing of Papers. The clerk of the court shall endorse on the first page of every document the date on which it is filed. Papers filed with the clerk of the court must comply with the Michigan Court Rules, requirements contained in the Michigan statutes, and the Michigan Supreme Court records standards. The clerk of the court may ~~reject papers which do not conform to MCR 2.113(C)(1) and MCR 5.113(A)(1)~~ return noncon-

forming papers related to a garnishment or consumer debt collection case in accordance with (D) below.

(D) Return of Nonconforming Papers Related to Garnishment or Consumer Debt Collection Case. If the clerk of the court returns a paper related to a garnishment or consumer debt collection case as nonconforming, the clerk must notify the litigant in writing of the reason for the return. The notice shall provide the name and phone number of the deputy clerk returning the papers. The litigant may, with no additional filing or motion fee, (a) submit supporting documentation; (b) submit an amended version of the paper; (c) request the clerk to submit the paper as initially submitted to the court for immediate review; or (d) withdraw the paper. If no judge is assigned to the case, the chief judge or the chief judge's designee shall perform the review. Upon review, the judge shall either allow the filing or issue a written order disallowing the filing. If disallowed, the reason shall be stated in the order. If the litigant withdraws the paper, the court shall not charge a filing fee and any filing fee previously paid shall be returned to the filer.

If a complaint is returned by a clerk as nonconforming, the litigant may file a motion for judicial review. Upon review, if the judge decides that the complaint was conforming as originally filed and should have been accepted, the complaint shall be considered filed on the original filing date.

(D)-(G) [Relettered (E)-(H), but otherwise unchanged.]

Staff Comment: Under this pilot project, the 46th District Court shall test its proposal to allow court clerks to return certain nonconforming papers submitted to the court in garnishment or consumer debt collections actions. If the clerk returns a paper as nonconforming, the litigant may respond by submitting supporting documentation, submitting an amended document, asking that the document be submitted to the court for immediate review, or withdrawing the paper. If, upon review, the judge

disallows filing of the document, an order would enter disallowing the filing and would state the reason in the order.

The staff comment is not an authoritative construction by the Court.

ADMINISTRATIVE ORDER No. 2010-1

ADOPTION OF ADMINISTRATIVE ORDER TO ESTABLISH AND REQUIRE COMPLIANCE WITH COURT COLLECTIONS PROGRAM AND REPORTING REQUIREMENTS

Entered February 2, 2010, effective May 1, 2010 (File No. 2005-13)—REPORTER

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following administrative order is adopted, effective May 1, 2010.

Enforcing court orders, including financial sanctions, is a responsibility of the courts that, if done effectively, enhances the courts' integrity and credibility while providing funds to assure victims are made whole and support law enforcement, libraries, the crime victim's rights fund, and local governments. In order to improve the enforcement and collection of court-ordered financial sanctions, it is ordered that the State Court Administrator establish court collections program requirements and that all circuit courts, circuit court family divisions, district courts, and municipal courts comply with those requirements. The State Court Administrative Office shall enforce the requirements and assist courts in adopting practices in compliance with those requirements.

In order to effectively monitor and measure the effect of collections programs, it is ordered that the State Court Administrator establish reporting requirements regarding outstanding receivables and collections efforts undertaken by courts, including establishment of the reporting format, method, and due dates. It is further ordered that all circuit courts, circuit court family divisions, district courts, and municipal courts comply with those requirements. The State Court Administrative Office shall facilitate compliance with and enforce the requirements.

ADMINISTRATIVE ORDER No. 2010-2

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 12TH CIRCUIT COURT AND THE BARAGA COUNTY PROBATE COURT.

Entered March 16, 2010, amended by order entered March 19, 2010 (File No. 2004-04)—REPORTER.

Administrative Order No. 2003-1 and MCL 600.401 *et seq*. authorize Michigan trial courts to adopt concurrent jurisdiction plans within a county or judicial circuit, subject to approval of the Court.

The Court approves adoption of the following concurrent jurisdiction plan, effective July 1, 2010:

• The 12th Circuit Court and the Baraga County Probate Court

The plan shall remain on file with the state court administrator.

Amendments to concurrent jurisdiction plans may be implemented by local administrative order pursuant to MCR 8.112. Plan amendments shall conform to the requirements of Administrative Order No. 2003-1 and MCL 600.401 *et seq*.

ADMINISTRATIVE ORDER No. 2010-3

ADOPTION OF ADMINISTRATIVE ORDER TO EXPAND THE SCOPE OF THE E-FILING PILOT PROJECT IN OAKLAND CIRCUIT COURT, FAMILY DIVISION.

Entered March 16, 2010, effective immediately (File No. 2002-37)—REPORTER.

On order of the Court, the Sixth Judicial Circuit Court, in consultation with the State Court Administrative Office (SCAO), developed this pilot project to study the effectiveness of electronically filing court documents in connection with the just, speedy, and economical determination of Family Division actions in a mandatory electronic filing environment.

Beginning March 16, 2010, or as soon thereafter as is possible and effective until December 31, 2012 or further order of this court, the Sixth Judicial Circuit Court adopts an e-filing pilot program requiring parties to electronically file documents in cases assigned to one or more participating judges. Rules designed to address issues unique to the implementation of this program are attached to and incorporated by reference to this local administrative order. Participation in this pilot program is mandatory for cases with a "DO" case code and assigned to pilot program judge(s).

The Sixth Judicial Circuit Court will track the participation and effectiveness of this pilot program and report the results to the SCAO.

1. Construction

The purpose of the pilot is to study the effectiveness of electronically filing court documents in connection with the just, speedy, and economical determination of divorce actions involved in the pilot. The Court may exercise its discretion to grant necessary relief to avoid the consequences of error so as not to affect the substantial rights of the parties. Except for matters related to electronically filing documents during the pilot, the Michigan Rules of Court govern all other aspects of the cases involved in the pilot.

2. Definitions

(a) "Clerk" means the Oakland County Clerk.

(b) "E-filing" means any court pleading, motion, brief, response, list, order, judgment, notice, or other document filed electronically pursuant to the pilot.

(c) "LAO" means all local administrative orders governing the Sixth Judicial Circuit Court.

(d) "MCR" means the Michigan Rules of Court.

(e) "Pilot" means the initiative by the Sixth Judicial Circuit Court, the Oakland County Clerk, and the Oakland County Department of Information Technology in conjunction with Wiznet, Inc. and under the supervision of the SCAO. This e-filing application facilitates the electronic filing of pleadings, motions, briefs, responses, lists, orders, judgments, notices, and other documents. The vision is that all state courts in Michigan will eventually permit e-filing (with appropriate modifications and improvements). The Oakland County pilot will begin testing with two Circuit Court judges with "DO" type civil cases. The Court plans to expand the pilot to all Family Division judges who wish to participate. The pilot program is expected to last approximately two years, beginning on January 1, 2010.

(f) "Technical malfunction" means any hardware, software, or other malfunction that prevents a user from timely filing a complete e-filing or sending or receiving service of an e-filing.

(g) "Wiznet envelope" means an electronic submission that contains one or more Wiznet transactions.

(h) "Wiznet transaction" means the submission of one or more related documents which results in a single register of actions entry. A single register of actions entry is determined by the Clerk. E.g. a motion, brief, affidavit, notice of hearing, and proof of service for a single motion submitted at one time frequently constitutes a single register of actions entry.

(3) Participation in the Pilot

(a) Participation in the Pilot program shall be mandatory in all pending or newly filed "DO" type cases assigned to participating Circuit Court judges. Participation for new filings shall begin following the filing of the initial complaint or other initiating document, and assignment of the case to a participating judge. At the discretion of the e-filing judge, participation in the pilot may also include proceedings in post-disposition cases assigned to the pilot judge.

(b) This is a mandatory e-filing project. It is presumed that all documents will be filed electronically. However, the Court recognizes that circumstances will arise which prevent one from e-filing. To ensure that all parties retain access to the courts, parties that demonstrate good cause will be permitted to file their documents with the Clerk, who will then file the documents electronically. Among the factors that the Court will consider in determining whether good cause exists to excuse a party from mandatory e-filing are a party's access to the Internet and indigency. A

self-represented party is not excused from the project merely because the individual does not have counsel.

4. E-filings Submission, Acceptance, and Time of Service with the Court; Signature

(a) Program participants must submit e-filings pursuant to these rules and the Pilot program's technical requirements. The Clerk may, in accordance with MCR 8.119(C) reject documents submitted for filing that do not comply with MCR 2.113(C), are not accompanied by the proper fees, clearly violate AO 2006-2, do not conform to the technical requirements of this pilot project, or are otherwise submitted in violation of statute, court rule, administrative order, or program rules.

(b) E-filings may be submitted to the court at any time, but shall only be reviewed and accepted for filing by the Oakland County Clerk's Office during normal business hours of 8:00 a.m. to 4:30 p.m. E-filings submitted after business hours shall be deemed filed the business day the e-filing is accepted (usually the next business day). The Clerk shall process electronic submissions on a first in/ first out basis.

(c) E-filings shall be treated as if they were hand delivered to the court for all purposes under statute, court rule, and administrative order.

(d) A pleading, document, or instrument e-filed or electronically served under this rule shall be deemed to have been signed by the judge, court clerk, attorney, party, or declarant.

(i) Signatures submitted electronically shall use the following form: /s/ *John L. Smith*.

(ii) A document that requires a signature under the penalty of perjury is deemed signed by the declarant if, before filing, the declarant has signed a printed form of the document.

(iii) An e-filed document that requires a signature of a notary public is deemed signed by the notary public if, before filing, the notary public has signed a printed form of the document.

(e) The original of a sworn or verified document that is an e-filing (e.g., a verified pleading) or part of an e-filing (e.g., an affidavit, notarization, or bill of costs) must be maintained by the filing attorney or self represented litigant and made available upon reasonable request of the court, the signatory, or opposing party.

(f) Proposed orders shall be submitted to the court in accordance with the provisions of the pilot. The Court and Clerk shall exchange the documents for review and signature pursuant to MCR 2.602(B).

(g) By electronically filing the document, the electronic filer indicates compliance with these rules.

5. Time for Service and Filing of Pleadings, Documents, and Motions; Judge's Copies; Hearings on Motions; Fees

(a) All times for filing and serving e-filings shall be governed by the applicable statute, court rule, and administrative order as if the e-filings were hand delivered. Where a praecipe is required by LCR 2.119(A), it must be submitted electronically to the Court through the epraecipe application at http://courts.oakgov.com/ePraecipe/.

(b) The electronic submission of a motion and brief through this Pilot program satisfies the requirements of filing a Judge's Copy under MCR 2.119(A)(2). Upon a request of the Court, the filing party shall promptly provide a traditional paper Judge's Copy to chambers.

(c) Applicable fees, including e-file fees and service fees, shall be paid electronically through procedures

established by the Oakland County Clerk's Office at the same time and in the same amount as required by statute, court rule, or administrative order.

(i) Each e-filing is subject to the following e-file fees.

Type of Filing	Fee
EFO (e-file only)	$5.00
EFS (e-filing with service)	$8.00
SO (service only)	$5.00

(ii) Users who use credit cards for payment are also responsible for a 3% user fee.

6. Service

(a) All parties shall register as a service contact with the Wiznet application which will provide the court and opposing parties with one email address with the functionality required for the Pilot program.

(b) It is highly recommended that all e-filings must be served electronically to the email addresses of all parties.

(c) The parties and court may agree that, instead of eservice, e-filings may be served to the parties (but not the court) as provided in MCR 2.107.

(d) For those choosing to accept facsimile service:

(i) the parties shall provide the court and opposing parties with one facsimile number with appropriate functionality,

(ii) the facsimile number shall serve as the number to which service may be made,

(iii) the sender of the facsimile should obtain a confirmation of delivery, and

(iv) parties shall comply with the requirements of MCR 2.406 on the use of facsimile communication equipment.

(e) Proof of Service shall be submitted to the Court according to MCR 2.104 and these rules.

7. Format and Form of E-filing and Service

(a) A party may only e-file documents for one case per Wiznet envelope.

(b) A party may e-file multiple Wiznet transactions within a single Wiznet envelope, subject to subrule 7(a).

(c) All e-filings shall comply with MCR 1.109 and the technical requirements of the Court's vendor.

(d) Any exhibit or attachment that is part of an e-filing must be clearly designated and identified as an exhibit or attachment.

(e) All e-filings, subject to subsection 6(c) above, shall be served on the parties in same format and form as submitted to the court.

8. Pleadings, Motions, and Documents not to be E-filed

The following documents shall not be e-filed during the Pilot program and must be filed by the traditional methods provided in the court rules and administrative orders:

(a) documents to be filed under seal (pursuant to court order), and

(b) initiating documents.

9. Official Court Record; Certified Copies

(a) For purposes of this Pilot program, the electronic version of all documents filed with the Court , with the exception of documents filed under seal [see 8(a) and

MCR 8.119(F)] is the official court record. An appellate record shall be certified in accordance with MCR 7.210(A)(1).

(b) Certified or true copies of e-filed documents shall be issued in the conventional manner by the Oakland County Clerk's Office in compliance with the Michigan Trial Court Case File Management Standards.

(c) At the conclusion of the Pilot program, if the program does not continue as a Pilot project or in some other format, the Clerk shall retain all e-filed documents in accordance with MCR 8.119(D)(1)(d).

(d) At the conclusion of the Pilot program, if the program continues as a Pilot project or in another format, the Court and Clerk shall provide for record retention and public access in a manner consistent with the instructions of the court and court rules.

10. Court Notices, Orders, and Judgments

The Court shall issue, file, and serve orders, judgments, and notices as e-filings. A party exempted from e-filing under this pilot shall be served in accordance with MCR 2.107(C).

11. Technical Malfunctions

(a) A party experiencing a technical malfunction with the party's equipment (such as PDF conversion problems or inability to access the Pilot sites), another party's equipment (such as an inoperable email address), or an apparent technical malfunction of the court's Pilot equipment, software or server shall use reasonable efforts to timely file or receive service as provided in these rules and shall provide prompt notice to the court and parties of any such malfunction.

(b) If a technical malfunction has prevented a party from timely filing, responding to, or otherwise perfecting or receiving service of an e-filing, the affected party

may petition the Court for relief. Such petition shall contain an adequate proof of the technical malfunction and set forth good cause for failure to use non-electronic means to timely file or serve a document. The Court shall liberally consider proof of the technical malfunction and use its discretion in determining whether such relief is warranted.

12. Privacy Considerations

(a) With respect to any e-filing, the following requirements for personal information shall apply:

1. **Social Security Numbers**. Pursuant to Administrative Order 2006-2, full social security numbers shall not be included in any e-filings. If an individual's social security number must be referenced in an e-filing, only the last four digits of that number may be used and the number specified in substantially the following format: XXX-XX-1234.

2. **Names of Minor Children**. Unless named as a party or otherwise required by statute, court rule, or administrative order, the identity of minor children shall not be included in any e-filings. If a non-party minor child must be mentioned, only the initials of that child's name may be used.

3. **Dates of Birth**. Except as required by statute, court rule, or administrative order, an individual's full birth date shall not be included in any e-filings. Subject to the above limitation, if an individual's date of birth is otherwise referenced in an e-filing, only the year may be used and the date specified in substantially the following format: XX/XX/1998.

4. **Financial Account Numbers**. Full Financial account numbers shall not be included in any e-filings unless required by statute, court rule, or other authority. If a financial account number must be referenced in

an e-filing, only the last four digits of these numbers may be used and the number specified in substantially the following format: XXXXX1234.

5. **Driver's License Numbers and State-Issued Personal Identification Card Numbers**. A person's full Driver's license number and state-issued personal identification number shall not be included in any e-filings. If an individual's driver's license number or state-issued personal identification card number must be referenced in an e-filing, only the last four digits of that number should be used and the number specified in substantially the following format: X-XXX-XXX-XX1-234.

6. **Home Addresses**. With the exception of a self-represented party, full home addresses shall not be included in any e-filings. If an individual's home address must be referenced in an e-filing, only the city and state should be used. For a party whose address has been made confidential by court order pursuant to MCR 3.203(F), the alternative address shall be treated as specified above.

(b) Parties wishing to file a complete personal data identifier listed above may:

1. Pursuant to and in accordance with court rules and administrative orders, file a motion to file a traditional paper version of the document under seal. The Court may, in granting the motion to file the document under seal, still require that an e-filing that does not reveal the complete personal data identifier be filed for the public files.

OR

2. Pursuant to and in accordance with the applicable court rules and administrative orders, obtain a court order to file a traditional paper reference list under seal.

The reference list shall contain the complete personal data identifiers and the redacted identifiers used in the e-filing. All references in the case to the redacted identifiers included in the reference list shall be construed to refer to the corresponding complete personal data identifiers. The reference list must be filed under seal, and may be amended as of right.

(c) Parties should exercise caution when filing papers that contain private or confidential information, including, but not limited to, the information covered above and listed below:

1. Medical records, treatment and diagnosis;

2. Employment history;

3. Individual financial information;

4. Insurance information;

5. Proprietary or trade secret information;

6. Information regarding an individual's cooperation with the government; and

7. Personal information regarding the victim of any criminal activity.

(d) These rules are designed to protect the private personal identifiers and information of individuals involved or referenced in actions before the Court.

Nothing in these rules should be interpreted as authority for counsel or a self represented litigant to deny discovery to the opposing party under the umbrella of complying with these rules.

13. Amendment

These rules may be amended upon the recommendation of the participating judges, the approval of the Chief Judge, and authorization by the State Court Administrator.

14. Financial data

Detailed financial data as defined in Administrative Order No. 2009-1, including costs generated and savings realized under the terms of this e-filing pilot project, shall be included in the Oakland Circuit Court's annual report for submission to this Court.

15. Expiration

Unless otherwise directed by the Michigan Supreme Court, this pilot program, requiring parties to electronically file documents in cases assigned to participating judges, shall continue until December 31, 2012 or further order of this court.

AMENDED ADMINISTRATIVE ORDER No. 2009-7

ADOPTION OF A PILOT PROJECT IN THE 46TH DISTRICT COURT TO STUDY THE EFFECTS OF PROPOSED RULE 8.119 OF THE MICHIGAN COURT RULES

Entered January 1, 2010, effective immediately, amending Administrative Order No. 2009-7, 485 Mich xcvii (File No. 2005-32)—REPORTER

On August 11, 2009, the 46th District Court submitted a letter to the Court in which the 46th District Court proposed revision of MCR 8.119 to implement a process that would allow a court clerk to return to a litigant a document that the clerk has identified as nonconforming with the Michigan Court Rules, requirements contained in the Michigan statutes, or the Michigan Supreme Court records standards. Upon receipt of the returned document, the litigant would have several options: the litigant could correct the nonconformity identified by the clerk, submit documentation in support of the document, request the clerk to submit the paper as it was initially submitted for immediate review by the court, or withdraw the document. On order of the Court, the 46th District Court is authorized to implement a pilot project in its court to study the effects of proposed Rule 8.119, limited to cases that involve garnishments and consumer debt collections.

The purpose of the pilot project is to determine whether the proposed language represents a feasible and practical procedure for courts to follow in screening documents that are submitted for filing in cases that involve garnishments and consumer debt collections. The Court is interested in learning whether this procedure will increase efficiency within the court (including assessing its effect on the clerk and the judges of the court), and determining what effect the procedure will have on litigants. The 46th District Court will operate under the following rule for the period of the pilot project, which will begin on the date this order enters and continue for ~~one year~~ six months or as otherwise ordered by the Court. The 46th District Court will provide a report to the Court within three months of the conclusion of the pilot project regarding the court's assessment of the feasibility of the procedure described below. ~~In addition, litigants will have an opportunity to provide feedback on the pilot project through a survey to be included when documents are returned by clerks, and through polls conducted of those who participate in the judicial review procedure.~~ The 46th District Court shall keep a list of litigants who request that the submitted document be reviewed by a judge.

RULE 8.119. COURT RECORDS AND REPORTS; DUTIES OF CLERKS.

(A)-(B) [Unchanged.]

(C) Filing of Papers. The clerk of the court shall endorse on the first page of every document the date on which it is filed. Papers filed with the clerk of the court must comply with the Michigan Court Rules, requirements contained in the Michigan statutes, and the Michigan Supreme Court records standards. The clerk of the court may ~~reject papers which do not conform to~~

~~MCR 2.113(C)(1) and MCR 5.113(A)(1)~~ return nonconforming papers related to a garnishment or consumer debt collection case in accordance with (D) below.

(D) Return of Nonconforming Papers Related to Garnishment or Consumer Debt Collection Case. If the clerk of the court returns a paper related to a garnishment or consumer debt collection case as nonconforming, the clerk must notify the litigant in writing of the reason for the return. The notice shall provide the name and phone number of the deputy clerk returning the papers. The litigant may, with no additional filing or motion fee, (a) submit supporting documentation; (b) submit an amended version of the paper; (c) request the clerk to submit the paper as initially submitted to the court for immediate review; or (d) withdraw the paper. If no judge is assigned to the case, the chief judge or the chief judge's designee shall perform the review. Upon review, the judge shall either allow the filing or issue a written order disallowing the filing. If disallowed, the reason shall be stated in the order. If the litigant withdraws the paper, the court shall not charge a filing fee and any filing fee previously paid shall be returned to the filer.

If a complaint is returned by a clerk as nonconforming, the litigant may file a motion for judicial review. Upon review, if the judge decides that the complaint was conforming as originally filed and should have been accepted, the complaint shall be considered filed on the original filing date.

(D)-(G) [Relettered (E)-(H), but otherwise unchanged.]

KELLY, C.J. (*concurring*). Some of my colleagues object to what they view as a diminution of the opportunity for and obligation of court users and the 46th District Court to provide the Michigan Supreme Court with

data and feedback. However, we should remember that the district court did not request this pilot project; instead, the Court adopted it at the request of the Michigan Creditors Bar Association after having sought little input from the very court that would be required to operate under its provisions. Moreover, the minor changes that the Court adopted after reconsideration of this pilot project (shortening the time period from one year to six months and removing the requirement to provide a survey to those whose pleadings are returned to them) do not eliminate public input. We welcome any comment from any individual subject to the procedure implemented in the 46th District Court; we have eliminated only the requirement that the district court perform a survey and provide it to this Court. Finally, the district court will generate and submit to us data regarding how the appeal process in that court works, which is the focus of its proposed procedure.

This pilot project is best viewed in light of the other actions the Court has taken in this matter, including its commitment to continue monitoring it. At the same time as the pilot project is operating in the 46th District Court, a workgroup in the Supreme Court Administrative Office composed of court staff and administrators is meeting to draft a rule that takes a different approach to clerks' return of pleadings. The workgroup is considering a court rule that would explicitly define what types of anomalies in pleadings provide the basis for a clerk to return documents. Thus, the issue of how and under what circumstances a clerk should be entitled to return pleadings is being pursued in different ways, each of which will provide important information to this Court when we ultimately consider the merits of the various approaches. I believe the experience in the 46th District Court will provide important information to

this Court as we move forward on this issue, and I appreciate its willingness to participate.

YOUNG, J. (*dissenting*). I join fully Justice MARKMAN's dissent from this order, but write separately to note the 46th District Court's reaction in opposing any restraint on its desire to institutionalize its historical practice of allowing court clerks to exercise judicial powers to review and independently return papers filed with that court.

This matter began when a party successfully sought review of this practice after a clerk in the 46th District Court rejected the party's pleadings. Relying on MCR 8.119(C), the Court of Appeals held that the court rules do "not give court clerks broad discretion to reject pleadings."[1] We summarily affirmed, stating in no uncertain terms that "[t]he court's authority to sanction parties cannot be delegated to the court clerks."[2]

Notwithstanding our decision, the 46th District Court *disregarded* that decision and continued to direct its clerks to perform adjudicative functions, allowing the clerks to exercise seemingly unlimited discretion in deciding when to return filed papers. Later, when this Court expressed concern that our decision was being ignored, members of the district court requested permission to experiment with using clerk review and rejection of papers in a "pilot project." That initial proposal was so broad, it would have permitted clerks to reject pleadings filed in medical malpractice cases and other complex matters that implicated profound issues such as how these rejections might affect statutes of limitations.

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[1] *In re Credit Acceptance Corp*, 273 Mich App 594, 600 n 2 (2007).

[2] *In re Credit Acceptance Corp*, 481 Mich 883, 883 (2008).

This Court carefully crafted and approved a limited pilot project to avoid inappropriate and broad delegation of judicial powers to non-judicial officers, coupled with a requirement that those affected by the procedures permitted in the pilot project be allowed to comment on how it actually functioned. Prior to the project's approval, as noted in Justice CORRIGAN's dissent from the May 20, 2009 order in ADM 2005-32 publishing proposed court rules concerning this topic, I and other members of this Court were hesitant to agree to a program whereby administrative clerks of a court are arguably assigned to exercise inherently judicial functions in the name of judicial expediency. However, I reluctantly agreed to a test run of the program under a set of circumstances that could, in theory, provide sufficient data and robust feedback concerning the program's operation by those individuals who actually had their papers rejected.

Members of the 46th District Court now worry that this feedback will reflect poorly on the court, and its members have expressed concern regarding the additional burdens necessary to provide this data. Unfortunately, these complaints about the pilot project as originally approved have led a majority of this Court to strip the program of the features that would provide this necessary data and shorten the duration of the project.

While I appreciate the administrative burdens under which courts may sometimes be required to operate, our original order was carefully considered and debated. I find it particularly inappropriate to limit the public's ability to comment on how our courts affect them, especially when we are experimenting with new processes and, as here, processes that might cross a line of allowing delegation of judicial power.

For these reasons, I would not make the changes the majority has made and withdraw my approval of the pilot project in its entirety.

CORRIGAN, J., concurred with YOUNG, J.

MARKMAN, J. (*dissenting*). For the reasons set forth in Justice CORRIGAN's dissenting statement to the May 20, 2009, order in ADM 2005-32 publishing proposed court rule amendments,[1] I have considerable reservations about the procedural shortcuts adopted in this pilot project in the 46th District Court, enabling court clerks to return pleadings that fail to conform to Michigan court rules. Now that the final order has been issued, I have further reservations concerning the elimination of language that would have allowed a systematic "opportunity to provide feedback" on the part of attorneys and litigants. Although the district court may have had legitimate concerns about how burdensome the proposed evaluation process might be, rather than attempting to fine-tune this process, this Court has now eliminated it altogether. Thus, we will have a "pilot project" in which there will be no comprehensive feedback from the very class of persons who may be most adversely affected. One might think that if there is value in a pilot project, that value would most likely arise from the very feedback that this Court has just denied itself.

CORRIGAN and YOUNG, JJ., concurred with MARKMAN, J.

Staff Comment: Under this pilot project, the 46th District Court shall test its proposal to allow court clerks to return certain nonconforming papers submitted to the court in garnishment or consumer debt collections actions. If the clerk returns a paper as nonconforming, the litigant may respond by submitting supporting documentation, submitting an

[1] Available at <http://Courts.michigan.gov/supremecourt/Resources/Administrative/2005-32-05-20-09_form.pdf> (accessed December 17, 2009).

amended document, asking that the document be submitted to the court for immediate review, or withdrawing the paper. If, upon review, the judge disallows filing of the document, an order would enter disallowing the filing and would state the reason in the order.

The staff comment is not an authoritative construction by the Court.

AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Adopted August 25, 2009, effective September 1, 2009 (File No. 2008-35)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

RULE 8.115. COURTROOM DECORUM; POLICY REGARDING USE OF CELL PHONES OR OTHER PORTABLE ELECTRONIC COMMUNICATION DEVICES.

(A)-(B) [Unchanged.]

(C) Establishment of a Policy Regarding Portable Electronic Communication Devices.

(1) A facility that contains a courtroom may determine use of electronic equipment in nonjudicial areas of the facility.

(2) The chief judge may establish a policy regarding the use of cell phones or other portable electronic communication devices within the court, except that no photographs may be taken of any jurors or witnesses, and no photographs may be taken inside any courtroom without permission of the court. The policy regarding the use of cell phones or other portable electronic communication devices shall be posted in a conspicuous location outside and inside each courtroom. Failure to comply with this section or with the policy established

by the chief judge may result in a fine, including confiscation of the device, incarceration, or both for contempt of court.

KELLY, C.J. I believe that attorneys should be permitted to bring electronic devices into courtrooms. If their use interferes with proceedings, judges certainly retain the discretion to have them removed.

The rule the Court has approved permits a judge to adopt a default policy banning all electronic devices from courtrooms. I am concerned that it will seriously impede some attorneys' ability to practice law. The role of technology in the practice of law has matured. Today, BlackBerrys, cell phones, and PDAs have become commonplace for most attorneys who rely heavily on them in their busy and fast-paced legal practices. These devices allow attorneys waiting in court for their cases to be called to stay current with, and quietly respond to, their clients' needs. Solo practitioners who do not have staff are especially dependent on the devices. Hence, for many, what was once merely a convenience has become a necessity.

For those reasons, I would allow attorneys to bring electronic devices into courtrooms with the proviso that their use must not interfere with court proceedings.

WEAVER and HATHAWAY, JJ., concurred with KELLY, C.J.

Staff Comment: This rule authorizes a court's chief judge to establish a policy for the use of cell phones and other portable electronic devices in courtrooms, and requires that the policy be posted in a conspicuous location in each courtroom. The amendment also acknowledges that the policy for cell phone and electronic device usage in nonjudicial areas may be set by the operators of the facility in which courtrooms are located. No photographs may be taken of jurors and witnesses, and no photographs are allowed without the judge's permission. Failure to comply with the judge's policy may result in a fine (including confiscation of the device), incarceration, or both for contempt of court.

The staff comment is not an authoritative construction by the Court.

Adopted September 9, 2009, effective January 1, 2010 (File No. 2005-32)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

RULE 2.112. PLEADING SPECIAL MATTERS.

(A)-(M) [Unchanged.]

(N) A party whose cause of action is to collect a consumer debt as defined in the Michigan collection practices act (MCL 445.251[a] and [d]) must also include the following information in its complaint:

(1) the name of the creditor (as defined in MCL 445.251[e] and [f]), and

(2) the corresponding account number or identification number, or if none is available, information sufficient to identify the alleged debt, and

(3) the balance due to date.

RULE 3.101. GARNISHMENT AFTER JUDGMENT.

(A)-(C) [Unchanged.]

(D) Request for and Issuance of Writ. The clerk of the court that entered the judgment shall review the request. The clerk shall issue a writ of garnishment if the writ appears to be correct, complies with these rules and the Michigan statutes, and if the plaintiff, or someone on the plaintiff's behalf, makes and files a statement verified in the manner provided in MCR 2.114(A) stating:

(1) that a judgment has been entered against the defendant and remains unsatisfied;

(2) the amount of the judgment; the total amount of the postjudgment interest accrued to date; the total amount of the postjudgment costs accrued to date; the total amount of the postjudgment payments made to date, and the amount ~~remaining unpaid~~of the unsatisfied judgment now due (including interest and costs);

(3) [Unchanged.]

(E)-(T) [Unchanged.]

Staff Comment: The amendments of MCR 2.112 impose specific pleading requirements for a case that is a consumer debt action under the Michigan collection practices act, which will provide defendants with relevant information regarding the alleged debt. The amendments of MCR 3.101 require those who seek a garnishment to provide specific information regarding the interest and costs related to the judgment.

The staff comment is not an authoritative construction by the Court.

Adopted September 9, 2009, effective January 1, 2010 (File No. 2009-8)—REPORTER

[Additions are indicated by underline and deletions are indicated by strikeover.]

RULE 3.936. FINGERPRINTING.

(A)-(C) [Unchanged.]

(D) Order for ~~Return~~ Destruction of Fingerprints. When a juvenile has been fingerprinted for a juvenile offense, but no petition on the offense is submitted to the court, the court does not authorize the petition, or the court does not take jurisdiction of the juvenile under MCL 712A.2(a)(1), if the records have not been destroyed as provided by MCL 28.243(7)-(8), the court, on motion filed pursuant to MCL 28.243(8), shall:

~~(1)~~ issue an order directing the Department of State Police, or other official holding the information, to ~~return~~ destroy the fingerprints and~~,~~ arrest card~~,~~ ~~and description~~ of the juvenile pertaining to the offense, other than an offense as listed in MCL 28.243(12)~~; and.~~

~~(2) direct that fingerprint information in the court file pertaining to the offense be destroyed.~~

Staff Comment: The amendment of MCR 3.936 eliminates the reference to the return of juvenile fingerprints, and instead, requires the destruction of fingerprints, which more closely follows the statutory authority in MCL 28.243.

The staff comment is not an authoritative construction by the Court.

Adopted October 13, 2009, effective May 1, 2010 (File No. 2005-42)—REPORTER

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 3.932. SUMMARY INITIAL PROCEEDINGS.

(A)-(B) [Unchanged.]

(C) Consent Calendar. If the court receives a petition, citation, or appearance ticket, and it appears that protective and supportive action by the court will serve the best interests of the juvenile and the public, the court may proceed on the consent calendar without authorizing a petition to be filed. No case may be placed on the consent calendar unless the juvenile and the parent, guardian, or legal custodian agree to have the case placed on the consent calendar. The court may transfer a case from the formal calendar to the consent calendar at any time before disposition.

(1) Notice. Formal notice is not required for cases placed on the consent calendar except as required by article 2 of the Crime Victim's Rights Act, MCL 780.781 *et seq*.

(2) Plea; Adjudication. No formal plea may be entered in a consent calendar case unless the case is based on an alleged violation of the Michigan Vehicle Code, MCL 257.1 *et seq*., in which case the court shall enter a plea., ~~and t~~ The court must not enter an adjudication.

(3) Conference. The court shall conduct a consent calendar conference with the juvenile and the parent, guardian, or legal custodian to discuss the allegations. The victim may, but need not, be present.

(4) Case Plan. If it appears to the court that the juvenile has engaged in conduct that would subject the juvenile to the jurisdiction of the court, the court may issue a written consent calendar case plan.

(5) Custody. A consent calendar case plan must not contain a provision removing the juvenile from the custody of the parent, guardian, or legal custodian.

(6) Disposition. No order of disposition may be entered by the court in a case placed on the consent calendar.

(7) Closure. Upon successful completion by the juvenile of the consent calendar case plan, the court shall close the case and may destroy all records of the proceeding. ~~No report or abstract may be made to any other agency nor may the court require the juvenile to be fingerprinted for a case completed and closed on the consent calendar.~~

(8) Transfer to Formal Calendar. If it appears to the court at any time that the proceeding on the consent calendar is not in the best interest of either the juvenile or the public, the court may, without hearing, transfer

the case from the consent calendar to the formal calendar on the charges contained in the original petition, citation, or appearance ticket. Statements made by the juvenile during the proceeding on the consent calendar may not be used against the juvenile at a trial on the formal calendar on the same charge.

(9) Abstracting. If the court finds that the juvenile has violated the Michigan Vehicle Code, the court must fulfill the reporting requirements imposed by MCL 712A.2b(d).

(D) [Unchanged.]

Staff Comment: The amendment of MCR 3.932 requires a court to enter a plea for violations of the Michigan Vehicle Code, and requires a court to report to the Secretary of State violations of the Michigan Vehicle Code that are handled on the court's consent calendar.

The staff comment is not an authoritative construction by the Court.

Adopted November 25, 2009, effective immediately (subsequently amended by order entered December 3, 2009, 485 Mich ccv) (File No. 2009-04)—REPORTER

[Additions are indicated by underline and deletions by strikethrough.]

RULE 2.003. DISQUALIFICATION OF JUDGE.

(A) Applicability. This rule applies to all judges, including justices of the Michigan Supreme Court, unless a specific provision is stated to apply only to judges of a certain court. The word "judge" includes a justice of the Michigan Supreme Court.

(BA) Who May Raise. A party may raise the issue of a judge's disqualification by motion~~,~~ or the judge may raise it.

(CB) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:

(1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:

(a~~1~~) The judge is ~~personally~~ biased or prejudiced for or against a party or attorney.

(b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, 556 US ___ ; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

(c~~2~~) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

(d~~3~~) The judge has been consulted or employed as an attorney in the matter in controversy.

(e~~4~~) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

(f~~5~~) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household, has ~~an~~ more than a de minimis economic interest in the subject matter in controversy that could be substantially impacted by the proceeding. ~~or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.~~

(g~~6~~) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i~~a~~) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii~~b~~) is acting as a lawyer in the proceeding;

(iiic) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding; or

(ivd) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) Disqualification not warranted.

(a) A judge is not disqualified merely because the judge's former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge.

(b) A judge is not disqualified based solely upon campaign speech protected by *Republican Party of Minn v White*, 536 US 765 (2002), so long as such speech does not demonstrate bias or prejudice or an appearance of bias or prejudice for or against a party or an attorney involved in the action.

(DC) Procedure.

(1) *Time for Filing*. To avoid delaying trial and inconveniencing the witnesses, a motion to disqualify must be filed within 14 days after the moving party discovers the ground for disqualification. If the discovery is made within 14 days of the trial date, the motion must be made forthwith. If a motion is not timely filed, untimeliness, including delay in waiving jury trial, is a factor in deciding whether the motion should be granted.

(2) *All Grounds to Be Included; Affidavit.* In any motion under this rule, the moving party must include all grounds for disqualification that are known at the time the motion is filed. An affidavit must accompany the motion.

(3) *Ruling*.

(a) For courts other than the Supreme Court, ~~T~~ the challenged judge shall decide the motion. If the challenged judge denies the motion,

(i~~a~~) in a court having two or more judges, on the request of a party, the challenged judge shall refer the motion to the chief judge, who shall decide the motion de novo;

(ii~~b~~) in a single-judge court, or if the challenged judge is the chief judge, on the request of a party, the challenged judge shall refer the motion to the state court administrator for assignment to another judge, who shall decide the motion de novo.

(b) In the Supreme Court, if a justice's participation in a case is challenged by a written motion or if the issue of participation is raised by the justice himself or herself, the challenged justice shall decide the issue and publish his or her reasons about whether to participate.

If the challenged justice denies the motion for disqualification, a party may move for the motion to be decided by the entire Court. The entire Court shall then decide the motion for disqualification de novo. The Court's decision shall include the reasons for its grant or denial of the motion for disqualification. The Court shall issue a written order containing a statement of reasons for its grant or denial of the motion for disqualification. Any concurring or dissenting statements shall be in writing.

(4) ~~Motion Granted~~ *If Disqualification Motion is Granted*.

(a) For courts other than the Supreme Court, w~~W~~hen a judge is disqualified, the action must be assigned to another judge of the same court, or, if one is not available, the state court administrator shall assign another judge.

(b) In the Supreme Court, when a justice is disqualified, the underlying action will be decided by the remaining justices of the Court.

(E~~D~~) ~~Remittal~~ Waiver of Disqualification. ~~If it appears that there may be grounds for disqualification, the judge may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If, following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings. The agreement shall be in writing or placed on the record.~~ Parties to the proceeding may waive disqualification even where it appears that there may be grounds for disqualification of the judge. Such waiver may occur whether the grounds for disqualification were raised by a party or by the judge, so long as the judge is willing to participate. Any agreement to waive disqualification must be made by all parties to the litigation and shall be in writing or placed on the record.

Staff Comment: The amendments adopted by the Court in this order explicitly apply the judicial disqualification rule to all state judges, including Supreme Court Justices. In addition, the amendments revise disqualification standards and establish procedures for the disqualification process.

KELLY, C.J. (*concurring*). I voted for this recusal rule and write to discuss it and respond, in part, to the criticism leveled against it.

In adopting this rule, the Michigan Supreme Court has, for the first time in its long history, reduced to writing a rule to govern when a justice should not vote on a case. In the past, the justices wrote rules on recusal but applied them to other judges only, not to themselves.

Some of us have long believed that the interests of the legal community and of the general public are best served if a Supreme Court recusal rule is put in writing. In that way, all can see and understand something that has long been shrouded in mystery: how recusal works in the Michigan Supreme Court.

Curiously, until recently, it was generally unknown that, when a motion to recuse was filed, only the justice at whom it was directed acted on it. The Court then issued an order that appeared to be an action of all the justices. Typically, no reason was given to the petitioner or the public if the request to recuse was denied. Also, no procedure existed to permit the party seeking a justice's recusal to obtain a vote of the other justices if the motion was denied.

Important to this discussion is the fact that, this year, the United States Supreme Court rendered its decision in the case of *Caperton v A T Massey Coal Co, Inc.*[1] It reversed an order of the West Virginia Supreme Court of Appeals in which a justice there refused to recuse himself following a procedure similar to that long used by the Michigan Supreme Court. The Court found that the party seeking the justice's recusal had been deprived of his constitutional right to due process. This was partly because, the Court found, a justice's decision on his or her own recusal is inherently subjective. But, the due process clause requires an objective decision.[2]

I read *Caperton* to mean that an independent inquiry into a challenged justice's refusal to recuse may be

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[1] 556 US___; 129 S Ct 2252; 173 L Ed 2d 1208 (2009). Since *Caperton* was decided, the Wisconsin Supreme Court amended its recusal rule in response. See *Wisconsin Supreme Court Rule Petitions 08-16, 08-25, 9-10, and 9-11* (acted upon October 28, 2009). Michigan is not the first state to react with a rule change.

[2] *Caperton*, 129 S Ct at 2263.

necessary to satisfy due process because the independent inquiry makes possible an objective decision. That independent inquiry has been written into Michigan's new rule where it allows the party requesting recusal to seek a vote on the motion by the entire court.

Those of us supporting Michigan's new rule believe that the situation that gave rise to the *Caperton* case should not be allowed to take place in this state. For that reason, together with the obvious need for increased clarity and understanding about our recusal procedures, we have voted for this rule.

I have read Justice YOUNG's and Justice CORRIGAN's statements that accompany this order. I quite agree with them that the order must not be applied to curtail fundamental freedoms. I have not heard any of the justices who favored the order suggest that it will be used "to prevent judicial candidates from speaking their minds" or to prevent "the voters [from electing] judges of their choosing." I know of nothing that would reasonably lead one to believe that the order will be used to permit "duly elected justices [to deprive] their co-equal peers of their constitutionally protected interest in hearing cases." And it seems an outrageous stretch of credulity to suggest that "starting today, those contesting traffic tickets will enjoy greater constitutional protections than justices of this Court."

In suggesting that no precedent exists for a judge to be removed from a case against his or her will, Justice CORRIGAN and Justice YOUNG forget this: under our existing rules,[3] trial judges are removed from cases

[3] MCR 2.003(C)(3). If the challenged judge denies the motion to recuse, in a court having two or more judges, the chief judge may reverse the decision and require recusal. In a single-judge court or if the challenged judge is the chief judge, the state court administrator may assign the decision to another judge who may overturn the refusal to recuse.

against their will in our courts every day and have been for years. Unanswered in their statements is the question: Why should trial judges be subject to having their decisions not to recuse themselves reversed by their peers while justices are insulated from the same treatment?

With respect to the constitutional arguments posed by Justices CORRIGAN and YOUNG, it should be noted that these arguments were made only at the eleventh hour. The parts of the rule that they attack have been actively before the Court for more than a year. If any serious treatment of them was intended, it would seem it would have been put forth well before the rule was voted on.

As Justice WEAVER has pointed out in her statement, the decision to adopt this rule has been anything but "hasty," notwithstanding the assertions of Justices CORRIGAN and YOUNG. In fact, the rule has received the Court's constant vision and revision, particularly during the last year. The normal procedure for rule adoption has been followed, including public comment and public hearing.

Justice YOUNG belatedly raises numerous constitutional challenges to the rule. Certainly, the Court can and, no doubt, will discuss them in due time. There has been no decision to refuse to place Justice YOUNG's proposals on the conference agenda. Suffice it to say that the rule in no way prevents the United States Supreme Court from reviewing a recusal decision made by our Court, as he apparently fears.

No factual basis exists on which to ground the insinuation that those who voted for this rule will use it to remove a justice from a case for improper reasons. No facts have been shown to support this assertion. None exist. Justice MARKMAN's fears of "gamesmanship" and "politicization" in the Court's future handling of re-

cusal motions arise only from his imaginings. Whether there will be further "acrimony" lies, in part, in the hands of each justice.

Moreover, it is a gross perversion of law for Justice CORRIGAN to allege that, "In one administrative order [the recusal rule], the majority takes away the right of every citizen of Michigan to have his or her vote count." The accurate statement is, with this rule, the Court permits a justice's recusal where that justice is unable to render an unbiased decision and unable or unwilling to acknowledge that fact. The justice system and this Court can only be stronger for it.

CAVANAGH, J. (*concurring*). The process by which justices are disqualified from hearing a case before this Court is not merely a theoretical matter. The disqualification process has very real consequences for the parties who seek justice from this Court, as well as the public at large. Our current practice provides no avenue to redress a decision by a justice who refuses to disqualify himself, no matter how much evidence is produced that the justice is indeed actually biased.

If my dissenting colleagues truly believe that our current practice is the best for Michigan's citizens, then they should have no problem explaining their rationale to the public and hearing the public's assessment of this rationale. However, I believe they know that there is no reasonable justification that can be proffered for allowing a justice accused of bias to be the only one who decides whether he should be disqualified, other than "we have always done it this way." I can think of no reasonable explanation that would be acceptable to the public for maintaining this procedure because it is apparent that it is incongruous with reason. This is especially true in light of the fact that Michigan's own

court rules—adopted by *this Court*—govern disqualifications for all other judges and explicitly provide the recourse of having the denial of a disqualification motion reviewed by another judge. See MCR 2.003(C)(3). Remarkably, the majority believes that members of this Court are above the same rules that it has adopted to apply to *all other judges in the state*.

WEAVER, J. (*concurring*). At last this Court has adopted clear, fair, written disqualification rules for Michigan Supreme Court justices.[1]

This newly amended rule is a positive, historical step forward toward achieving more transparency and fairness in the Michigan Supreme Court. The amended rule provides a fair disqualification process to ensure that the parties appearing before the Court have justices deciding their cases that are not actually biased, nor objectively appear to be biased. It does so in a transparent process by requiring a justice challenged by a party to submit his or her decision and reasons in writing regarding his or her recusal decisions and requiring the Court—the remaining justices—if requested by a party to review the challenged justice's decision and to publish the remaining justices' decision and reasons in writing. This process, of written decision and with written reasons, is fair to the parties and to the challenged justice. It provides the public with more knowledge of how the justices conduct the people's judicial business.

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[1] This concurring statement is submitted November 24, 2009, at approximately 3:20 p.m. and although other justices have indicated a desire to submit concurring and dissenting statements, no other statements have been submitted as yet. Because the order is scheduled for entry on November 25, Thanksgiving Eve, there will not be a reasonable opportunity to respond to subsequently submitted statements. If any response to statements submitted hereafter is necessary, my response will be submitted to the Court on a date after Thanksgiving for the Court to file and distribute to the public, and will also be posted on my personally funded website: justiceweaver.com.

I concur in this Court's adoption of such rules, but write separately to inform the parties in pending cases and the public of the improper delay and procedure concerning entry of this order adopting the amendment and its effective date.

Since May 2003, I have repeatedly called for this Court to recognize; publish for public comment; place on a public hearing agenda; and address the need to have written, clear, fair, orderly, and public procedures concerning the participation or disqualification of justices.[2]

On November 5, 2009, this Court finally adopted rules for disqualification of justices by amending Michigan Court Rule (MCR) 2.003—Disqualification of Judge. At our regularly scheduled public administrative conference, Justice HATHAWAY moved for the adoption of amendments to that court rule. The motion was seconded by Chief Justice KELLY and Justice WEAVER,

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[2] See, e.g., the statements or opinions by WEAVER, J., in *In re JK*, 468 Mich 202, 219 (2003); *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003); *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91 (2005); *McDowell v Detroit*, 474 Mich 999, 1000 (2006); *Stamplis v St John Health Sys*, 474 Mich 1017 (2006); *Heikkila v North Star Trucking, Inc*, 474 Mich 1080 (2006); *Lewis v St John Hosp*, 474 Mich 1089 (2006); *Adair v Michigan*, 474 Mich 1027, 1044 (2006); *Grievance Administrator v Fieger*, 476 Mich 231, 328 (2006); *Grievance Administrator v Fieger*, 477 Mich 1228, 1231 (2006); *People v Parsons*, 728 NW2d 62 (2007); *Ruiz v Clara's Parlor Inc*, 477 Mich 1044 (2007); *Neal v Dep't of Corrections*, 477 Mich 1049 (2007); *State Auto Mut Ins Co v Fieger*, 477 Mich 1068, 1070 (2007); *Ansari v Gold*, 477 Mich 1076, 1077 (2007); *Short v Antonini*, 729 NW2d 218 (2007); *Flemister v Traveling Med Services, PC*, 729 NW2d 222, 223 (2007); *McDowell v Detroit*, 477 Mich 1079, 1084 (2007); *Johnson v Henry Ford Hosp*, 477 Mich 1098, 1099 (2007); *Tate v City of Dearborn*, 477 Mich 1101, 1102 (2007); *Dep't of Labor & Economic Growth v Jordan*, 480 Mich 869 (2007); *Cooper v Auto Club Ins Ass'n,* 739 NW2d 631 (2007); and *Citizens Protecting Michigan's Constitution v Secretary of State and Reform Michigan Government Now! (RMGN)*, 482 Mich 960 (2008).

and the motion was adopted by a vote of 4-to-3,[3] with the understanding that Justice YOUNG and Justice HATHAWAY would possibly offer an amendment to MCR 2.003(D)(1) (time for filing) that might be proposed at the next, or a future, public administrative conference for discussion and vote. The only portion of Justice HATHAWAY's proposed revision that was not adopted on November 5, 2009, was her proposed amendment to Subsection (C)(1) (time for filing), which remains and is re-designated now as MCR 2.003(D)(1). By adopting an amendment to MCR 2.003—Disqualification of Judge—this Court has finally established clear, written, and fair rules governing the disqualification of justices on the Michigan Supreme Court.

"Immediate effect" of the amendment to MCR 2.003—Disqualification of Judge—that had just been adopted was established by a 4-to-3 vote on motion by Justice CAVANAGH,[4] seconded by Justice WEAVER. "Immediate effect" was necessary because there were already two cases with pending motions for disqualification against various justices. One of these pending cases, *Pellegrino v Ampco Systems Parking,* Docket No. 137111, was a case that had originally been scheduled for oral argument on November 3, 2009, but was adjourned because it was anticipated that adoption of clear written disqualification rules would occur at the November 5, 2009 public administrative conference.[5]

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[3] Voting for adoption of the motion were Chief Justice KELLY and Justices CAVANAGH, WEAVER, and HATHAWAY. Voting against the motion were Justices CORRIGAN, YOUNG, and MARKMAN.

[4] Voting for the motion were Chief Justice KELLY and Justices CAVANAGH, WEAVER, and HATHAWAY. Voting against the motion were Justices CORRIGAN, YOUNG, and MARKMAN.

[5] The discussion and possible adoption of disqualification rules had been passed at Justice YOUNG's request and removed from the October 8, 2009 public administrative conference because Justice YOUNG wanted to

Incredibly, although "immediate effect" was given to the amendment of MCR 2.003 on November 5, the order informing the public of the rule change did not enter on that date or promptly thereafter. Instead it is finally being entered 20 days later on November 25, 2009.[6] This Court should not have delayed issuing the order for any amount of time.[7]

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participate in the discussion, but he was unavailable for that properly noticed public administrative conference.

[6] As a result, apparently when the Michigan Supreme Court says that something has "immediate effect," that is not the case in this matter.

[7] In my 15 years' service as a justice, my experience in the adoption of proposals and other administrative matters, and the entry of orders, is as follows:

It is rare when this Supreme Court adopts proposals or other administrative matters with "immediate effect."

Such matters usually are adopted without an effective time as it is the general rule that the adopted item is effective at the time the Clerk of the Court enters the order within a reasonable time—usually a few days or a week—as the Court "speaks through its orders."

For an administrative matter, not a case matter, if any justice indicates he or she will write a statement, he or she has 14 days to submit it and other justices wishing to respond to it have 14 days to respond—a maximum of 28 days delay from adoption to entry.

Exceptions to the general rule above are:

Sometimes a matter is adopted with a specific future time to be effective like 30 days, 6 months, or 1 year later and the order is entered (after statements within 28 days) before the effective date, but is only effective on the specific adopted date, not the date of the entry of the order.

Other times, those of emergency, which rarely occur, the adopted matter is voted "immediate effect" and should be entered and therefore effective on that day of adoption. For example, see Administrative Order 2006-08, "the Gag order," which stated:

> The following administrative order, supplemental to the provisions of Administrative Order No. 1997-10, is effective immediately.

After the Court provided for "immediate effect" of the amendment to MCR 2.003, this Court *should* have issued the order containing the amendment with a notation that any statements by justices, whether concurrences or dissents, would be released together at a future time. Instead, in a private administrative conference on November 19, 2009,[8] a majority of this Court established that all statements from justices had to be circulated to the Court by November 25, 2009, and that

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> All correspondence, memoranda and discussions regarding cases or controversies are confidential. This obligation to honor confidentiality does not expire when a case is decided. The only exception to this obligation is that a Justice may disclose any unethical, improper or criminal conduct to the JTC or proper authority.
>
> CAVANAGH, WEAVER and KELLY, JJ., dissent.
>
> Dissenting statements by WEAVER and KELLY, JJ., to follow.

If delay occurs for entering the day of adoption, the order is entered as soon as possible "*nunc pro tunc*" (Latin for "now for then") making the late-entered order effective retroactive to the date of adoption. In either case, concurring, dissenting and responding statements by justices are not included with the order and the order has a notation that statements will follow. Unfortunately these rules were not followed in this administrative item and it would not matter but for these two consequences:

> 1. Justices YOUNG and CORRIGAN's attempts to avoid being governed by the new rule adopted in their presence November 5, by filing their statements refusing to be disqualified right before the close of business on November 18, apparently trying to beat the clock, believing the disqualification order would enter November 19 at an emergency (but not identified as such) private administrative conference.
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> 2. Leaving "immediate effect" with an Alice in Wonderland definition where "immediate effect" does not mean "immediate effect" and the public is deprived of knowledge of what exactly was adopted with no copies available for now 20 days.

[8] This private administrative conference was justified as not being held in a noticed public administrative conference because it was rightfully an emergency, although it has not yet been so identified.

the order adopting the amendment to MCR 2.003 would also issue at that time, November 25, 2009.[9]

The delay and seeming confusion that has arisen from the entry of this order is unfortunate because it deprived the parties and the public for 20 days of their right to have access to the language of the amendment to MCR 2.003, which was given "immediate effect." Further, it allowed two justices to attempt to avoid the application of a new written rule for a justice's disqualification to pending motions for their disqualification in a case.

Specifically, on November 18, 2009, Justices CORRIGAN and YOUNG directed the Clerk of the Court to submit their responses to the pending motions for recusal against them in the case of *Pellegrino v Ampco Systems Parking*, Docket No. 137111. In his response to the recusal motion, Justice YOUNG stated that "I am deciding this motion under this Court's current and traditional rules for disqualification because they are still in effect . . . ." Thereafter, Justice CORRIGAN indicated in her responding statement that "[l]ike Justice YOUNG, I am deciding this motion under this Court's current and traditional rules of disqualification . . . ."[10] Despite the fact that Justices CORRIGAN and YOUNG attempted to avoid complying with the new amended court rule, it remains to be seen whether their denials to the motions for their recusal will be

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[9] A motion was made by Justice WEAVER to issue the order that day, November 19, with a statement indicating that the order was *nunc pro tunc* to November 5, meaning that it would be retroactive to November 5, 2009 when the Court actually voted to give the amendment to MCR 2.003 "immediate effect." There was no second to this motion.

[10] Justice MARKMAN recognized that the rules were adopted with "immediate effect" on November 5, 2009, when he stated in a e-mail dated November 18, 2009: "This Court made clear at conference that it intended the new disqualification rules to be 'effective immediately.' "

subject to the procedures and safeguards in the newly amended MCR 2.003—Disqualification of Judge.

Again, the adoption of the amendment to MCR 2.003—Disqualification of Judge—is a positive, historical step forward toward achieving more transparency and fairness in the Michigan Supreme Court. The amended rule provides a fair disqualification process to ensure that the parties appearing before the Court have justices deciding their cases that are not actually biased, nor objectively appear to be biased. It does so in a transparent process by requiring a justice challenged by a party to submit his or her decision and reasons in writing regarding recusal decisions and requiring the Court—the remaining justices—as requested by a party to review the challenged justice's decision and to publish the remaining justices' decision and reasons in writing. This process, of written decision and with written reasons, is fair to the parties and to the challenged justice. It provides the public with more knowledge of how the justices conduct the people's judicial business.

Hopefully, the day will come when every justice will give these new, written and fair rules for disqualification of justices an opportunity to work and, if experience proves necessary, to refine such rules by workable proposed amendment. And hopefully the day will come when some justices no longer resort to proclaiming dramatic forecasts of failure, negative consequences, or unconstitutionality, and no longer attempt to avoid application of the disqualification rules to themselves as we have seen so far.

Unnecessary delay and attempts to avoid application of adopted rules do not contribute to public confidence in the way some justices perform their duties and in the

way the Michigan Supreme Court conducts its business.[11]

CORRIGAN, J. (*dissenting*).

> "*May God save these United States, the State of Michigan, and this Honorable Court*."—Michigan Supreme Court traditional *oyez*

It is always wise to be wary of any government action taken the day before a holiday or late on a Friday. Such actions are designed to travel under the radar screen. So it is with this 4-3 order.

Tomorrow we celebrate Thanksgiving. Many Americans will pause to thank our Creator for the blessings of liberty—for the right to speak free from government oppression and for the right to vote in free elections and have those votes count.

How sadly ironic, then, that this order empowers the Court to curtail those fundamental freedoms—the rights of judicial candidates to speak their minds under clear standards and the rights of voters to elect judges of their choosing. For the first time in our state's history, duly elected justices may be deprived by their co-equal peers of their constitutionally protected interest in hearing cases. Starting today, those contesting traffic tickets will enjoy greater constitutional protections than justices of this Court.

The justices in the majority, having assumed the power to remove a co-equal justice, have not lifted a pen to establish their authority to do so. Their new regime brings to mind George Orwell's *Animal Farm*: "All animals are equal[,] but some animals are more

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[11] This statement and the order amending MCR 2.003—Disqualification of Judge—will be published on my personally funded website: justiceweaver.com.

equal than others."[1] Of all the justices who have served during this Court's 173-year existence, only the four justices adopting these rules arrogate to themselves this new, "more equal" dominion over their colleagues.

This Court's order also imperils civility among the justices. The current philosophical and personal divisions on this Court are no more than a mild case of acne compared to the cancerous vitriol sure to spew from justices' pens. "Every kingdom divided against itself is laid waste, and no city or house divided against itself will stand." Matthew 12:25 (New Revised Standard). Today's order will guarantee a permanent siege within this institution.

No issue that I have ever tackled is as important as these disqualification provisions. The majority's action here will precipitate a constitutional crisis.

Many have applauded this Court's disqualification initiative. They have not done their homework! The devil is always in the details, and the details of this order eviscerate fundamental freedoms.

I support clear rules that would establish written constitutional standards for the disqualification of judges and justices. But I oppose the ill thought out provision of MCR 2.003(D)(3)(b) that allows justices to review de novo another justice's decision not to disqualify from a proceeding.

Chief Justice THOMAS GILES KAVANAGH once said that the members of this Court are seven people on a boat in stormy seas. This provision allows those seven people to throw one another overboard. Peer review of recusal decisions will lead to rancor and incivility in this most

[1] Orwell, *Animal Farm* (New York: Signet Classics, 1996), p 133.

fragile and battered institution.[2] This rule is a lacerating wound to this institution. Those who are privileged to be at the Supreme Court table are short timers, just temporary occupants of these chairs. This order will do lasting harm to this institution—and the case for change has not been made.

VIOLATION OF THE UNITED STATES AND MICHIGAN CONSTITUTIONS[3]

MICHIGAN CONSTITUTION

The basic question is whether the Michigan Constitution authorizes today's move. It does not.

Our constitution created a Supreme Court composed of seven elected or appointed justices. Const 1963, art 6, §§ 2 and 23. Under our constitution, a sitting justice may be removed from the bench only in certain ways. First, a justice may be removed under the impeachment provisions in Const 1963, art 11, § 7. Next, a justice may be removed for reasonable cause by a concurrent resolution of two-thirds of the members elected to and serving in each house of the Legislature. Const 1963, art 6, § 25. And finally, this Court may remove a justice

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[2] The State Bar of Michigan Board of Commissioners narrowly voted in favor of permitting peer review of a justice's recusal decision despite recognizing the potential for litigants' gamesmanship in the review process. The Board also suggested creating an independent review panel but acknowledged that a constitutional amendment may be required to create the panel. Several commissioners told me that the issue was hotly debated and that the independent review panel was proposed because they did not believe that members of the Court should review de novo a justice's declination to recuse.

[3] Contrary to Chief Justice KELLY's suggestion that our constitutional arguments were not raised before the rule was passed, the arguments were raised at administrative hearings, as Justice YOUNG has explained. Further, the text of the recusal rule as enacted by the majority was not circulated to the Court until one day before the November 5, 2009, administrative conference.

upon recommendation of the Judicial Tenure Commission. Const 1963, art 6, § 30(2). The constitution provides no other authority for justices to remove one another. The majority's new rule falls within none of the express methods of removal set forth in our constitution.

So if it is not to be found in the constitution, then where do my colleagues in the majority derive their newly discovered power to remove a fellow justice? They offer not the slightest justification. If the majority believes that such authority somehow inheres in the judicial power of this Court, they are fundamentally mistaken. The judicial power is the "authority to hear and decide controversies, and to make binding orders and judgments respecting them." *Risser v Hoyt*, 53 Mich 185, 193 (1884). Our state constitution vests the "judicial power" in one court of justice, headed by this Court, which consists of seven justices of equal power and authority. Const 1963, art 6, §§ 1 and 2. Although we "hear and decide controversies" and "make binding orders and judgments respecting them" by majority vote, no individual justice has more authority to exercise the judicial power than another justice, and nothing in the nature of the judicial power gives this Court or any justice the power to remove a duly elected or appointed justice. See, e.g., *People v Paille #1*, 383 Mich 605, 607 (1970) ("Whatever intra-court battles occasioned the adoption of the restriction upon intra-court review, *the wisdom of preventing judges of equal station from overruling each other abides*.") (emphasis added); *Dodge v Northrop,* 85 Mich 243, 245 (1891) ("Courts of concurrent jurisdiction cannot set aside or modify the orders and decrees of other courts of like jurisdiction."); *In re Wayne Co Prosecutor*, 110 Mich App 739, 742 (1981) (noting the holding in *Paille* that "the dual function of Detroit Recorder's Court as a magisterial

court as well as a felony trial court *does not provide for intra-court review whereby judges of equal station might overrule one another*.") (emphasis added); *Wayne Co Prosecutor v Recorder's Court Judges*, 81 Mich App 317, 322 (1978) ("Judges of co-equal authority lack jurisdiction to set aside the orders of bond forfeiture issued by their fellow judges."). Indeed, that may be precisely why in the United States Supreme Court each justice decides the recusal question individually; the other justices possess no authority to remove a justice.[4]

To make matters worse, it appears the majority's violations of our state constitution may have only just begun. At the November 5, 2009, public hearing, the Chief Justice suggested that the majority may promulgate a rule for appointing a replacement justice when a duly elected or appointed justice is recused. She opined:

> Clearly this rule isn't perfect, and I view it as the first step in the realization of a truly excellent rule. Missing from this is any discussion of replacing a disqualified justice with another judge for the purpose of hearing the case involved. I think that's essential. It isn't here. I'd like to see that subject addressed another day.

Const 1963, art 6, § 2, however, provides that the "supreme court shall consist of seven justices . . . ." Because a recused justice simply does not participate in the case and does *not* cease to be a justice of the Court, the Chief Justice's suggestion would at the very minimum add an eighth justice. As Justice YOUNG explains more fully, referencing my statement at 483 Mich 1205, 1229-1234 (2009), our constitution does not authorize the appointment of temporary justices in excess of the seven justices that have been duly elected or appointed.

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[4] See also Letter: New court rules may let minority win, Detroit News, letter to the editor from Timothy Baughman, November 18, 2009, attached as Appendix A.

The majority's potential arrogation of power to itself apparently knows no bounds.

UNITED STATES CONSTITUTION

The new rule also fails to ensure that minimal due process protections will be accorded to the challenged justice in a recusal appeal. Because justices elected to this Court have a vested property right in exercising their judicial duties, they cannot be divested of that right without an opportunity to be heard before an impartial arbiter. See *Goldberg v Kelly*, 397 US 254, 271 (1970); *Ng Fung Ho v White*, 259 US 276, 284-285 (1922). The majority has not adopted Justice YOUNG's proposed amendments that would have provided the challenged justice the right to counsel, the right to file a brief, and the right to an evidentiary hearing to determine any material factual questions. Also, as Justice YOUNG's cogent dissenting statement, which I join in its entirety, explains well, the majority's new rule violates the First Amendment right to freedom of speech because it trenches on judicial campaign speech protected by *Republican Party of Minnesota v White,* 536 US 765 (2002). The majority's refusal to accord even basic constitutional rights thus calls the validity of the entire new scheme into question.

This rejection of clearly defined procedural protections will likely encourage baseless recusal motions by those seeking to "justice-shop."[5] Indeed, some members of the current majority seem willing to entertain ploys to remake the elected composition of this Court to fit the ideological or partisan preferences of certain parties

[5] See Bashman, *Recusal on appeal: An appellate advocate's perspective*, 7 J App Prac & Process 59, 71 (2005) (stating that while the "subject of strategic recusal . . . is not often discussed, no doubt because the goal seems to be unfair and unethical . . . you can be sure that strategic recusals do occur").

or lawyers.[6] Both this Court and, more importantly, the people of Michigan whom we were elected to serve, deserve better.

By far the most troubling implication of today's new rule is the majority's outright deprivation of the retained sovereign right of the people of Michigan to elect the members of their judicial branch of government. The constitutional magnitude of this action should not be underestimated. With one fell swoop, the majority simply casts aside the one-man, one-vote principle of *Baker v Carr*, 369 US 186 (1962). The justices of this Court were elected by our fellow citizens to hear and decide cases. We campaigned on our judicial philosophies, explaining our philosophies in deciding cases that come before us. The people then chose the justices that they preferred to sit on this Court in free elections where each vote counted equally. In one administrative order, the majority takes away the right of every citizen of Michigan to have his or her vote count. Instead of "one-man, one-vote," we now have "four-justices, one-vote," as four justices usurp the people's constitutional right to choose who decides the cases coming before the highest Court in our state.

CAPERTON v A T MASSEY COAL CO, INC

I have also studied carefully the United States Supreme Court's recent decision in *Caperton v A T Massey Coal Co, Inc*.[7] The question under *Caperton* is whether

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[6] See, e.g., *Commentary: Beware power grab for Michigan court*, Detroit News, November 19, 2009, attached as Appendix B.

[7] *Caperton v A T Massey Coal Co, Inc*, 556 US ___; 129 S Ct 2252; 173 L Ed 2d 1208 (2009). *Caperton* held that a state supreme court justice was required to recuse himself from a case involving a corporate party whose chairman and CEO supported the justice's campaign both by directly

the Due Process Clause of the federal constitution requires this change—that is, that this Court review de novo a justice's decision not to disqualify himself from a proceeding. My research reflects that not one state that has examined its rules post-*Caperton* has changed its rules regarding the identity of the decision maker.[8] Indeed, Michigan becomes an outlier by doing so. The federal constitution plainly does not require any such action.

The United States Supreme Court itself has not changed its own recusal practices in response to *Caperton*. That is, it continues to leave recusal decisions to each individual justice. Nothing in *Caperton* remotely suggests that this longstanding practice violates due process. *Caperton* considered the standards for recusal, not the identity of the decision maker. And unlike the United States Supreme Court, where individual justices' recusal decisions are entirely unreviewable, recusal decisions of justices of this Court *are* subject to review in the United States Supreme Court.

NATIONAL IMPLICATIONS

"*The game is out there and it's either play or get played . . . .* [*It's*] *all in the game*."—*The Wire*[9]

Myriad questions of national importance bob in the wake of this new disqualification procedure. Do judicial candidates or incumbent justices seeking reelection show "an appearance of bias or prejudice" even if they merely respond to an organization's questionnaire

donating the statutory maximum to the justice and by contributing $2.5 million to an independent group that targeted the justice's opponent during the electoral process because the sum of these contributions raised "a serious, objective risk of actual bias" on the part of the justice. *Id.* at ___; 129 S Ct at 2265.

[8] My memo to the Court on this subject is attached as Appendix C.

[9] The Wire, 100 Greatest Quotes <http://www.youtube.cpm/watch?v=Sgj78QG9B> at 3:36 and 9:50 to 9:55 (accessed November 25, 2009).

about their personal views on legal and social issues?[10] Across the country, organizations have challenged, with varying degrees of success, the constitutionality of certain provisions in state codes of judicial conduct insofar as those provisions infringe on the campaign speech of judicial candidates.[11] Plainly, a line exists between what a judicial candidate can and cannot say during the electoral process.[12] Nevertheless, the amorphous standards in the new rule do not clarify the appropriate demarcation between constitutionally protected campaign speech and disqualifying conduct.

Moreover, the national debate regarding the necessity of new federal recusal procedures is ongoing.[13] Regrettably, however, most of the discussion is glaringly one-sided. I see little interest in truly considering opposing viewpoints. The House Judiciary Subcommittee on Courts and Competition Policy, chaired by Georgia Congressman Hank Johnson, recently postponed a hearing regarding judicial recusals scheduled for October 20, 2009. The chairman of the Judiciary Committee, Michigan Congressman John Conyers, has apparently rescheduled the hearing for December 10, 2009. Three of my colleagues who voted for the new recusal rules

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[10] See, e.g., *Duwe v Alexander*, 490 F Supp 2d 968 (WD Wis, 2007).

[11] Compare *Kansas Judicial Review v Stout*, 562 F3d 1240 (CA 10, 2009) (dismissing lawsuit filed by political action committee, judicial candidate, and prospective candidate as moot because the Kansas Supreme Court adopted a new Code of Judicial Conduct after answering questions certified about former Code provisions) with *Duwe*, *supra* at 977 (holding that judicial candidates' responses to survey questions are constitutionally protected speech and do not constitute commitments that could be restricted in the interest of protecting judicial openmindedness).

[12] See *Republican Party of Minnesota*, *supra*.

[13] David Ingram, National Law Journal, *Congress Set to Take Aim at Judicial Recusals,<http://www.law.com/jsp/aticle.jsp?id=1202435099939> (accessed November 23, 2009).*

have apparently been invited to testify in person at the upcoming Judiciary Committee hearing. In contrast, no member of the Court who voted against these rules has been invited to testify. My offer to testify in person was rejected by a staffer for the House Judiciary Subcommittee on Courts and Competition Policy. I was told that I could submit a five-page written statement. So much for full and robust debate about the appropriate scope and structure of any potential recusal guidelines.

Moreover, there appears to be a national push among a handful of well-funded interconnected advocacy groups to disqualify judges who express their views during the electoral process. I am aware that George Soros does not support judicial elections. Certain Soros-sponsored groups, including the Brennan Center for Justice and Justice at Stake, have enthusiastically lauded the efforts of the majority.[14] Many voters would be surprised to know about the extensive financial ties that exist between these organizations and George Soros's main foundation, the Open Society Institute. Preliminary scrutiny of IRS Form 990s reveals that the Open Society Institute has spent at least $34 million to derail judicial elections in favor of merit selection since 2000.[15]

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[14] See Jonathan Blitzer, *Recusal Reform in Michigan*, July 31, 2009 ("With Justice Elizabeth Weaver leading the charge, the Michigan Supreme Court is poised to codify new standards for how and when judges must recuse themselves.") <http://www.brennacenter.org/blog/archives/recusal_reform_in_michigan/> (accessed November 23, 2009); see also Gavel Grab Blog, *Brandenburg on the Future of Recusal*, November 19, 2009 (where the executive director of Justice at Stake describes the new "tougher" recusal rules as a sign that Michigan is moving "forward instead of backward.") <http://www/gavelgrab.org/?cat=42> (accessed November 23, 2009).

[15] See <http://www.eri-nonprofitsalaries.com/index.cfm?FuseAction=NPO.Form990&EIN=137029285&Year=2009> (accessed November 23, 2009). Additionally, since December 4, 2008, regional advocacy groups,

Consistent with these national efforts, when Chief Justice KELLY told the public that the Court has only begun its efforts at divining detailed disqualification rules at our November 5, 2009, public administrative conference, she added:

> Also not present in this rule is the question of when financial contributions to sitting justices constitute the appearance of bias or the probability of bias such as to require disqualification. That's I think an important matter that has to be addressed and I hope that we will address it soon in the future.[16]

Any effort to expand our new disqualification procedure is ill-advised. The Wisconsin Supreme Court, for example, recently rejected two proposals submitted by the League of Women Voters of Wisconsin Educational Fund and former Justice William Bablitch respectively. The League of Women Voters' proposal would have required justices to disqualify themselves if a lawyer, law firm, or party to a case donated more than $1,000 or if a party contributed to "a mass communication that was disseminated in support of the judge's election" within the preceding two years. In contrast, Justice Bablitch's proposal would have mandated recusal if a lawyer or party donated $10,000, the legal limit for individual contributions to a judicial candidate's campaign, and the proposal would require recusal for certain third party expenditures.[17] After a lengthy public

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including the Joyce Foundation, have donated $400,000 to the Brennan Center and $190,000 to Justice at Stake. See *Money and Politics Grants List* <http://www.joycefdn.org/programs/moneypolitics/grantlist.aspx> (accessed November 23, 2009).

[16] See minutes 1:02:25 to 1:03:35 of the November 5, 2009, public administrative conference at <http://www.michiganbar.org/courts/virtualcourt.cfm> (accessed November 23, 2009).

[17] Adam Korbitz and Alex De Grand, State Bar of Wisconsin, *Court to tackle recusal issue and other rules petitions*, October 27, 2009,

hearing, the Wisconsin Supreme Court instead adopted a proposal clarifying that endorsements, campaign contributions, and independent ad expenditures, standing alone, are not enough to require a justice to recuse himself or herself.[18] In other states, including Florida, committees continue to evaluate appropriate recusal procedures after soliciting input from judges, attorneys, and legal scholars.[19] In light of the uncertainty in various states concerning judicial disqualification procedures, the hasty adoption of these rules today is imprudent and unwise.

Finally, the majority's action is a self-inflicted wound. This rule will take the honor from "your Honor." What foolish person would run for this Court and allow his or her hard earned reputation to be sacrificed not by the slings and arrows of a vitriolic election campaign, but at the hands of colleagues? So much for civility initiatives.

The people of Michigan cannot possibly benefit from this order. Today's order is a lacerating wound to this institution and the people of Michigan.[20] May God save these United States, the state of Michigan, and this honorable Court.

YOUNG, J., concurred with CORRIGAN, J.

<http://www.wisbar.org/AM/Template.cfm?Section=News&Template=/CM/ContentDisplay.cfm&ContentID=87014> (accessed November 24, 2009); Patrick Marley, The Milwaukee Journal Sentinel *State Justices Skeptical of Recusal Proposal*, October 28, 2009, <http://www.leagle.com/unsecure/news.do?feed=yellowbrix&storyid=137049882> (accessed November 23, 2009).

[18] Patrick Marley, *State High Court Says Campaign Donations Can't Force Recusals*, The Milwaukee Journal Sentinel October 29, 2009, <http://www.leagle.com/unsecure/news.do?feed=yellowbrix&storyid=137059379> (accessed November 23, 2009).

[19] Gary Blankenship, Florida Bar News, *To recuse or not to recuse: How to do it is the real question*, November 1, 2009.

[20] In the event the majority precipitates a constitutional crisis by purporting to oust a justice from a case, I leave all my possible options open.

APPENDIX A

The Detroit News www.detnews.com

November 18, 2009 http://detnews.com/article/20091118/OPINION01/911180309

Letter: New court rules may let minority win

The Nov. 10 editorial ("Justice disqualified") notes that "New rules on recusal of state Supreme Court members could cause problems with subjective standard." It is worse than that. The promulgation of the four-justice Michigan Supreme Court majority rule that permits justices to oust other justices from consideration of a case is a seizure of power without authority that is unprecedented in the history of the court.

The majority of justices speak for the court. But nothing in our Constitution gives a majority of justices -- and here, only a majority of justices who have not been challenged by a litigant, which might be a minority of the court -- the authority to decide whether another justice or justices may sit on a case. Undoubtedly some litigants will, calculating on past decisions that they are likely to lose 4-3 in a case, challenge two justices of what they perceive will be the majority.

Under the new recusal rule, the remaining justices will vote on whether the challenged justices may sit, and in a 3-2 vote the three justices who might be in the minority in the case may oust two other justices from the case.

In the U.S. Supreme Court, each justice individually decides questions of recusal in any case, and there is no recourse to either the chief justice or the rest of the court should a justice not excuse himself or herself from a case.

This is precisely because the members of that court understand the limits on their authority, which, unfortunately, four members of our state Supreme Court do not.

Tim Baughman, Royal Oak

APPENDIX B

The Detroit News www.detnews.com

November 19, 2009 http://detnews.com/article/20091119/OPINION01/911190343

Commentary: Beware power grab for Michigan court

DAN PERO

There's a discredited practice in politics: If you can't win the game, change the rules. The majority of justices on the Michigan Supreme Court is attempting to do just that by making it far easier to dismiss justices elected by Michigan voters from controversial cases and blatantly shift the balance of power on the court.

Michigan Supreme Court justices historically have voluntarily removed themselves from cases they cannot hear impartially. Under the new rules, the well-defined "actual bias" test for disqualification will be replaced by a fuzzy "appearance of impropriety" standard.

The definition of what constitutes the perception of bias is a moving target. Does a $1,000 campaign contribution create the "appearance" that a justice cannot be impartial? Who knows?

What happens if a trial lawyer compares a judge to "Adolf Hitler and Goebbels," as Geoffrey Fieger has done? Isn't it easy to claim there is at least an "appearance" that a judge who has been tagged with that epithet shouldn't rule in cases involving that lawyer? What's to stop an unscrupulous attorney from smearing a justice so the justice is removed from cases down the road?

The new rules also make the disqualification process less transparent and accountable.

Under the old system, litigants could request that individual justices recuse themselves, but the justices made the ultimate decision on whether to hear a case. This worked well in Michigan because justices knew if they abused this process or ruled on cases in which there was clear bias, voters could throw them off the court in the next election.

The new rules, however, give justices the power to request (and achieve) the removal of their colleagues. This policy invites retaliatory recusal demands and endless bias accusations, especially given the petty and vindictive proclivities of many court members.

Even worse, justices will be allowed to vote on disqualification challenges with no public oversight. Any justice can be removed from any case for any reason -- and the court will never have to justify or even explain its actions to the voters.

This is an especially ironic twist since the new liberal majority has railed for more transparency. Justice Elizabeth Weaver has made it her mantra. Justice Diane Hathaway campaigned on it. And Chief Justice Marilyn Kelly promised it.

There's not a shred of evidence the existing rules failed to keep Michigan's high court impartial, giving this entire exercise the whiff of partisan politics and ideological gamesmanship. In the future, any combination of four justices on the seven-member court can temporarily unseat a democratically elected colleague and shift the direction of the court. The result will be heightened cynicism about the judicial branch.

The court's new recusal rules are the culmination of an effort to get conservative justices off the court -- or at

least push them to the sidelines. If the court does so, it will undermine the ability of Michigan voters to decide who is going to hear the cases that affect their lives, jobs and businesses.

Dan Pero, former chief of staff to Gov. John Engler, is president of the American Justice Partnership, a national organization headquartered in Lansing that focuses on enacting legal reform at the state level. E-mail comments to letters@detnews.com">letters@detnews.com

APPENDIX C

STATE OF MICHIGAN
SUPREME COURT

MEMORANDUM
FOR COURT USE ONLY

TO: The Justices
cc: Corbin Davis, Mike Schmedlen, and Danilo Anselmo

DATE: November 2, 2009

FROM: Justice Maura Corrigan

SUBJECT: ADM 2009-04, #3 on 11/5/09 administrative agenda

In light of my call for further study of *Caperton v A T Massey Coal Co, Inc,* 556 US ___ (2009); 129 S Ct 2252 (June 8, 2009),[1] I would like to share my follow-up research with regard to whether and how *Caperton* bears on courts' general recusal policies. The *Caperton* opinion itself, courts' and commentators' interpretations of *Caperton,* and court practices in the wake of *Caperton* have convinced me that *Caperton* applies very narrowly and does not suggest that due process requires us to change our recusal practices. Indeed, this Court would be a true outlier if we read *Caperton* to require evidentiary hearings or a vote by the full Court in order to resolve recusal motions consistent with due process principles. The fact that *Caperton* does not require such changes to our historical recusal practice provides additional support for my vote in favor of alternative A.

First and foremost, the *Caperton* majority took pains to explain the limited nature of its holding. Indeed, it devoted Part IV of the opinion to clarifying that the Court's "decision today addresses an extraordinary situation where the Constitution requires recusal." Slip op at 16. It

[1] See my statement accompanying the order denying the motion for recusal in *United States Fidelity Insurance & Guaranty Co v Michigan Catastrophic Claims Assoc,* 484 Mich 1, 49-60 (2009).

specified: "the facts now before us are extreme by any measure." *Id.* at 17.[2] Otherwise, it acknowledged that "'most matters relating to judicial disqualification [do] not rise to a constitutional level.'" *Id.* at 6, quoting *FTC v Cement Institute*, 333 US 683, 701 (1948).

Recall that *Caperton* held that a state supreme court justice was disqualified from hearing a case involving a corporate party whose chairman and CEO made "extraordinary efforts to get [the justice] elected" by expending $3 million to support the justice's campaign. *Id.* at 2-3, 11. *Caperton* explicitly limited itself to "the context of judicial elections," *id.* at 11, and, more specifically, to extreme facts when a party directs or significantly contributes to a campaign while that party's case is pending. See *id.* at 13 ("Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case."), 14 ("[T]here is a serious risk of actual bias ... when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."), 15 ("The temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is ... critical."), 17 ("The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case.")

Accordingly, I tend to agree with the following observations by former Texas Chief Justice Thomas Phillips, who authored the amicus brief in *Caperton* on behalf of the Conference of Chief Justices, concerning the limited scope of *Caperton*:

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[2] And see *id.* at 17 ("[E]xtreme cases often test the bounds of established legal principles, and sometimes no administrable standard may be available to address the perceived wrong"; "[t]his Court's recusal cases ... deal[] with extreme facts ... .").

> Some have suggested that judges can never rule in any case where parties to a case or their attorneys are donors. It does no such thing. The holding, as I read it, is that due process is only violated when "[1] a person [2] with a personal stake in a particular case [3] had a significant [4] and disproportionate influence [5] in placing the judge on the case ... [6] when the case was pending or imminent." Given how narrow that holding is, I'm not sure *Caperton* will ever be direct precedent for another recusal. [Coping With 'Caperton': A Q&A With Former Texas Chief Justice, Tony Mauro, The National Law Journal June 11, 2009.]

Cases interpreting *Caperton* have reached similar a conclusion, that is: *Caperton* is limited to extreme facts in the context of campaign support in judicial elections. For just a few examples see *Rhiel v Hook (In re Johnson)*, 408 BR 123, 127 (Bankr, SD Ohio 2009) (*Caperton* is limited to "the specific issue of recusal 'in the context of judicial elections'"); *Ala Dep't of Pub Safety v Prince*, 2009 Ala Civ App LEXIS 510 (Oct 2, 2009) (quoting Chief Justice Roberts' dissent to observe that it is unclear whether *Caperton* applies beyond financial support in judicial elections but, in any event, the majority made clear that *Caperton* was "an exceptional case" that presented "extreme facts" and concluding that the facts in the case before it "are not the 'extreme facts' of *Caperton*"); *Marek v Florida*, 14 So 3d 985, 1000 (Fla 2009) (rejecting a defendant's claim that his constitutional right to due process was violated under *Caperton* when the same judge presided over his 1984 sentencing and the 1988 evidentiary hearing on his initial motion for postconviction relief; *Caperton's* "extraordinary facts regarding a litigant's campaign contributions to a state supreme court justice" are "irrelevant" to this case); *South Dakota v List*, 2009 SD 73, 8 (SD 2009) (citing *Caperton* for the proposition that "most matters relating to judicial disqualification [do] not rise to a constitutional level").

Perhaps most significantly, the few state courts I have discovered that have publicly considered whether *Caperton* bears on their recusal practices have primarily addressed the

case's ramifications for rules concerning contribution limits to judicial elections. These states have not read *Caperton* to require evidentiary hearings or a vote by unchallenged judges or justices.[3] For example, the Supreme Court of Nevada's Commission on the Amendment to the Nevada Code of Judicial Conduct issued a supplementary report recommending two additional rule changes in response to *Caperton*; both changes address recusal on the basis of a judge's financial or electoral campaign support from a party or attorney.[4] Similarly, on October 28, 2009, the Wisconsin Supreme Court conducted a hearing on petitions asking whether to amend the Supreme Court Rules concerning judicial campaign contributions and whether there are circumstances when recusal is required if a party or lawyer in an action "previously made a campaign contribution to or spent money on a media campaign relating to a judicial election for

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[3] At least one state also considered, but rejected, rephrasing its general recusal standards in reaction to *Caperton*. According to a September 2009 report from the Washington Supreme Court Task Force on the Code of Judicial Conduct, a minority of the task force would have adopted the 2007 ABA Model Code for Rule 1.2 of the Code of Judicial Conduct on Promoting Confidence in the Judiciary; based in part on *Caperton*, the version of the rule preferred by the minority would direct judges to avoid not just impropriety, but the "appearance of impropriety." See<http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Code%20of%20Judicial%20Conduct%20Task%20Force%20Committe/Final%20CJC%20%20Task%20Force%20Report%20Sept%2009.pdf> (accessed October 28, 2009). The proposed new Washington State Code of Judicial Conduct also addresses disqualification of a judge on the basis of monetary campaign support in excess of the statutory direct contribution limits. See proposed Rule 2.11(A)(4) and comment [7], <http://www.courts.wa.gov/committee/?fa=committee.home&committee_id=141> (accessed November 2, 2009).

The Chief Justice of the Supreme Court of Ohio informed me that Ohio's high court discussed *Caperton* formally once and decided not to take any action; Ohio's justices, like myself, are interested to see whether other states find reform necessary.

[4] See <http://nevadajudiciary.us/index.php/viewdocumentsandforms/Commission-Files/Nevada-Judicial-Conduct-Code-Commission/Supplemental-Report/> (accessed November 2, 2009).

a judge who is presiding in the case."[5] But thus far, my research has not revealed that any state supreme court has read *Caperton* even to *potentially* require evidentiary hearings or a vote of the full Court. It is worth further noting that the United States Supreme Court appears not to have amended its own recusal process—which comports with our own historical practice—in the wake of *Caperton*.[6]

Along these lines, I again note the comments, published by Michigan Lawyers Weekly, of Wayne County Assistant Prosecuting Attorney Timothy Baughman concerning *Caperton*:

> *Caperton* is a case about standards and not about the identity of the decision-maker. . . .
>
> * * *
>
> Nothing in *Caperton* requires that the decision on a recusal motion be reviewed by another justice or body of justices. For the Michigan Supreme Court [to continue] to follow the practice of the U.S. Supreme Court is perfectly permissible, so long as a system of "objective rules" exists. [*'Caperton' was about recusal standards, not decision maker*, Michigan Lawyers Weekly, June 22, 2009, p 7.]

For these reasons, my study of *Caperton* convinces me that it does not require any changes to our recusal rules. Accordingly, I reiterate my support for alternative A in this file,

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[5] See <http://www.wicourts.gov/supreme/petitions_audio.htm> (accessed October 29, 2009), rule petitions 08-16, 08-25, 09-10 and 09-11. The originating petition, 08-16, appears to have been filed before *Caperton* was decided, but the Court accepted an amendment the petition in light of *Caperton*. See <http://www.wicourts.gov/supreme/docs/0816petitionamend.pdf> (accessed October 29, 2009).

[6] The primary difference between our practice and that of SCOTUS is the fact that a party who wishes to challenge a Michigan Supreme Court justice's recusal decision has another level of recourse; he may appeal that decision to SCOTUS. Thus I find it particularly noteworthy that SCOTUS has not concluded that due process requires unchallenged SCOTUS justices to bless or reverse an individual SCOTUS justice's recusal decision although there is no higher body to which the movant may appeal the decision. Clearly SCOTUS continues to believe that individual justices are generally competent to decide motions for their recusal.

which effectively codifies our historical recusal practice and does not require a vote of the Court under any circumstances.

YOUNG, J. (*dissenting*). I respectfully dissent from the new majority's enactment of this unconstitutional rule of disqualification. ***In eliminating all due process protections, compromising and chilling protected First Amendment rights, and conducting secret appeals that might lead to the removal of an elected justice from a case against his will, the majority has created a 21st Century Star Chamber with its new disqualification rule.***

The issue here is not *whether* this Court should have a disqualification rule—we have had a disqualification rule for 173 years that mirrored the rule that the United States Supreme Court continues to use—but rather *which* disqualification rule best ensures that parties whose cases are decided by this Court have neutral arbiters deciding those cases. Every member of this Court purports to subscribe to the elementary principle of due process that parties whose cases are decided by this Court must have impartial justices deciding those cases.[1] ***However, the plain fact is that the rule issued today is facially unconstitutional in several critical ways, with the result that it will allow four justices to disenfranchise the millions of Michigan voters who elected a justice. And it is also the fact that the justices who voted for this rule*—KELLY, CAVANAGH, WEAVER, and HATHAWAY—enacted this new rule despite having knowledge that the rule was constitutionally deficient**.[2] The

[1] "A hearing before an unbiased and impartial decisionmaker is a basic requirement of due process." *Crampton v Dep't of State*, 395 Mich 347, 351 (1975).

[2] There are two responses to Chief Justice KELLY's claim that these constitutional concerns were raised only at the "eleventh hour." First, as Justice CORRIGAN states, the rule that the Court voted on was circulated to the Court just the day before conference. Second, Chief Justice KELLY's suggestion that the Court has no obligation to consider these constitu-

citizens of Michigan should be concerned when a majority of their Supreme Court is indifferent to the state and federal constitutions they have been entrusted and have sworn to uphold.

THE NEW RULE VIOLATES THE FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS

The removal of a sitting justice against his or her will is a serious matter trenching upon the right to execute the duties of the office to which the justice was elected, as well as an infringement on the rights of electors who placed the justice in office. A justice subject to a motion for disqualification is entitled to the basic due process rights of notice and opportunity to be heard.[3] Heretofore, only an appeal to the United States Supreme Court could reverse a Michigan justice's determination

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tional objections, even if raised at the hearing, is an abrogation of the obligation that each justice makes to uphold the federal and state constitutions. Moreover, Justice MARKMAN also proposed several amendments at the November 5, 2009 administrative hearing to address some of the constitutional deficiencies with the rule, which he circulated to members of the Court well in advance of the administrative hearing. I also circulated to all members of the Court on November 19, 2009 written proposals to address the constitutional problems I raised. This memorandum is attached as Appendix A. The public is invited to access our administrative hearing at <http://www.michbar.org/courts/virtualcourt.cfm> (accessed November 24, 2009), to determine whether Chief Justice KELLY or I have accurately described the discussion of constitutional questions I raise herein.

As important, the Chief Justice has refused to place on our next administrative agenda my written proposals so that they can be considered by the Court. This course of conduct underscores my contention that the new majority is indifferent to the serious constitutional questions I and my colleagues in dissent have placed before them.

[3] " 'The fundamental requisite of due process of law is the opportunity to be heard.' " *Dow v State of Michigan*, 396 Mich 192, 205 (1976), quoting *Grannis v Ordean*, 234 US 385, 394 (1914). "The 'opportunity to be heard' includes the right to notice of that opportunity." *Id.*

regarding a motion to disqualify. In an appeal taken from a Michigan justice's denial of a motion for disqualification, the challenged justice is entitled to the full range of due process rights that all appellees before the United States Supreme Court are entitled. A justice challenged on such an appeal from his decision not to recuse therefore has a right to counsel, to file briefs in opposition to the appeal, to have the issues on which the disqualification is predicated framed in advance, and the right to have it decided by a neutral arbiter. ***The new rule eliminates all of these due process rights.***

The new rule creates an appellate process whereby the members of the Michigan Supreme Court, rather than the United States Supreme Court, will determine whether one of their challenged colleagues may sit on a case. By interposing itself as an appellate body in the disqualification decision, this Court must afford the targeted justice no fewer rights than he enjoyed in such an appeal to the United States Supreme Court. As stated, a justice has the right to have an appeal be limited to the grounds stated in the motion for disqualification, to retain counsel in the matter, and to submit a brief in response to the motion for disqualification. Sometimes, due process will also necessitate an evidentiary hearing, as there may be facts in dispute between the moving party and the challenged justice. ***Notwithstanding these constitutional requirements of due process, the new majority protected none of them, even though I specifically raised each of them to the Court before this order entered and provided proposed language to the rule that would remedy these constitutional deficiencies.***

Moreover, if due process means anything—particularly in the disqualification setting where this issue is pivotal—a targeted justice is most assuredly

entitled to have an *impartial* arbiter decide the question. When the United States Supreme Court is the arbiter, no serious question on this point arises. ***However, when the justices of this Court become the arbiters of a disqualification decision of one of its members, there are substantial questions whether an impartial arbiter is involved.*** It is no secret that this Court is riven with deep philosophical, personal, and sometimes frankly partisan cleavages.[4] Where personal and political biases could affect the decision-making of members of this Court in the new disqualification appeal process, I cannot imagine that due process demands anything less than the right to challenge the potential biases of the decision-makers in this appellate procedure. Yet the new rule provides no

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[4] Justice WEAVER has already gone on record stating that I ought "to recuse [myself in a case] in which Mr. Fieger is himself a party" because of campaign remarks I made in 2000. *Grievance Administrator v Fieger*, 476 Mich 231, 328 and 340 (2006) (WEAVER, J. dissenting). See also *State Automobile Mut Ins Co v Fieger*, 477 Mich 1068, 1070 (2007). She has also gone on the record as dissenting from my participation in cases "where Mr. Geoffrey N. Fieger's law firm represents" a party. *Ansari v Gold*, 477 Mich 1076, 1077 (2007). See also *Flemister v Traveling Med Services*, 729 NW2d 222 (2007); *Short v Antonini*, 729 NW2d 218 (2007); *Johnson v Henry Ford Hosp*, 477 Mich 1098, 1099 (2007); and *Tate v City of Dearborn*, 477 Mich 1101, 1102 (2007). As I note below, Mr. Fieger and his firm have been responsible for nearly all the disqualification motions filed during my tenure on the Court. All have been based on campaign speech and all have been unsuccessful here and in the federal courts, including the United States Supreme Court, where he appealed my denials.

Other of my colleagues have made explicitly hostile partisan comments. See, for example, our Chief Justice's recent comment wherein she promised to "undo a great deal of the damage that the *Republican* Court has done." Brian Dickerson, *Justices Gird for Gang of 3½*, Detroit Free Press, January 11, 2009, at 1B (emphasis added). Some sitting members of this Court openly campaigned against Chief Justice TAYLOR's re-election last year. These actions and published statements fairly call into question how impartially some of my colleagues will decide disqualification appeals under the new rule they have established.

mechanism for challenging the bias of a member of this Court in the appeal process it establishes today. At the November 5, 2009 administrative conference, the new majority specifically repudiated Justice MARKMAN's proposed amendment addressing this issue. The new majority also refused to consider all of the specific due process rules I later proposed in writing. ***The majority's open rejection of these basic constitutional protections indicates that it is willing to sacrifice essential requirements of due process in enacting this rule. The open question is why.***

THE NEW RULE ALSO VIOLATES THE FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH

Even beyond the specific due process requirements that the new majority has thrown overboard, the new rule facially violates a judge's First Amendment rights. In every written constitution since 1850, the People of Michigan have retained their sovereign right to elect judges rather than surrender that right to some other process. Accordingly, judicial candidates in Michigan campaign for judicial office. In campaigning, they will engage in political speech that is clearly protected under the First Amendment.[5] The protection of speech guaranteed under the First Amendment is especially important within the context of political campaigns. James Madison, drafter of the First Amendment, wrote:

> The value and efficacy of [the right of elections] depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal free

[5] *Republican Party of Minnesota v White*, 536 US 765 (2002).

> dom, consequently, of examining and discussing these merits and demerits of the candidates respectively.[6]

Thus, any restrictions on campaign speech not only infringe on a candidate's right to speak, but also infringe on the *public's* right to vote intelligently on their candidates.

The importance of citizens' decisions regarding whom to entrust with public office deserves no less than a robust public discussion of issues by candidates seeking their votes. ***The order issued today, however, frustrates this kind of political discussion between judicial candidates and voters and penalizes a judicial candidate for trying to do so.*** The order expressly contemplates that campaign speech protected under the First Amendment will nevertheless cause a duly-elected judge to be disqualified from hearing a case. This is so because the new rule establishes that campaign political speech is subject to an "appearance of impropriety" limitation. Apart from the fact that it is inherently a nebulous standard,[7] the "appearance of impropriety" standard is not a constitutional standard.[8]

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[6] James Madison, *Report on the Virginia Resolutions*, available at <http://press-pubs.uchicago.edu/founders/documents/amendI_speechs24.html> (accessed November 19, 2009).

[7] We cannot even be sure that the justices who voted for the rule understand its own implications. See, e.g., note 24, *infra*.

[8] Even the rule's proponent, Justice HATHAWAY, recognizes that "appearance of impropriety" is an extraconstitutional standard. At our November 5, 2009 administrative conference, Justice HATHAWAY explained, "*Caperton* says that states can have stricter standards [than due process requires]. . . . We have Canon 2 of the Michigan Code of Judicial Conduct, which talks about a judge having to adhere to the appearance of impropriety standard." Justice HATHAWAY *clearly believes that the appearance of impropriety does and should trump First Amendment rights*. So, apparently, do her colleagues in the majority.

Thus, even if the challenged political speech in no way implicated actual bias against a party (or any other constitutional right of such a party), an elected justice is still liable to be disqualified if his campaign comments were later determined to create an appearance of impropriety. It is not hard to contemplate campaign speech that might offend and later be considered "improper" under the new rule's standard.[9]

Moreover, the mere *threat* of future disqualification produces a chilling effect on protected speech. The United States Supreme Court's decision in *Republican Party of Minnesota v White* struck down the Minnesota Supreme Court's rule forbidding an incumbent judge or candidate for judicial office from "announc[ing] his or her views on disputed legal or political issues" during an election campaign.[10] While the Minnesota Supreme Court's restriction on campaign speech was more expressly content-based than the rules promulgated by this order, ***the new majority here is attempting to achieve indirectly what the United States Supreme Court declared in* White *that a court could***

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[9] I made this very point in my statement concerning a disqualification motion addressed to Justice HATHAWAY. See *United States Fidelity & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 484 Mich 45, 60 (2009) (statement of YOUNG, J.). In fact, journalists looking at Justice HATHAWAY's campaign statements questioned whether she could be fair and impartial to all parties. An article written on the occasion of Justice HATHAWAY's investiture suggested that "[i]n her campaign . . . Hathaway seemed to take sides. She suggested that, if elected, she would be the 'voice' of and stand up for 'middle-class families,' instead of 'siding with big insurance companies and polluters' and 'big corporations.' " Todd Berg, *Diane M Hathaway Sworn in as Michigan Supreme Court's 104th Justice*, Michigan Lawyers Weekly, January 12, 2009. It will be interesting to see how Justice HATHAWAY fares under the new recusal standard she has championed if challenged by the very parties she stated she would "side against" if elected.

[10] *Republican Party of Minnesota v White*, *supra*, 536 US at 768.

not do directly: stifle protected judicial campaign speech. The new "appearance of impropriety" standard is so broad and vague that judges and judicial candidates will be forced to self-limit their campaign speech so that, once they are elected, they can actually exercise the duties of the office they have sought. Thus, this rule is facially unconstitutional because it expressly allows a jurist's First Amendment right to free speech to be subordinated to a nonconstitutional standard. ***The new majority is untroubled by this obvious abridgement of First Amendment rights that their new rule causes. Again, the question remains how the new majority could be so unconcerned about such a serious matter.***

THE MICHIGAN CONSTITUTION DOES NOT ALLOW THIS COURT TO REMOVED A JUSTICE FROM AN INDIVIDUAL CASE

Under the Michigan Constitution there are at most *four* ways a duly-sitting justice may be removed against his or her will:

• The People can choose not to reelect that justice.[11]

• The House can impeach a justice "for corrupt conduct or for crimes or misdemeanors" by majority vote. Upon impeachment, a judicial officer is forbidden from "exercis[ing] any of the functions of his office—until he is acquitted." The Senate can permanently remove a justice from office by a two-thirds vote.[12]

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[11] Const 1963, art 6, § 2: "The supreme court shall consist of seven justices elected at non-partisan elections as provided by law. The term of office shall be eight years . . . ."

[12] Const 1963, art 11, § 7:

> The house of representatives shall have the sole power of impeaching civil officers for corrupt conduct in office or for crimes or misdemeanors, but a majority of the members elected thereto and serving therein shall be necessary to direct an impeach-

• The House and Senate can enact a concurrent resolution removing a justice "[f]or reasonable cause" that "is not sufficient ground for impeachment" by a vote of 2/3 of the members elected to each house, at which time the governor "shall" remove the justice.[13]

• This Court can remove a justice from the Court upon recommendation of the Judicial Tenure Commission.[14]

Notably, these constitutional provisions only refer to removal of a justice from *all* cases, not from a particular *individual* case, as this order allows. It is important to note, however, that there is no provision in the Michigan Constitution that explicitly allows this Court to overturn the elective will of the People and remove a justice from an individual case, nor is there any language that would even implicitly provide such authority.

Significantly, the Michigan Constitution has provided extra protections for judicial officers that no other officeholder enjoys. And it is not hard to imagine why the People would want to insulate judicial officers from political attacks that would impede their ability to discharge their duties of office. Accordingly, our Constitution acknowledges the primacy of judicial office—*even as between judicial office and executive or legislative*

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ment. . . . No person shall be convicted without the concurrence of two-thirds of the senators elected and serving. Judgment in case of conviction shall not extend further than removal from office . . . . No judicial officer shall exercise any of the functions of his office after an impeachment is directed until he is acquitted.

[13] Const 1963, art 6, § 25: "For reasonable cause, which is not sufficient ground for impeachment, the governor shall remove any judge on a concurrent resolution of two-thirds of the members elected to and serving in each house of the legislature. The cause for removal shall be stated at length in the resolution."

[14] Const 1963, art 6, § 30(2): "On recommendation of the judicial tenure commission, the supreme court may . . . retire or remove a judge . . . ."

offices. It expressly precludes the recall of judges by Michigan voters while allowing the recall of all other elective officers.[15] In other words, the People have decided that, once they have elected a justice, that decision is final, at least for the duration of the justice's eight-year term. This extraordinary constitutional protection for judicial office is an important backdrop against which to assess the new majority's asserted right to prevent a sitting justice from exercising the duties of his office. If statewide judicial elections are to mean anything, it should not be up to four justices to pick and choose when to allow the will of the People to be heard and when to stifle that will. By creating through court rule the power to remove justices from individual cases, the majority has done just that.

The authority of this Court to remove an elected justice from a particular case is, therefore, highly questionable. In issuing its new recusal rules, the new majority has not adequately considered, much less justified, the authority of the Court to remove a justice in a particular case, especially since such removal by the fiat of four silences the People, who elected *seven* particular justices to the Court, who are not fungible. I am not sure by what logic an administrative rule may be used to amend our Constitution and create a new authority whereby an elected justice can be removed from a case by his co-equal justices. ***While justices are constitutionally protected from political attacks from without, the new majority has conceived a clever means to launch political attacks from within the Court, giving a majority of four justices the ability to disenfranchise millions of Michigan voters by removing their elected justices from hearing cases that will affect their daily lives.***

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[15] Const 1963, art 2, § 8.

THE NEW RULE WILL ENHANCE GAMESMANSHIP THAT WILL UNDERMINE THE INTEGRITY OF JUDICIAL ELECTIONS AND THIS COURT

The new disqualification rule is simply bad policy that is the product of a manufactured crisis. Although it purports to ensure that only impartial justices sit on cases, the new rule has the effect of "weaponizing" disqualification as a tool to achieve countermajoritarian results to nullify elections. Shockingly, my colleagues have set themselves up as the gunners on the artillery they have manufactured.

For the entire existence of our Court, the justices of the Michigan Supreme Court have conscientiously striven to address questions of judicial qualification-,whether raised on motion by a party or by the justice. They have done so under our unvaried practice that mirrors the one used by the United States Supreme Court.[16] In short, a justice confronted with a disqualification motion has typically consulted with members of this Court and made a determination whether participation in a particular matter was appropriate. Other than providing their personal counsel, other members of the Court have not participated in the decision.

Until recently, no one has challenged, or apparently had reason to challenge, the Court's historical practice for addressing the issue of a justice's disqualification. Of late, however, with the shift in the philosophical majority of this Court,[17] disqualification has taken on a

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[16] See *Johnson v Henry Ford Hosp*, 477 Mich 1098, 1099 (2007); see also Statement of Recusal Policy, United States Supreme Court, November 1, 1993, available at 483 Mich 1237.

[17] It is no secret that the philosophical majority of this Court changed with the 1998 Supreme Court election. The philosophical transformation of the Michigan Supreme Court that occurred eleven years ago, and the debate that has accompanied that transformation—a debate similar in

new, more politicized role. One need look only as far as a recent volume of the *Michigan Bar Journal* for evidence of this new effort to politicize disqualification motions. In a letter to the editor, attorney John Braden suggests that the judicial electoral process is an unsatisfactory solution for addressing what he believed to be the unfavorable philosophy and decisions of the Court's former philosophical majority.[18] Therefore, he urged his colleagues in the Bar to use motions to disqualify as a suitable alternative to the electoral process guaranteed by the Michigan Constitution to alter the philosophical balance of the Court in order to achieve what he desired: more favorable results for his clients and himself. Moreover, it is entirely foreseeable that sophisticated and well-financed clients, like insurance companies and unions, will demand that their lawyers file motions for disqualification as a matter of course in order to alter the philosophical makeup of the Court in ways the electorate hardly intended. ***Thus, today's order is no less than a call for the use of disqualification as a non-electoral political weapon to remove judges with whose judicial philosophy one disagrees. My colleagues, wittingly or not, in enacting this new rule, give aid to this politicized use of disqualification motions.***

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some ways to that taking place within the federal judicial system—resonated strongly in the electoral political process, which the citizens of Michigan, through their constitution, have chosen as the method by which they select their justices. Perhaps not surprisingly, those who had been most comfortable with the approach of the Michigan Supreme Court over the previous decades were resistant to this transformation, and many responded forcefully in political opposition. The 2000 Supreme Court election, in which three members of the Court's prior philosophical majority stood for election, was one of the most bitterly contested in the state's history, as was the most recent Supreme Court election.

[18] See Opinion & Dissent, 85 Mich B J 10, 12 (March 2006).

Why do I claim that the new disqualification rule is a product of a "manufactured crisis"? The facts are very plain. After the Court's philosophical majority changed in 1999, disqualification motions became a tactic to alter the decision-making and outcome of a particular case. As I explained in my statement accompanying the proposed disqualification rules when originally published for public comment, each of the motions to disqualify made between 1999 and 2008 were brought against members of what was then the Court's philosophical majority.[19] Importantly, nearly all of the motions to disqualify brought during my tenure on this Court were the product of one law firm.

Each of the motions to disqualify made by this firm involved various allegations of claimed bias, principally stemming from political speech in Michigan Supreme Court judicial campaigns.[20] This firm has taken advantage of the review process that our traditional disqualification practice guaranteed parties, by

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[19] Proposals Regarding Procedure for Disqualification of Supreme Court Justices, 483 Mich 1205, 1236 (2009). Since this statement, three additional motions for disqualification have been filed with the Court: an additional motion by the law firm described above to disqualify Justices MARKMAN and CORRIGAN and myself, and two separate motions to disqualify Justice HATHAWAY.

[20] In addition to a motion to disqualify me in the pending case of *Pellegrino v Ampco Systems Parking* (Docket No. 137111), by counsel's own admission, he has filed motions for my recusal in the following cases: *Tate v City of Dearborn*, 477 Mich 1101 (2007); *Johnson v Henry Ford Hosp*, 477 Mich 1098 (2007); *Flemister v Traveling Med Services*, 729 NW2d 222 (2007); *Short v Antonini*, 729 NW2d 218 (2007); *Ansari v Gold*, 477 Mich 1076 (2007); *State Automobile Mut Ins Co v Fieger*, 477 Mich 1068 (2007); *Grievance Administrator v Fieger*, 476 Mich 231 (2006); *Lewis v St John Hosp*, 474 Mich 1089 (2006); *Heikkila v North Star Trucking, Inc*, 474 Mich 1080 (2006); *Stamplis v St John Health Sys*, 474 Mich 1017 (2006); *McDowell v Detroit*, 474 Mich 999 (2006); *Harter v Grand Aerie Fraternal Order of Eagles*, 693 NW2d 381 (2005); *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003); *Graves v Warner Bros*, 469 Mich 853 (2003).

appealing my previous denials of its motions to disqualify to the United States Supreme Court at least three times. Notably, that Court has denied certiorari on each occasion.[21] Moreover, this firm has unsuccessfully challenged in federal court the constitutionality of this Court's historic practice of handling motions for judicial recusal that the Court today is jettisoning.[22] While the United States Supreme Court has denied these meritless claims of bias directed at me, as its decision in the *Caperton* case demonstrates, when warranted, the United States Supreme Court is not uninterested in reviewing and reversing a state justice's decisions on disqualification.[23]

Finally, it is not beyond imagining that the new disqualification procedure will become fuel for the ever-intensifying fire of judicial election campaigns in Michigan. For example, if Candidate A is running a campaign against Justice B, it is entirely possible that Candidate A would make a campaign issue over the number of times that Justice B's colleagues voted that he could not be an impartial arbiter of a case. ***Although the new majority would no doubt deny it, the new rule it enacts today creates ample ammunition for future judicial electoral warfare.***

THE NEW RULE WAS ENACTED WITH UNSEEMLY HASTE AND IN VIOLATION OF THE NEW MAJORITY'S COMMITMENT TO "TRANSPARENCY"

I close with a final point about the new majority's methods in enacting the rule contained in today's order.

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[21] *Graves*, *supra*, cert den 542 US 920 (2004); *Gilbert v DaimlerChrysler Corp*, *supra*, cert den 546 US 821 (2005); *Grievance Administrator v Fieger*, *supra*, cert den 127 S Ct 1257 (2007).

[22] See *Fieger v Ferry*, 2007 WL 2827801 (ED Mich, 2007).

[23] See *Caperton v A T Massey Coal Co*, 556 US ___; 129 S Ct 2252; 173 L Ed 2d 1208 (2009).

So eager was the new majority to enact this unconstitutional rule that they did so with unseemly haste.[24] They not only ignored the obvious constitutional problems I and Justices CORRIGAN and MARKMAN had brought to their attention, they enacted the rule in violation of this Court's public administrative process. ***The order issued today does <u>not</u> contain the rule this Court voted on in its November 5, 2009, public administrative conference.***

The disqualification rule approved at our November 5, 2009, administrative conference included my amendment to subsection (D)(1). When the motion to approve Justice HATHAWAY's proposed version of the rule was moved, it was explicitly subject to a friendly amendment I offered (which amendment Justice HATHAWAY accepted) regarding the language of subsection (D)(1).

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[24] Furthermore, the arrogance that characterizes the majority's eagerness to enact new recusal rules *without even understanding their content* is utterly astounding. The following exchange occurred at our November 5, 2009, administrative conference, when I sought clarification regarding how the new "appearance of impropriety" standard would actually work:

> *Justice Hathaway*: If there is an appearance of impropriety, then you cannot sit on a case.
>
> *Justice Young*: And from what perspective is the appearance of impropriety standard? Is it a subjective standard? Is it an objective standard?
>
> *Justice Hathaway*: I haven't thought through all that to be honest with you, to answer you here.
>
> *Justice Young*: But we're going to vote on this today.
>
> *Justice Hathaway*: Then let's vote.

As this exchange indicates, the members of the new majority are less interested in understanding how the rule actually works than in pushing through immediate adoption of these unconstitutional and ill-advised rules, whatever the cost, in order to supplant a practice that has served this state well for 173 years.

My amendment provided that the actual language of subsection (D)(1) of the rule would be determined *at a later date after conferring with Justice* HATHAWAY. In proof of this, I offer the following exchange that occurred at our November 5, 2009, public administrative conference when we voted on her proposal:

> *Chief Justice Kelly*: Can we act on the motion at this point? Shall we start, Justice Hathaway?
>
> *Justice Hathaway*: Well, first I'm going to include Justice YOUNG's . . .
>
> *Justice Weaver*: Well, no, you can just let him bring it up next time. Just keep it as it is.
>
> *Justice Hathaway*: I move that this Court adopt my November 4, 2009 version of alternative C as Michigan Court Rule 2.003 regarding disqualifications of judges.
>
> *Justice Weaver*: Second.
>
> *Justice Hathaway*: And I support.
>
> *Justice Young*: ***With a friendly amendment we can work out.***
>
> *Justice Hathaway*: ***Right. Regarding (D)(1).***
>
> *Chief Justice Kelly*: I think we've discussed this issue. Would you like to vote? [Roll call vote omitted.] It passes by a 4 to 3 vote. We have a new recusal rule. ***We will take it up again at next month's meeting for further discussion at least of (D)(1).***[25]

Thus, this Court did not vote on a complete rule in our November 5, 2009, administrative conference.[26]

As this exchange shows, there remained a significant procedural issue to resolve before an order effectuating a new disqualification rule could enter and be given immediate effect: the actual language of subsection

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[25] Emphasis added.

[26] Once the language of the rule is finalized, however, it is to have immediate effect, as a subsequent majority vote determined.

(D)(1) must still be settled.[27] Chief Justice KELLY acknowledged this and stated on the record that the rule would be returned to our December administrative conference to resolve the language of subsection (D)(1). ***All of this was done in open Court, and members of the public are invited to verify whether I have accurately represented the proceedings and vote by accessing the video recording of the administrative conference from the State Bar of Michigan's "Virtual Court."***[28]

Therefore, I believe that issuing an order today before resolving the status of my amendment is improper and a contravention of the Court's commitment to conduct its administrative matters in public. ***The issuance of the order today enacting this new disqualification rule that was not approved in open Court belies any pretense that this Court is functioning "transparently."***

Given the stated desire of this rule's proponents for having this Court's business done "in an open, transparent, restrained, orderly, fair, and efficient manner,"[29] there is another important aspect of this new rule that violates the new majority's alleged interest in transpar-

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[27] Justice WEAVER wanted an order that was *retroactive* to the November 5, 2009 vote on the new rule. No other justice supported her position. A court speaks through its orders. *Johnson v White*, 430 Mich 47, 53 (1988). The vote to establish a new disqualification rule cannot be given immediate effect without an order. The order being entered today is being given immediate effect, as desired by the majority. Whatever the timing of the order's effective date, ***my point is that this order does not reflect the actual vote on November 5, 2009.***

[28] <http://www.michbar.org/courts/virtualcourt.cfm> (last accessed November 23, 2009).

[29] Justice WEAVER's dissenting statement to the minutes of November 13, 2008 conference, available at <http://www.justiceweaver.com/pdfs//eaw-dissent_satellite%20offices_12-2-08.pdf> (accessed November 19, 2009).

ency: ***The rule enacted today permits an elected justice of this Court to be removed from a case in secrecy.*** At our November 5, 2009, conference, Justice MARKMAN proposed and the new majority repudiated an amendment that would require all appeals of a justice's initial decision to deny a motion for disqualification to be heard in an open session of this Court. So much for the openness and transparency that the new majority has continuously trumpeted.

Finally, as its proponents admit, this order is but an opening salvo for additional radical changes to this Court, ***including the unconstitutional replacement of an elected justice with some other judge not elected to the Supreme Court.***[30] At our November 5, 2009, administrative conference, Chief Justice KELLY indicated her support for the new disqualification rule but also reiterated that it was only "the first step in the realization of a truly excellent rule." She considers it "essential" for this Court to have a rule that would allow the "replac[ement of] a disqualified justice with another judge for the purpose of hearing the case involved." As Justice CORRIGAN explained in great detail in her statement on the proposed disqualification rules,[31] unlike other states, the People of Michigan have not authorized this Court to appoint temporary justices. Rather, the Michigan Constitution provides that "[t]he supreme court *shall* consist of seven justices *elected at*

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[30] As I explained in my statement accompanying the three proposed rules, Proposals Regarding Procedure for Disqualification of Supreme Court Justices, 483 Mich 1205, 1236 n 2 (2009): "[T]wo of [my] colleagues have made the radical proposal that justices *can* be replaced by other judicial officers. See *Adair v State of Michigan*, 474 Mich 1027, 1045, 1051 (2006)."

[31] Proposals Regarding Procedure for Disqualification of Supreme Court Justices, 483 Mich 1205, 1229-1234 (2009) (statement by CORRIGAN, J.).

non-partisan elections as provided by law."[32] Thus, this order appears to be preparatory for additional unconstitutional changes to this Court that would further disenfranchise Michigan voters.

This is truly a sad day for this Court, the citizens of Michigan, and for the judicial elective system that our citizens as sovereign have mandated. For all of these reasons, I dissent.

CORRIGAN, J., concurred with YOUNG, J.

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[32] Const 1963, art 6, § 2.

APPENDIX A

MEMORANDUM

TO: The Justices
cc: Corbin Davis & Mike Schmedlen

FROM: Justice Robert P. Young, Jr.

RE: ADM 2009-04, Disqualification

DATE: November 19, 2009

Before issuing an order adopting the rule on disqualification, the members of this Court should seriously consider the following amendments to MCR 2.003. They are designed primarily to assure minimal due process and to clarify the procedures used when this Court reviews as an appellate body a Justice's decision to deny a motion for recusal. I will discuss in turn my reasons for proposing each of the amendments. I provide at the conclusion of this memo the entire rule as voted on November 5, 2009, containing all of my proposed amendments in redline.

PROPOSED DUE PROCESS AMENDMENTS

- As discussed at our last ADM conference, I believe that the timing requirement for filing disqualification motions in the Supreme Court requires more precision than the language contained in Justice Hathaway's proposal specified. (This is the subject matter of my "friendly amendment" offered before our vote on Justice Hathaway's proposal.) I have split the "Time for Filing" subsection into four parts (subsections (D)(1) through (D)(4)). There is proposed one subsection for procedures respectively in the trial court, the Court of Appeals, and this Court, and a fourth subsection concerning the effect of an untimely motion. Consistent

with my proposal at conference, I have specified that the appellant must file a motion for disqualification with the application if the appellant knows the basis for disqualification at that point and that the appellee must file a motion for disqualification within 28 days of the application if the appellee then knows the basis for disqualification. That way, we are aware of potential grounds for disqualification before acting on the application for leave to appeal. I would also retain the previous language concerning the effect of an untimely proposal and specify that a judge shall not consider a motion made after a case has already been decided. (I previously provided Justice Hathaway with language similar to this proposal, but she has not responded; this language is slightly revised from that that I supplied to her right after the last ADM conference.)

- I would clarify that, when the rule refers to an appeal on disqualification being decided by "the *entire* Court," this includes the challenged justice. This is already implied in the plain text of the current rule – "[t]he entire Court shall then decide the motion for disqualification de novo" – and so my revisions would merely clarify the rule as enacted. These clarifications are contained in subsection (D)(6)(b). If this proposal is repudiated, and a targeted justice is ineligible to hear *any* appeal on a motion for disqualification, there is the possibility, when multiple justices are targeted, that an appeal on disqualification will run afoul of the quorum requirement of MCL 600.211(3), requiring "a majority of justices...for hearing cases and transacting business."
- I continue strongly to support Justice Markman's demand for transparency in the disqualification process. A disqualification matter to be decided under the new

rule as an appeal to the entire Court is not one on the merits and thus is not subject to the same kind of confidentiality that attends our merit discussions of pending appeals. Accordingly, I would expressly require that any appeal to the entire Court on a motion for disqualification be heard and decided in an open session of this Court. This procedure is contained in subsection (D)(6)(b)(ii).

- The removal of a sitting Justice against his or her will is a serious matter trenching upon the right to execute the duties of office to which the Justice was elected as well as an infringement on the right of electors who placed the Justice in office. Heretofore, only an appeal to the Supreme Court of the United States could reverse a Justice's determination regarding a motion to disqualify. In interposing itself in this decision as an appellate body, this Court must afford the targeted Justice no fewer rights than he enjoyed in such an appeal to the Supreme Court of the United States on a denial of a motion to disqualify. I would clarify that a justice subject to a motion for disqualification is entitled to basic due process rights: that the appeal is limited to the grounds stated in the motion for recusal and that the justice be allowed to retain counsel in the matter and submit a brief in response to the motion for disqualification. The procedural requirements for filing such a brief are consistent with the filing of reply briefs in the Court of Appeals and this Court. These proposals are contained in subsections (D)(6)(b)(i) and (ii).
- If due process means anything -- particularly in the disqualification setting where this issue is pivotal – a targeted Justice is most assuredly entitled to an *impartial*

arbiter.[1] Where personal and political biases could affect the decision-making of members of this Court in the new disqualification appeal process, I cannot imagine that due process demands less than the right to challenge such potential biases of the decision-makers in this appellate procedure. Therefore, I would amend the rule to ensue that this cardinal due process right is preserved, such that a targeted justice facing an appellate review of his refusal to disqualify can challenge the potential biases of other members of this Court. The substance of this rule is consistent with Justice Markman's failed motion at the last ADM discussion. However, I have provided specific procedural requirements for a judge to challenge the decision-maker in such an appeal. This is contained in subsection (D)(6)(b)(iii).

- Due process also demands an adequate opportunity for a challenged justice to be heard.[2] Sometimes, this will entail an evidentiary hearing. I have therefore proposed a procedure for this Court taking evidence, contained in subsection (D)(6)(b)(ii).
- I continue to be concerned with the First Amendment implications of our new recusal rules. I propose amending subsection (C)(2)(b) to provide that "A judge is not disqualified based solely upon campaign speech protected by *Republican Party of Minn v White*, 536 US 765 (2002)." This is consistent with Justice Cavanagh's previous recommended revision. Moreover, to keep our court rules

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[1] "A hearing before an unbiased and impartial decisionmaker is a basic requirement of due process." *Crampton v Dep't of State*, 395 Mich 347, 351 (1975).

[2] "The fundamental requisite of due process of law is the opportunity to be heard." *Dow v State of Michigan*, 396 Mich 192, 205 (1976) (internal quotation omitted).

in accordance with the *White* decision, I have specified that campaign speech shall not be the basis for recusal under the "appearance of impropriety" standard in the former subsection (C)(1)(b)(ii), which I propose to be renumbered (C)(1)(c).

- I would clarify when *Caperton* requires a justice's disqualification by using further language consistent with the decision. This is contained in subsection (C)(1)(b).
- I would clarify the procedure by which a justice may challenge another justice's participation in a particular case. I propose amending subsection (B) expressly to allow a justice to raise another justice's participation in a case, and the procedure required to challenge another justice's participation is parallel with the procedure required of a party and is provided in subsection (D)(3). The obligation to challenge arises when a justice becomes aware of the basis for disqualification in a particular case.
- I would specify that a judge may not be subject to disqualification simply because the parties agree among themselves that the judge should be disqualified. I propose adding a new subsection (B)(2)(c) to address this situation.
- Finally, while I do not object to changing the term "remittal" to "waiver" in the new subsection (E), I believe the language in the current rule provides more protection for the parties and a more structured procedural mechanism than the provision as revised. In particular, the previous language specified that parties may not waive a judge's participation in the face of personal bias or prejudice and that the waiver must be made out of the presence of the judge. I cannot think of a single justification for asking parties to waive a judge's *actual* bias and believe that the draftsman of the revised provision inadvertently omitted this

language from the current rule in attempting to restate it. Therefore, I would retain the current language in the rule.

I have indicated in redline my proposed amendments to the rule. The baseline language in subsection (D)(1) is the language that Justice Hathaway initially proposed as the deadline for filing a motion for disqualification, but which was agreed to be reworked at our next ADM conference.

THE RULE VOTED ON WITH JUSTICE YOUNG'S PROPOSED AMENDMENTS

Rule 2.003 Disqualification of Judge

(A) Applicability. This rule applies to all judges, including justices of the Michigan Supreme Court, unless a specific provision is stated to apply only to judges of a certain court. The word "judge" includes a justice of the Michigan Supreme Court.

(B) Who May Raise. A party may raise the issue of a judge's disqualification by motion or the judge may raise it. Any justice on the Supreme Court may raise the issue of another justice's disqualification when grounds in a particular case become known.

(C) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:

(1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:

(a) The judge is biased or prejudiced for or against a party or attorney.

(b) The judge, based on objective and reasonable perceptions, has ~~either (i)~~ a serious risk of actual bias impacting the due process rights of a party when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election

campaign when the case was pending or imminent, as enunciated in *Caperton v Massey*, ___ US ___ (2009).

(c) The judge, based on objective and reasonable perceptions, ~~or (ii)~~ has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct. Recusal shall not be required under this section based on a judge's campaign speech.

(cd) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

(~~d~~e) The judge has been consulted or employed as an attorney in the matter in controversy.

(e~~f~~) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

(f~~g~~) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household, has more than a de minimis economic interest in the subject matter in controversy that could be substantially impacted by the proceeding.

(g~~h~~) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than a de minimis interest that could be substantially affected by the proceeding; or

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) Disqualification Not Warranted.

(a) A judge is not disqualified merely because the judge's former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge.

(b) A judge is not disqualified based solely upon campaign speech protected by *Republican Party of Minn v White*, 536 US 765 (2002). ~~so long as such speech does not demonstrate bias or prejudice or an appearance of bias or prejudice for or against a party or an attorney involved in the action~~.

~~(b)~~(c) A judge shall not be subject to disqualification based solely on the agreement of the parties.

(D) Procedure.

(1) *Time for Filing in the Trial Courts.* ~~For motions in the trial court, t~~To avoid delaying trial and inconveniencing witnesses, if a party is aware of a basis for a motion to disqualify a judge before filing its initial pleading, the party must file a motion to disqualify with the initial pleading. Otherwise, the party must file a motion to disqualify ~~be filed~~ within 14 days after the moving party discovers the ground for disqualification. If the discovery is made within 14 days of the trial date, the motion must be made forthwith. ~~All motions in the Court of Appeals must be filed within 28 days of the disclosure to the parties of the judge's assignment to the case or within 28 days of the discovery of the grounds for disqualification, whichever is later. All motions in the Supreme Court must be filed within 28 days of the order granting leave or oral argument on the application for leave, or within 28 days of the discovery of the grounds for disqualification, whichever is later. Untimely motions in the trial court, Court of Appeals or Supreme Court may be granted for good cause shown.~~

(2) *Time for Filing in the Court of Appeals.* If a party is aware of a basis for a motion to disqualify a Court of Appeals judge assigned to adjudicate the appellant's case, the party must file a motion to disqualify within 14 days after receiving notice of the judges assigned to the appellant's case. Otherwise, a party must file a motion to disqualify within 14 days after the party discovers or should have discovered the basis for disqualification. If a party discovers the basis for disqualification within 14 days before a scheduled oral argument or argument on the application for leave to appeal, the motion must be made forthwith.

(3) *Time for Filing in the Supreme Court.* If an appellant is aware of a basis for a motion to disqualify a justice before the application for leave is filed, the appellant must file a motion to disqualify with the application. Otherwise, the appellant must file a motion to disqualify within 28 days after the appellant discovers or should have discovered the basis for disqualification. If an appellee is aware of a basis for a motion to disqualify a justice, the appellee must file a motion to disqualify within 28 days after the application is filed. Otherwise, an appellee must file a motion to disqualify within 28 days after the

appellee discovers or should have discovered the basis for disqualification. If any party discovers the basis for disqualification within 28 days before a scheduled oral argument or argument on the application for leave to appeal, the motion must be made forthwith.

If a justice is aware of a basis of another justice's disqualification when an application for leave is filed, the justice must raise this question before the order to enter date. Otherwise, a justice must raise the issue of disqualification within 28 days after the justice discovers or should have discovered the basis for disqualification. If a justice discovers the basis for disqualification within 28 days before a scheduled oral argument or argument on the claim or application for leave to appeal, the issue must be raised forthwith.

~~(1)~~(4) *Effect of Untimely Motion.* If a motion is not timely filed in the trial court, the Court of Appeals, or the Supreme Court, untimeliness, including delay in waiving jury trial, is a factor in deciding whether the motion should be granted. No judge shall consider a motion filed after an order resolving the case has been entered.

(52) *All Grounds to be Included; Affidavit.* In any motion under this rule, the moving party must include all grounds for disqualification that are known at the time the motion is filed. An affidavit must accompany the motion.

(63) *Ruling.*

(a) For courts other than the Supreme Court, the challenged judge shall decide the motion. If the challenged judge denies the motion,

(i) in a court having two or more judges, on the request of a party, the challenged judge shall refer the motion to the chief judge, who shall decide the motion de novo;

(ii) in a single-judge court, or if the challenged judge is the chief judge, on the request of a party, the challenged judge shall refer the motion to the state court administrator for assignment to another judge, who shall decide the motion de novo.

(b) In the Supreme Court, if a justice's participation in a case is challenged by a written motion or if the issue of participation is raised by the justice himself or herself or another justice, the challenged justice shall decide the issue and publish his or her reasons about whether to participate. If the challenged justice denies the motion for disqualification, a party may move for the motion to be decided by the entire Court.

(i) The entire Court, including the justice who is the subject of the appeal and any other justice whose participation is challenged in the case, except a justice removed pursuant to subsection (iii), shall then decide the motion for disqualification de novo. In deciding the motion for disqualification, the Court shall be limited to the grounds raised in the motion itself. The Court's decision shall include the reasons for its grant or denial of the motion for disqualification. A justice may only be disqualified from a case upon the vote of a majority of all justices on the Court. The Court shall issue a written order containing a statement of reasons for its grant or denial of the motion for disqualification. Any concurring or dissenting statements shall be in writing, including that of the challenged justice.

(ii) Upon motion by the challenged justice, the Court shall conduct an evidentiary hearing, governed by the Michigan Court Rules and the Michigan Rules of Evidence, to determine any material facts necessary to the resolution of the motion for disqualification. Any appeal on the motion for disqualification decided by the entire Court, including any evidentiary hearing, must be made in an open session of the Court. The challenged justice may retain counsel and file a brief in response to the motion to appeal denial of disqualification. The responsive brief must be filed and served within 21 days after the party moving for disqualification appeals the justice's decision to deny the motion for disqualification.

~~(i)~~(iii) Any appeal on the motion for disqualification must be resolved by a neutral arbiter following the Michigan Court Rules and the Michigan Rules of Evidence. The justice may challenge the participation of any justice to hear an appeal on the motion for disqualification by indicating the basis for any such disqualification of any other justice sitting on the appeal. Such claim of disqualification of a justice is subject to the procedures contained in this rule and shall be resolved in accordance with the appropriate substantive rules for disqualification prior to any decision on the appeal of the original motion for disqualification.

(7) If Disqualification Motion Is Granted.

(a) For courts other than the Supreme Court, when a judge is disqualified, the action must be assigned to another judge of the

same court, or, if one is not available, the state court administrator shall assign another judge.

(b) In the Supreme Court, when a justice is disqualified, the underlying action will be decided by the remaining justices of the Court.

(E) Waiver of Disqualification. If it appears that there may be grounds for disqualification, the judge may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If, following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings. The agreement shall be in writing or placed on the record. ~~Parties to the proceeding may waive disqualification even where it appears that there may be grounds for disqualification of the judge. Such waiver may occur whether the grounds for disqualification were raised by a party or by the judge, so long as the judge is willing to participate. Any agreement to waive disqualification must be made by all parties to the litigation and shall be in writing or placed on the record.~~

MARKMAN, J. (*dissenting*). In place of a judicial disqualification rule that has worked satisfactorily for over 175 years to ensure an honorable Michigan Supreme Court and that remains employed by the United States Supreme Court and the majority of other state supreme courts, the new rule adopted by the majority, by establishing justices as the reviewing authority for the disqualification decisions of other justices and by adopting a vague "appearance of impropriety" standard applicable to all judges throughout the state: (a) will incentivize disqualification motions and thereby produce a considerable increase in the number of such motions and in the amount of time and effort devoted by this Court to addressing such motions; (b) will introduce an unprecedented degree of gamesmanship and politicization into the judicial process by enabling attorneys to influence which duly-elected justices will be allowed to participate in deciding their own cases and controversies; and (c) will seriously undermine the collegiality of this Court. In the end, the new rule is far more likely to reflect adversely upon the integrity of this Court than it is to enhance this Court's standards of conduct.

Although I opposed the adoption of the new rule, recognizing that there was majority support, I did move for the adoption of four amendments. Each of these was rejected by the same 4-3 vote. Most importantly, in my judgment, the majority refused to adopt the following amendment:

> All disqualification decisions other than the challenged justice's own initial decision shall be decided in public administrative session.

For this Court to disqualify an elected justice of this Court from participation in a case constitutes an action of extraordinary significance in a democratic system of judicial selection and should be undertaken in as open

and as transparent a manner as possible. Indeed, it is hard to imagine a more consequential decision of this Court than that of some justices disqualifying an elected and coequal colleague. In view of the emphasis on transparency that has motivated this Court to adopt open administrative hearings, I cannot think of an action that more compellingly requires an open decision-making process than that of determining which justices will, and which justices will not, be allowed to participate in a case. The people are entitled to know why a justice whom they have elected to serve on this Court has been deprived of this right, and they are entitled to the opportunity to assess the rationale and motives of those who have rendered this judgment.

The majority also rejected the following amendment:

> A justice shall raise the issue of another justice's disqualification within 14 days after the former discovers the alleged basis for disqualification, including where a justice discovers the alleged basis during a non-public conference of the Court.

This amendment would have made clear that a justice may raise the issue of another justice's disqualification and that such disqualification could be predicated upon inappropriate conduct or behavior reflected during closed conferences. Tellingly, the single justice on this Court who has repeatedly cast public aspersions upon colleagues on the basis that they have committed unspecified misconduct and misbehavior at closed conferences not only voted against this amendment, but also voted against the amendment requiring public deliberation on disqualification motions. Under this amendment, in the event a justice exhibits bias or prejudice for or against a party or an attorney, another justice would have 14 days from when they first became aware of this to move for that justice's disqualification. Absent an

opportunity for a justice to sua sponte challenge the participation of another justice, statements of genuine bias or prejudice made in the context of confidential case discussions cannot be addressed, and attorneys exclusively will control the flow of disqualification motions, in particular, the few attorneys who have demonstrated a disproportionate inclination to repeatedly offering disqualification motions. Moreover, MRPC 8.3(b) requires "[a] lawyer having knowledge that a judge has committed a significant violation of the Code of Judicial Conduct that raises a substantial question as to the judge's honesty, trustworthiness, or fitness for office [to] inform the Judicial Tenure Commission." Given that the justices of this Court are all lawyers, it seems clear that our rules of conduct *require* us to raise disqualification issues if we believe that a justice should be disqualifying himself and is not doing so.

The majority likewise rejected the following amendment:

> Participation in a disqualification decision is subject to the same disqualification procedures as are applicable to a justice's participation in a particular case.

This amendment was intended to ensure the integrity of the disqualifying justices with reference to the justice whose disqualification is being sought. For instance, if Justice A, the subject of a disqualification motion, believes Justice B is prejudiced against him, or is himself partial for or against lawyers or parties in a particular case, Justice A in fairness ought to be permitted to challenge the propriety of Justice B's participation in the disqualification decision. For instance, if Justice A may be disqualified from participation because he received a campaign contribution from a particular lawyer or party, it cannot be proper for Justice B, whose opponent received a contribution from

that same lawyer or party, or who himself received a contribution from the opposing lawyer or party, to participate in the disqualification decision. Individual justices, no less than lawyers and parties, are entitled to a fair hearing before their rights are adjudicated, and this cannot be obtained if there is a conflict of interest between himself and the decision maker. Can a justice who has campaigned against the challenged justice, or who has benefitted from political support from the party or attorney seeking the disqualification, or who has benefitted from political support from groups or organizations that might be advantaged by a justice's disqualification, decide any better than the challenged justice himself whether the latter can participate in a case?

Lastly, the majority rejected the following amendment:

> A decision by an individual justice to disqualify himself or herself from participation may be accompanied by a statement that provides the reasons for such decision, but this is not required.

This amendment would have maintained our existing practice of neither requiring nor prohibiting a statement by an individual justice deciding a motion. Making such statements mandatory is likely only to prove embarrassing to third persons who do not deserve to be embarrassed. Further, it is ironic that most of the justices in the majority have had no compunction in the context of even full-blown *opinions* of this Court in choosing not to offer even a whit of explanation for their positions.

As explained above, all four of my proposed amendments were rejected 4-3. So, now we have a rule that allows a majority of justices to decide behind closed doors which other justices can and cannot do what they

were duly elected to do—participate in deciding cases and controversies—and without any regard to whether the justices making this decision are themselves biased in some manner. However, not only did the majority adopt a rule that confers upon itself the authority to determine which justices may participate in deciding what the law of this state is, but by adopting a novel "appearance of impropriety" standard—which applies to the entire judiciary in this state, not merely to the justices of this Court—it has enlarged its own discretion for rendering such decisions. The majority can now disqualify a justice from participation in a case even though it does not believe that the challenged justice is *actually biased*, but merely by reciting that it believes there to be some "appearance of impropriety."

The threshold problem, of course, with the new "appearance of impropriety" standard is its utter vagueness. What is an "appearance of impropriety," and from whose standpoint is the "appearance of impropriety" to be gauged? As this Court once explained, an "appearance of impropriety" standard will subject justices "to vague, subjective, and increasingly politically directed, allegations of misconduct, against which no justice could effectively defend himself or herself." *Adair v Michigan,* 474 Mich 1027, 1039 (2006) (statement of TAYLOR, C.J., and MARKMAN, J.), 1051 (statement of CORRIGAN, J.), 1053 (statement of YOUNG, J.). Further, an "appearance of impropriety" standard is likely to vitiate all other existing grounds for disqualification and create an ethical snare for judges. For example, under the new rule, MCR 2.003(C)(1)(e) requires a judge to disqualify himself where he had been a member of a law firm representing a party within the preceding two years, but MCR 2.003(C)(1)(b)(ii) requires a judge to disqualify himself if his participation would create an "appearance of impropriety." What if

the judge has not been a member of the law firm that is representing a party for two years and one month? The judge would be able to participate under MCR 2.003(C)(1)(e), but would he be able to participate under MCR 2.003(C)(1)(b)(ii)? That is, if a judge would be required to disqualify himself if he has been a member of that law firm within the preceding two years, presumably because the chance of bias would be too substantial to allow his participation, could it truly be said that there was no longer any "appearance of impropriety" where that judge has not been a member of that law firm for two years and one month? Is that one month sufficient to alleviate any "appearance of impropriety"? Who knows? In the case of this Court, this decision will be left to the discretion of other justices who have been no less involved in the political process than the justice whose disqualification has been sought. In other words, there will no longer be any rules, or "safe harbor," on the basis of which a judge can act. Instead, everything will be dependent upon ad hoc standards applied on a case-by-case basis by justices whose own biases and prejudices will apparently never be subject to challenge.

Furthermore, how does the "appearance of impropriety" standard operate in connection with statutes that specifically permit certain actions? For instance, MCL 169.252 and 169.269 specifically allow individual and political committee contributions to Michigan judicial candidates up to certain limits. "Such limits must be understood as clearly reflecting the Legislature's, and the people's, understanding that contributions in these amounts will not supply a basis for disqualification." *Adair*, 474 Mich at 1042 (statement of TAYLOR, C.J., and MARKMAN, J.), 1051 (statement of CORRIGAN, J.), 1053 (statement of YOUNG, J.). "If justices . . . were to recuse themselves on the basis of [legal] campaign contribu-

tions to their or their opponents' campaigns, there would be potential recusal motions in virtually every appeal heard by this Court, there would an increasing number of recusal motions designed to effect essentially political ends, and there would be a deepening paralysis on the part of the Court in carrying out its essential responsibilities." *Id*. For these reasons, I believe that where a justice has abided by all applicable statutes and specific court rule provisions that address the asserted basis for disqualification, disqualification is not required. That is, I would "decline to allow general allegations of impropriety that might overlap with specifically authorized or prohibited behavior and conduct to supersede [statutes and court rules] that specifically apply to the conduct in question." *In re Haley,* 476 Mich 180, 195 (2005). "Otherwise, such specific rules and [statutes] would be of little consequence if they could always be countermanded by the vagaries of an 'appearance of impropriety' standard." *Adair,* 474 Mich at 1039 (statement of TAYLOR, C.J., and MARKMAN, J.), 1051 (statement of CORRIGAN, J.), 1053 (statement of YOUNG, J.). However, such details did not appear to interest the majority during the court's recent deliberations, and the relationship between the court rules and the new "appearance of impropriety" standard will undoubtedly be resolved on a case-by-case basis at the majority's standardless discretion.

I am also uncertain as to whether, where a justice has been prohibited from participation in a case on the basis that he is biased against an attorney, that justice will *always* be prohibited from participation in a case in which that attorney is involved. In other words, once a majority of this Court has determined that a justice is biased against an attorney, will parties then be permitted to effectively choose which justices can participate

in their cases by simply choosing that attorney to represent them? This would take forum shopping to an altogether new length.

An additional concern I have with the new rule pertains to the manner by which a justice is to responsibly review his colleagues' disqualification decisions. That is, what is the basis upon which a justice is to know whether another justice is or is not biased for or against a party or an attorney, or whether his disqualification is required on other grounds? For example, if another justice is accused of having a "more than de minimis economic interest in the subject matter in controversy that could be substantially impacted by the proceeding," MCR 2.003(C)(1)(f), without knowing that justice's financial situation, how am I to render an intelligent and responsible decision? What may be a "de minimis economic interest" to one justice might be a substantial economic interest to another justice depending on the particular justice's financial situation. Are justices going to be required to disclose all information that may be pertinent to this decision? Am I then entitled to know the entirety of their, and their spouses', financial circumstances? Am I entitled to question such justice as to aspects of his financial circumstances? Am I entitled to review what I might consider to be relevant financial records or documents? Are fact-finding hearings to be required? If so, will these be done in public or behind closed doors like the disqualification decisions themselves? The majority was uninterested in discussing these and related questions when they were raised during debate.

For all these reasons, and especially for those set forth in the first paragraph of this statement, I strongly dissent from the adoption of the new disqualification rule. The majority will doubtlessly enjoy plaudits from

those who fail to look beneath the surface of the majority's claims of "reform." However, as time goes by, it will become increasingly clear that the majority has replaced a time-tested disqualification procedure with one that will lead inevitably to politicization, gamesmanship, and acrimony.[1]

Entered December 3, 2009, effective immediately (File No. 2009-04)—REPORTER.

On order of the Court, the order of November 25, 2009,[*] is amended to correct a clerical error. In subrule (C), the sentence following the word "Grounds." is deleted.

The subrule, through subsection (1), is thus amended to read:

"(C) Grounds.

(1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:"

[(a)-(g) unchanged.]

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[1] In once again revealing a confidential communication of this Court, Justice WEAVER also once again fails to supply fair and necessary context. In suggesting in note 10 of her dissent that I agree with her that the Court "adopted" the new disqualification rule, she cites my statement that the majority "intended" the rule to become "effective immediately." I continue to believe this was the majority's intention. However, Justice WEAVER fails to note my related observation at conference that courts "speak through their orders," not through their subjective intentions. Every other justice, except for Justice WEAVER, agreed with this proposition and concluded that the new rule had not yet been "adopted," but would only become so upon the issuance of an order. To subject ourselves to the new rule, Justice HATHAWAY and I have chosen to wait until such order has been issued before deciding pending disqualification motions.

[*] 485 Mich cxxx—REPORTER.

Filed December 4, 2009, effective immediately (File No. 2009-04)—REPORTER.

WEAVER, J. (*concurring*).

I write this additional concurring statement to the order amending MCR 2.003—Disqualification of Judge—entered on November 25, 2009,[*] to both respond to and correct the mistaken, confused and inaccurate statements of the dissenting justices, Justices CORRIGAN, YOUNG, and MARKMAN.[1]

While the dissenting justices are entitled to their opinions regarding the constitutionality of the newly amended MCR 2.003—Disqualification of Judge, they are mistaken, and their over 46 pages of dramatic, confused, and fearful forecasts of failure, negative consequences, and unconstitutionality still do not make their assertions true. Furthermore, certain statements made by Justices CORRIGAN and YOUNG are so inaccurate and misleading that this additional statement is necessary to correct those inaccurate statements.

First, the newly amended disqualification rule is constitutional and provides for due process. It is a fair disqualification process, ensuring that the parties before the Court have justices deciding their cases that are not actually biased or do not objectively appear to be biased. The new rule does so in a transparent and fair process, requiring a justice challenged by a party to submit his or her decision and reasons regarding recusal in writing and requiring the remaining justices, as

[*] 485 Michigan cxxx—REPORTER.

[1] As noted in my original concurring statement to this order, no other justices had circulated statements at the time my original concurring statement was circulated on November 24, 2009 and I said that if I had any response for any statements filed after mine, I would submit my response after Thanksgiving and do so now, today, Friday December 4, 2009.

requested by a party, to review the challenged justice's decision and to publish the remaining justices' decisions and reasons in writing.

This process of requiring published written decisions and written reasons is fair to the parties and is fair to the challenged justice, and it provides for due process under both the Michigan and United States Constitutions. It also provides the public with more knowledge of how the justices conduct the people's judicial business.

This process is not secret because it is done in writing, with reasons, and it is published promptly for the public to see. The fearful proclamations, nonsensical claims, and objections of unconstitutionality seem apparently founded in fear for the reputations of the justices rather than concern for the parties and public having their cases decided by justices who are not biased or do not have a reasonably objective appearance of bias against a party. Indeed, the plan adopted upholds justice.

It is not unique to have judges or justices reviewing other judges' or justices' disqualification decisions. As United States District Judge Avern Cohn pointed out recently in the *Detroit News*:

> That other members of a high court may review a refusal of a fellow judge to step aside if challenged is not a unique requirement. For example, Mississippi has such a procedure. Oregon has a procedure that allows for the chief justice to decide a motion for disqualification or refer it to the full court. In Texas, a motion for recusal may be heard by the entire court. In addition, the American Bar Association Standing Committee on Judicial Independence recommends that when a Supreme Court justice denies a motion to disqualify, the decision should be reviewed by the rest of the court.[2]

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[2] The Detroit News, *Disqualification plan upholds justice*, November 30, 2009, available at: http://detnews.comarticle/20091130/OPINION01/11300316/Disqualification-plan-upholds-justice (last accessed December 4, 2009).

Further, Justice YOUNG's statement contains inaccuracies and half-truths in an apparent attempt to cause confusion surrounding this Court's vote to adopt the amendment of MCR 2.003—Disqualification of Judge. In his erroneous statement, he asserts:

> ***The order issued today does not contain the rule this Court voted on in its November 5, 2009, public administrative conference***.
>
> The disqualification rule approved at our November 5, 2009, administrative conference included my amendment to subsection (D)(1). When the motion to approve Justice HATHAWAY's proposed version of the rule was moved, it was explicitly subject to a friendly amendment I offered (which amendment Justice HATHAWAY accepted) regarding the language of subsection (D)(1). My amendment provided that the actual language of subsection (D)(1) of the rule would be determined *at a later date after conferring with Justice* HATHAWAY.

Justice YOUNG did not offer a proposed amendment to the Court at the November 5 public administrative conference. Instead, he requested further work on an amendment to subsection (D)(1) with Justice HATHAWAY, and Justice HATHAWAY agreed to work with Justice YOUNG on that subsection.

As noted in the transcript, when Justice HATHAWAY moved for the Court to adopt her proposed amendment to MCR 2.003, Justice YOUNG interrupted and offered the following to Justice HATHAWAY: "With a friendly amendment we can work out."

Justice HATHAWAY replied, "Right. Regarding (D)(1)."

Thus, in my November 25 concurring statement I provided the following accurate account of the vote taken at the November 5 public administrative conference:

At our regularly scheduled public administrative conference, Justice HATHAWAY moved for the adoption of amendments to that court rule. The motion was seconded by Chief Justice KELLY and Justice WEAVER, and the motion was adopted by a vote of 4-to-3,[3] with the understanding that Justice YOUNG and Justice HATHAWAY would possibly offer an amendment to MCR 2.003(D)(1) (time for filing) that might be proposed at the next, or a future, public administrative conference for discussion and vote. The only portion of Justice HATHAWAY's proposed revision that was not adopted on November 5, 2009 was her proposed amendment to Subsection (C)(1) (time for filing), which remains and is re-designated now as MCR 2.003(D)(1).

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[3] Voting for adoption of the motion were Chief Justice KELLY and Justices CAVANAGH, WEAVER, and HATHAWAY. Voting against the motion were Justices CORRIGAN, YOUNG, and MARKMAN.

Further, Justice YOUNG mistakenly asserts that "this Court did not vote on a complete rule in our November 5, 2009 administrative conference." Justice YOUNG's assertion is not true. On November 5, all of Justice HATHAWAY's amendments to MCR 2.003—Disqualification of Judge—were voted upon and approved 4-3. However, no proposed amendment to (D)(1) was adopted because Justice Hathaway agreed to work further on a future amendment to (D)(1) with Justice YOUNG, instead of including her proposed amendment to (D)(1) with the rest of the amendments that were adopted. **Thus, the original "Time for Filing" Subsection (C)(1), renamed "(D)(1)," was left in place.** As such, Justice YOUNG's assertion that this Court did not vote on a complete rule is erroneous.

As evidenced by the entire relevant portion of the conference transcript (including portions left out by Justice YOUNG in his dissenting statement), this Court *did* adopt and vote to give "immediate effect" to the

amended rule on November 5. Justice YOUNG's "offer" to continue working on Subsection (D)(1) establishes that this subsection was unchanged because Justice YOUNG did not at that time have any alternative proposed language as an amendment to Subsection (D)(1). Further, as Justice YOUNG stated in his dissenting statement, his "amendment provided that the actual language of subsection (D)(1) of the rule would be determined *at a later date after conferring with Justice* HATHAWAY."

In order to accurately show what transpired at the November 5 public administrative conference, the entire relevant portion of the transcript, including portions left out by Justice YOUNG, is attached.

As the attached transcript reveals, on November 5, 2009, by a 4-3 vote, a majority of this Court adopted and gave "immediate effect" to the amendment of MCR 2.003—Disqualification of Judge.

Justice YOUNG also inaccurately states that "The rule enacted today permits an elected justice of this Court to be removed from a case in secrecy." (Emphasis removed from Justice YOUNG's statement). First, Justice YOUNG's use of the word "removed" is mistaken. The use of the word "removed" confuses the disqualification of a challenged justice from sitting on a specific case or cases with the removal of a justice from office, which is permanent. The "removal"—disqualification—of a justice from sitting on a case is a procedure used to ensure that parties are afforded due process, and it is not the same as the permanent removal of a justice from office.

Additionally, there is nothing secret about the new disqualification process. The new disqualification process is a transparent process because it requires the Court—the remaining justices—if requested by a party,

to review a challenged justice's decision and to publish the remaining justices' decision and reasons in writing. Again, this process, of *requiring published written decisions and written reasons*, is fair to the parties and to the challenged justice, and it reveals to the public the manner in which the justices conduct the people's judicial business.

In response to Justice CORRIGAN's misleading inference that a majority of this Court released this order the day before Thanksgiving in an effort to keep the order "under the radar," I have included with this statement the memos and attachments that I circulated to this Court on November 16 and November 17 after this Court gave "immediate effect" to the amended MCR 2.003—Disqualification of Judge—on November 5. These memos affirmatively establish that I repeatedly urged this Court to follow through on entering the order amending MCR 2.003—Disqualification of Judge—on the day that it was adopted and given "immediate effect," November 5, or as soon as possible. In addition to these memos, at an administrative conference on November 19, I moved for this Court to enter the order amending MCR 2.003—Disqualification of Judge—immediately. There was no second to my motion. Despite my urgings, a majority of this Court, including Justice CORRIGAN and the other dissenting justices, chose to delay issuing the order for 20 days until November 25, so that all justices could attach their concurrences or dissents to the order.

Despite this Court's unnecessary delay in issuing the order, I continue to concur with the order amending MCR 2.003—Disqualification of Judge—because the newly amended rule is a positive, historical step forward toward achieving more transparency and fairness in the Michigan Supreme Court.[3]

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[3] This statement and the order amending MCR 2.003—Disqualification of Judge—will be published on my personally funded website: justiceweaver.com.

Partial Transcript of November 5, 2009
Michigan Supreme Court
Public Administrative Hearing

CHIEF JUSTICE KELLY:	Can we act on the motion at this point? Um…shall we start Justice Hathaway.
JUSTICE HATHAWAY:	Well, first I'm going to include Justice Young's….
JUSTICE WEAVER:	Well no you just let him bring it up next…next time. Just keep it as is.
JUSTICE HATHAWAY:	I move that this court adopt my…
JUSTICE YOUNG:	It's a friendly…
JUSTICE HATHAWAY:	…November 4th, 2009 version of Alternative C as Michigan Court Rule 2.003, regarding disqualifications of judges.
CHIEF JUSTICE KELLY:	Okay…support…
JUSTICE WEAVER:	Support.
JUSTICE HATHAWAY:	And I support…
JUSTICE YOUNG:	With a friendly Amendment we can workout…
JUSTICE HATHAWAY:	Right. Regarding D-1
JUSTICE YOUNG:	Okay.
CHIEF JUSTICE KELLY:	And I think we've discussed this. Would you like to vote?
JUSTICE HATHAWAY:	I support.
JUSTICE YOUNG:	Call the question.
CHIEF JUSTICE KELLY:	Okay, Justice Markman.
JUSTICE MARKMAN:	I'd like to do a roll call vote Justice.
CHIEF JUSTICE KELLY:	That's what…
JUSTICE WEAVER:	That's what we're doing…
JUSTICE MARKMAN:	In an or…orderly sequence.
CHIEF JUSTICE KELLY:	I'm starting with the junior Justice.
JUSTICE MARKMAN:	Okay.

Partial Transcript of November 5, 2009
Michigan Supreme Court
Public Administrative Hearing

CHIEF JUSTICE KELLY:	And she voted in favor…
JUSTICE HATHAWAY:	Support.
JUSTICE YOUNG:	Yes.
JUSTICE MARKMAN:	I vote against.
CHIEF JUSTICE KELLY:	Okay, Justice Young.
JUSTICE YOUNG:	No.
CHIEF JUSTICE KELLY:	Justice Corrigan.
JUSTICE CORRIGAN:	No.
CHIEF JUSTICE KELLY:	Justice...
JUSTICE WEAVER:	Yes.
CHIEF JUSTICE KELLY:	Weaver…yes. Justice Hath…Cor…Cavanagh.
JUSTICE CAVANAGH:	Uh…yes.
CHIEF JUSTICE KELLY:	And I vote yes. So it passes by 4-3 vote. Uh…we have a new recusal rule. Uh…we will take it up again…uh…at next months meeting for further discussion at least of…uh…D-1.
JUSTICE WEAVER:	Okay.
JUSTICE YOUNG:	What was the number again?
JUSTICE WEAVER:	D-1
JUSTICE CAVANAGH:	Do we need to have an effective date? Can it be immediately effective, because we have a couple motions.
JUSTICE WEAVER:	Yeah.
JUSTICE YOUNG:	Yeah we do.
JUSTICE WEAVER:	I move that it be immediately effective.
JUSTICE CAVANAGH:	And then it can be amended.
JUSTICE HATHAWAY:	D-1 would not really be a problem…right, as effective because we already have the motions?

Partial Transcript of November 5, 2009
Michigan Supreme Court
Public Administrative Hearing

JUSTICE YOUNG:	Which is part of the reason why I made the proposed change. Well somebody's made a motion for immediate effect.
CHIEF JUSTICE KELLY:	Is the motion for immediate effect…
JUSTICE CAVANAGH:	Yeah.
JUSTICE WEAVER:	Second.
CHIEF JUSTICE KELLY	…supported by Justice Weaver. All in favor say "I."
JUSTICE CAVANAGH:	I.
CHIEF JUSTICE KELLY:	I.
JUSTICE WEAVER:	I.
JUSTICE HATHAWAY:	I.
JUSTICE CORRIGAN:	I oppose.
JUSTICE YOUNG:	No.
CHIEF JUSTICE KELLY:	Opposed?
JUSTICE MARKMAN:	I oppose too.
CHIEF JUSTICE KELLY:	Okay. Again it's a 4-3 vote. We'll move onto our agenda now to number four...

MEMORANDUM

TO: The Justices, Corbin Davis, Mike Schmedlen & Anne Boomer

FROM: Justice Elizabeth A. Weaver

RE: ADM 2009-04, Disqualification—Continuing Delay of Issuance of Order Amending Disqualification Rules Adopted With Immediate Effect on November 5, 2009

DATE: November 16, 2009

Concerning the continuing improper delay in issuing the order amending with immediate effect MCR 2.003 adopted with immediate effect on November 5, 2009 written disqualification rules for all judges, including Supreme Court Justices, my view and vote is as follows:

1. The order amending Michigan Court Rule (MCR) 2.003—Disqualification of Judge—attached to the November 13, 2009 memo from Administrative Counsel Anne Boomer, forwarded to the Justices by Sally LaCross, should be issued immediately today, November 16, 2009 because it was adopted 4-to-3 on November 5, 2009 on motion by Justice Hathaway and given immediate effect through a 4-to-3 vote on motion by Justice Cavanagh. (See the DVD of November 5, 2009 Administrative Conference.)

2. No proposed amendment concerning section (D)(1)(Time for Filing) worked on and agreed upon by Justices Young and Hathaway, if any yet exists, should be included in the above-referenced order circulated November 13, as we did not adopt on November 5, 2009 any proposed amendment to (D)(1)(Time for Filing) because there was no proposed amendment to adopt. If and when Justices Young and Hathaway do have such a proposed amendment, it must be put on a public administrative conference for discussion and vote.

3. Because we adopted and gave immediate effect to the amendment of MCR 2.003—disqualification rules—the order should have been promptly issued on November 5, 2009. We are already 11 days late in providing the public access to the language of the adopted disqualification rules. The press and media have correctly reported the adoption of disqualification rules and many individuals, as well as the press and the media, have inquired where the disqualification order can be found on our website or obtained from our Court. On Thursday, November 12, 2009, it was incredible to learn that the order was not yet issued to the public.

4. Because we gave the disqualification rules immediate effect on November 5, the order should have been issued on that date with notation that any statements would follow. This procedure is the procedure that the Court used when the "Gag Order," Administrative Order 2006-08, was issued with immediate effect and indication that statements would follow. (For your convenience, a copy of Administrative Order 2006-08 is attached.) The issuance of the important order amending MCR 2.003—disqualification rules— with immediate effect should not be delayed any longer. It must be issued today, Monday, November 16, 2009 with notation that statements will follow. The public should not have to wait any longer to get a copy of the order amending MCR 2.003—Disqualification of Judge—adopted with immediate effect on November 5, 2009.

Order

December 6, 2006

ADMINISTRATIVE ORDER No. 2006-8

DELIBERATIVE PRIVILEGE AND CASE DISCUSSIONS IN THE SUPREME COURT

The following administrative order, supplemental to the provisions of Administrative Order No. 1997-10, is effective immediately.

All correspondence, memoranda and discussions regarding cases or controversies are confidential. This obligation to honor confidentiality does not expire when a case is decided. The only exception to this obligation is that a Justice may disclose any unethical, improper or criminal conduct to the JTC or proper authority.

Cavanagh, Weaver and Kelly, JJ., dissent.

Dissenting statements by Weaver and Kelly, JJ., to follow.

I, Corbin R. Davis, 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.

December 6, 2006

Corbin R. Davis
Clerk

MEMORANDUM

TO: The Justices, Corbin Davis, Mike Schmedlen & Anne Boomer

FROM: Justice Elizabeth A. Weaver

RE: ADM 2009-04, Disqualification—Response to Justice Young's November 16, 2009 memo/Continuing Delay of Issuance of Order Amending Disqualification Rules Adopted with Immediate Effect on November 5, 2009

DATE: November 17, 2009

Justice Young's 4:59 pm November 16, 2009 memo did not supply all of the relevant portion of the DVD recording of the November 5, 2009 public administrative hearing. His memo is incomplete and misleading because it fails to include the transcription of Justice Cavanagh's and my motion for immediate effect. Attached to this memo is the rest of the conversation omitted by Justice Young. Also attached is my memo of yesterday for your convenience.

On November 5, this Court did adopt by a 4-to-3 vote Justice Hathaway's proposed amendment to MCR 2.003—Disqualification of Judge—except for her amendment to Subsection (D)(1) (Time for Filing), which remained unchanged from the existing Subsection, MCR 2.003 (D)(1), for possible future amendment. Immediate effect was voted for what this Court adopted—all of Justice Hathaway's proposal except Subsection (D)(1) (Time for Filing)—with the understanding that Justice Young and Justice Hathaway would possibly come to agreement on a proposed friendly amendment, to what was adopted November 5 and given immediate effect, that would be brought back at the next, or a future, public administrative conference for discussion and vote.

It has now been 12 days since the Court adopted and gave immediate effect to the amendment of MCR 2.003. The order in this matter should issue today, November 17, 2009, because the continuing delay deprives the public of what this Court has adopted and given immediate effect. The public has a right to know now the rule amendment to MCR 2.003 that this Court put into immediate effect. This Court should not delay any amount of time whether it is 7 days or any other number of days. All statements to the approved and immediately effective order, including dissents and responses to those dissents, should be released at the same time. The order should include a notation: "Any and all statements to follow," as done when the Court gave immediate effect to the "Gag Order," Administrative Order 2006-08, as referenced in my November 16, 2009 memo.

For everyone's convenience, copied below is the order circulated from Administrative Counsel Anne Boomer and forwarded to the justices by Sally LaCross on November 13, 2009, with language added stating "Any and all statements to follow."

ADM File No. 2009-04

Amendment of Rule 2.003
of the Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rule 2.003 of the Michigan Court Rules are adopted, effective immediately. Any and all statements to follow.

[Additions are indicated by underline, and deletions by strikethrough.]

Rule 2.003 Disqualification of Judge

(A) Applicability. This rule applies to all judges, including justices of the Michigan Supreme Court, unless a specific provision is stated to apply only to judges of a certain court. The word "judge" includes a justice of the Michigan Supreme Court.

(B~~A~~) Who May Raise. A party may raise the issue of a judge's disqualification by motion~~,~~ or the judge may raise it.

(C~~B~~) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:

(1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:

(a~~1~~) The judge is ~~personally~~ biased or prejudiced for or against a party or attorney.

(b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, ___ US ___; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

(c~~2~~) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

(d~~3~~) The judge has been consulted or employed as an attorney in the matter in controversy.

(e~~4~~) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

(f~~5~~) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household, has ~~an~~ more than a de minimis economic interest in the subject matter in controversy that could be substantially impacted by the proceeding, ~~or in a party to the proceeding or has any other more than de~~

~~minimis interest that could be substantially affected by the proceeding.~~

(~~g~~6) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i~~a~~) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii~~b~~) is acting as a lawyer in the proceeding;

(iii~~e~~) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding; or

(iv~~d~~) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) Disqualification not warranted.

(a) A judge is not disqualified merely because the judge's former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge.

(b) A judge is not disqualified based solely upon campaign speech protected by *Republican Party of Minn v White*, 536 US 765 (2002), so long as such speech does not demonstrate bias or prejudice or an appearance of bias or prejudice for or against a party or an attorney involved in the action.

(D~~C~~) Procedure.

(1) *Time for Filing*. To avoid delaying trial and inconveniencing the witnesses, a motion to disqualify must be filed within 14 days after the moving party discovers the ground for disqualification. If the discovery is made within 14 days of the trial date, the motion must be made forthwith. If a motion is not timely filed, untimeliness, including delay in waiving jury trial, is a factor in deciding whether the motion should be granted.

(2) *All Grounds to Be Included; Affidavit.* In any motion under this rule, the moving party must include all grounds for disqualification that are known at the time the motion is filed. An affidavit must accompany the motion.

(3) *Ruling.*

(a) For courts other than the Supreme Court, ~~T~~the challenged judge shall decide the motion. If the challenged judge denies the motion,

(i~~a~~) in a court having two or more judges, on the request of a party, the challenged judge shall refer the motion to the chief judge, who shall decide the motion de novo;

(ii~~b~~) in a single-judge court, or if the challenged judge is the chief judge, on the request of a party, the challenged judge shall refer the motion to the state court administrator for assignment to another judge, who shall decide the motion de novo.

(b) In the Supreme Court, if a justice's participation in a case is challenged by a written motion or if the issue of participation is raised by the justice himself or herself, the challenged justice shall decide the issue and publish his or her reasons about whether to participate.

If the challenged justice denies the motion for disqualification, a party may move for the motion to be decided by the entire Court. The entire Court shall then decide the motion for disqualification de novo. The Court's decision shall include the reasons for its grant or denial of the motion for disqualification. The Court shall issue a written order containing a statement of reasons for its grant or denial of the motion for disqualification. Any concurring or dissenting statements shall be in writing.

(4) ~~Motion Granted~~ *If Disqualification Motion is Granted.*

(a) For courts other than the Supreme Court, w~~W~~hen a judge is disqualified, the action must be assigned to another judge of the same court, or, if one is not available, the state court administrator shall assign another judge.

(b) In the Supreme Court, when a justice is disqualified, the underlying action will be decided by the remaining justices of the Court.

(E~~D~~) ~~Remittal~~ Waiver of Disqualification. ~~If it appears that there may be grounds for disqualification, the judge may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If, following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings. The agreement shall be in writing or placed on the record.~~ Parties to the proceeding may waive disqualification even where it appears that there may be grounds for disqualification of the judge. Such waiver may occur whether the grounds for disqualification were raised by a party or by the judge, so long as the judge is willing to participate. Any agreement to waive disqualification must be made by all parties to the litigation and shall be in writing or placed on the record.

Administrative Hearing November 5, 2009
Partial Transcription of Discussion Regarding ADM # 2009-04

CHIEF JUSTICE KELLY: And I vote yes. So it passes by 4-3 vote. Uh…we have a new recusal rule. Uh…we will take it up again…uh…at next months meeting for further discussion at least of…uh…D-1.

JUSTICE WEAVER: Okay.

JUSTICE YOUNG: What was the number again?

JUSTICE WEAVER: D-1

JUSTICE CAVANAGH: Do we need to have an effective date? Can it be immediately effective, because we have a couple motions.

JUSTICE WEAVER: Yeah.

JUSTICE YOUNG: Yeah we do.

JUSTICE WEAVER: I move that it be immediately effective.

JUSTICE CAVANAGH: And then it can be amended.

JUSTICE HATHAWAY: D-1 would not really be a problem…right, as effective because we already have the motions?

JUSTICE YOUNG: Which is part of the reason why I made the proposed change. Well somebody's made a motion for immediate effect.

CHIEF JUSTICE KELLY: Is the motion for immediate effect…

JUSTICE CAVANAGH: Yeah.

JUSTICE WEAVER: Second.

CHIEF JUSTICE KELLY …supported by Justice Weaver. All in favor say "I."

JUSTICE CAVANAGH: I.

CHIEF JUSTICE KELLY: I.

JUSTICE WEAVER: I.

JUSTICE HATHAWAY: I.

JUSTICE CORRIGAN: I oppose.

JUSTICE YOUNG: No.

CHIEF JUSTICE KELLY: Opposed?

JUSTICE MARKMAN: I oppose too.

CHIEF JUSTICE KELLY: Okay. Again it's a 4-3 vote. We'll move onto our agenda now to number four...

Adopted February 2, 2010, effective May 1, 2010 (File No. 2008-43)—REPORTER.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 3.002. INDIAN CHILDREN.

For purposes of applying the Indian Child Welfare Act, 25 USC 1901 *et seq.*, to proceedings under the Juvenile Code, the Adoption Code, and the Estates and Protected Individuals Code, the following definitions taken from 25 USC 1903 and 25 USC 1911(a) shall apply.

(1) "Child custody proceeding" shall mean and include

(a) "foster-care placement," which shall mean any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated,

(b) "termination of parental rights," which shall mean any action resulting in the termination of the parent-child relationship,

(c) "preadoptive placement," which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but before or in lieu of adoptive placement, and

(d) "adoptive placement," which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act that, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "Exclusive jurisdiction" shall mean that an Indian tribe has jurisdiction exclusive as to any state over any child custody proceeding as defined above involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the state by existing federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child. 25 USC 1911[a].

(3) "Extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of 18 years and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

(4) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 43 USC 1606.

(5) "Indian child" means any unmarried person who is under age 18 and is either

(a) member of an Indian tribe, or

(b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

(6) "Indian child's tribe" means

(a) the Indian tribe of which an Indian child is a member or eligible for membership, or

(b) in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts.

(7) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under state law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child.

(8) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians.

(9) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 43 USC 1602(c).

(10) "Parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include an unwed father whose paternity has not been acknowledged or established.

(11) "Reservation" means Indian country as defined in section 18 USC 1151 and any lands not covered under such section, for which title is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation.

(12) "Secretary" means the Secretary of the Interior.

(13) "Tribal court" means a court with jurisdiction over child custody proceedings and that is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe that is vested with authority over child custody proceedings.

RULE 3.800. APPLICABLE RULES; INTERESTED PARTIES; INDIAN CHILD.

(A) [Unchanged.]

(B) Interested Parties.

(1) The persons interested in various adoption proceedings, including proceedings involving an Indian child, are as provided by MCL 710.24a~~,~~ except ~~that the~~as otherwise provided in subrules (2) and (3).

(2) If the adoptee is an Indian child, in addition to the above, the persons interested are the child's tribe and the Indian custodian, if any, and, if the Indian's child's parent or Indian custodian, or tribe, is unknown, the Secretary of the Interior.

(3) The interested persons in a petition to terminate the rights of the noncustodial parent pursuant to MCL 710.51(6) are:

(a) the petitioner;

(b) the adoptee, if over 14 years of age; ~~and~~

(c) the noncustodial parent; and

(d) if the adoptee is an Indian child, the child's tribe and the Indian custodian, if any, and, if the Indian child's parent or Indian custodian, or tribe, is unknown, the Secretary of the Interior.

RULE 3.802. MANNER AND METHOD OF SERVICE.

(A) Service of Papers.

(1)–(2) [Unchanged.]

(3) Notice of Proceeding Concerning Indian Child. If an Indian child is the subject of an adoption proceeding and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(2),

(a) in addition to any other service requirements, the petitioner shall notify the parent or Indian custodian and the Indian child's tribe, by personal service or by registered mail with return receipt requested, of the pending proceedings on a petition for adoption of the Indian child and of their right of intervention on a form approved by the State Court Administrative Office. If the identity or location of the parent or Indian custodian, or of the tribe, cannot be determined, notice shall be given to the Secretary of the Interior by registered mail with return receipt requested.

(b) the court shall notify the parent or Indian custodian and the Indian child's tribe of all other hearings pertaining to the adoption proceeding as provided in this rule. If the identity or location of the parent or Indian custodian, or of the tribe, cannot be determined, notice of the hearings shall be given to the Secretary of the Interior. Such notice may be made by first-class mail.

(~~3~~4) [Former (3) is renumbered, but otherwise unchanged.]

(B)–(C) [Unchanged.]

RULE 3.807. INDIAN CHILD.

(A) Definitions. If an Indian child, as defined by the Indian Child Welfare Act, 25 USC 1903, is the subject of an adoption proceeding, the definitions in MCR 3.002 shall control.

(B) Jurisdiction, Notice, Transfer, Intervention.

(1) If an Indian child is the subject of an adoption proceeding and an Indian tribe has exclusive jurisdiction as defined in MCR 3.002(2), the matter shall be dismissed.

(2) If an Indian child is the subject of an adoption proceeding and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(2), the court shall ensure that the petitioner has given notice of the proceedings to the persons prescribed in MCR 3.800(B) in accordance with MCR 3.802(A)(3).

(a) If either parent or the Indian custodian or the Indian child's tribe petitions the court to transfer the proceeding to the tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer of the case to tribal court jurisdiction or the court finds good cause not to transfer. In determining whether good cause not to transfer exists, the court shall consider the Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg No 228, 67590-67592, C.2-C.4. A perceived inadequacy of the tribal court or tribal services does not constitute good cause to refuse to transfer the case.

(b) The court shall not dismiss the matter until the transfer has been accepted by the tribal court.

(c) If the tribal court declines transfer, the Indian Child Welfare Act applies, as do the provisions of these rules that pertain to an Indian child (see 25 USC 1902, 1911[b]).

(d) A petition to transfer may be made at any time in accordance with 25 USC 1911(b).

(3) The Indian custodian of the child and the Indian child's tribe have a right to intervene at any point in the proceeding pursuant to 25 USC 1911(c).

(C) Record of Tribal Affiliation. Upon application by an Indian individual who has reached the age of 18 and who was the subject of an adoption placement, the court that entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

RULE 3.901. APPLICABILITY OF RULES.

(A) [Unchanged.]

(B) Application. Unless the context otherwise indicates:

(1) MCR 3.901-3.930, ~~3.980,~~ and 3.991-3.993 apply to delinquency proceedings and child protective proceedings;

(2)-(5) [Unchanged.]

RULE 3.903. DEFINITIONS.

(A) General Definitions. When used in this subchapter, unless the context otherwise indicates:

(1)-(12) [Unchanged.]

(13) "Legal Custodian" means an adult who has been given legal custody of a minor by order of a circuit court in Michigan or a comparable court of another state or who possesses a valid power of attorney given pursuant to MCL 700.5103 or a comparable statute of another state. It also includes the term "Indian custodian" as defined in MCR 3.002(7).

(14)-(16) [Unchanged.]

(17) "Parent" means the mother, the father as defined in MCR 3.903(A)(7), or both, of the minor. It also includes the term "parent" as defined in MCR 3.002(10).

(18)-(26) [Unchanged.]

(B)-(E) [Unchanged.]

(F) Indian Child Welfare Act. If an Indian child, as defined by the Indian Child Welfare Act, 25 USC 1901 *et seq.*, is the subject of a protective proceeding or is charged with a status offense in violation of MCL 712A.2(a)(2)-(4) or (d), the definitions in MCR 3.002 shall control.

RULE 3.905. INDIAN CHILDREN; JURISDICTION, NOTICE, TRANSFER, INTERVENTION.

(A) If an Indian child is the subject of a protective proceeding or is charged with a status offense in violation of MCL 712A.2(a)(2)-(4) or (d), and if an Indian tribe has exclusive jurisdiction as defined in MCR 3.002(2), and the matter is not before the state court as a result of emergency removal pursuant to 25 USC 1922, the matter shall be dismissed.

(B) If an Indian child is the subject of a protective proceeding or is charged with a status offense in violation of MCL 712A.2(a)(2)-(4) or (d), and if an Indian tribe has exclusive jurisdiction as defined in MCR 3.002(2), and the matter is before the state court as a result of emergency removal pursuant to 25 USC 1922, and either the tribe notifies the state court that it is exercising its jurisdiction, or the emergency no longer exists, then the state court shall dismiss the matter.

(C) If an Indian child is the subject of a protective proceeding or is charged with a status offense in violation of MCL 712A.2(a)(2)-(4) or (d) and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(2), the court shall ensure that the petitioner has given notice of the proceedings to the persons described in MCR 3.921 in accordance with MCR 3.920(C).

(1) If either parent or the Indian custodian or the Indian child's tribe petitions the court to transfer the proceeding to the tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer of the case to tribal court jurisdiction or the court finds good cause not to transfer. In determining whether good cause not to transfer exists, the court shall consider the Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg No 228, 67590-67592, C.2-C.4. (November 26, 1979). A perceived inadequacy of the tribal court or tribal services does not constitute good cause to refuse to transfer the case.

(2) The court shall not dismiss the matter until the transfer has been accepted by the tribal court.

(3) If the tribal court declines transfer, the Indian Child Welfare Act applies to the continued proceeding in state court, as do the provisions of these rules that pertain to an Indian child. See 25 USC 1902, 1911(b).

(4) A petition to transfer may be made at any time in accordance with 25 USC 1911(b).

(D) The Indian custodian of the child and the Indian child's tribe have a right to intervene at any point in the proceeding pursuant to 25 USC 1911(c).

RULE 3.920. SERVICE OF PROCESS.

(A)-(B) [Unchanged.]

(C) Notice of Proceeding Concerning Indian Child. If an Indian child is the subject of a protective proceeding or is charged with a status offense in violation of MCL 712A.2(a)(2)-(4) or (d) and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(2):

(1) in addition to any other service requirements, the petitioner shall notify the parent or Indian custodian

and the Indian child's tribe, by personal service or by registered mail with return receipt requested, of the pending proceedings on a petition filed under MCR 3.931 or MCR 3.961 and of their right of intervention on a form approved by the State Court Administrative Office. If the identity or location of the parent or Indian custodian, or of the tribe, cannot be determined, notice shall be given to the Secretary of the Interior by registered mail with return receipt requested. Subsequent notices shall be served in accordance with this subrule for proceedings under MCR 3.967 and MCR 3.977.

(2) the court shall notify the parent or Indian custodian and the Indian child's tribe of all hearings other than those specified in subrule (1) as provided in subrule (D). If the identity or location of the parent or Indian custodian or the tribe cannot be determined, notice of the hearings shall be given to the Secretary of the Interior. Such notice may be by first-class mail.

(~~C~~D)-(~~H~~I) [Renumbered, but otherwise unchanged.]

RULE 3.921. PERSONS ENTITLED TO NOTICE.

(A) Delinquency Proceedings.

(1) General. In a delinquency proceeding, the court shall direct that the following persons be notified of each hearing except as provided in subrule (A)(3):

(a)–(f) [Unchanged.]

(g) in accordance with the notice provisions of MCR 3.905, if the juvenile is charged with a status offense in violation of MCL 712A.2(a)(2)-(4) or (d) and if the juvenile is an Indian child:

(i) the juvenile's tribe and, if the tribe is unknown, the Secretary of the Interior, and

(ii) the juvenile's parents or Indian custodian, and if unknown, the Secretary of the Interior.

(2)–(3) [Unchanged.]

(B) Protective Proceedings.

(1) General. In a child protective proceeding, except as provided in subrules (B)(2) and (3), the court shall ensure that the following persons are notified of each hearing:

(a)–(g) [Unchanged.]

(h) in accordance with the notice provisions of MCR 3.905, if the child is an Indian child:

(i) the child's tribe and, if the tribe is unknown, the Secretary of the Interior, and

(ii) the child's parents or Indian custodian, and if unknown, the Secretary of the Interior, and

(i) [former (h) relettered, but otherwise unchanged.]

(2) Dispositional Review Hearings and Permanency Planning Hearings. Before a dispositional review hearing or a permanency planning hearing, the court shall ensure that the following persons are notified in writing of each hearing:

(a)–(i) [Unchanged.]

(j) ~~any tribal leader, if there is an Indian tribe affiliation~~if the child is an Indian child, the child's tribe,

(k) [Unchanged.]

(l) if the child is an Indian child and the parents, guardian, legal custodian, or tribe are unknown, to the Secretary of Interior, and

(m) [former (l) relettered, but otherwise unchanged.]

(3) Termination of Parental Rights. Written notice of a hearing to determine if the parental rights to a child shall be terminated must be given to those appropriate

persons or entities listed in subrule (B)(2), except that if the child is an Indian child, notice shall be given in accordance with MCR 3.920(C)(1).

(C)–(D) [Unchanged.]

RULE 3.931. INITIATING DELINQUENCY PROCEEDINGS.

(A) [Unchanged.]

(B) Content of Petition. A petition must contain the following information:

(1) the juvenile's name, address, and date of birth, if known;

(2) the names and addresses, if known, of

(a) the juvenile's mother and father,

(b) the guardian, legal custodian, or person having custody of the juvenile, if other than a mother or father,

(c) the nearest known relative of the juvenile, if no parent, guardian, or legal custodian can be found, ~~and~~

(d) the juvenile's membership or eligibility for membership in an Indian tribe, if any, and the identity of the tribe, and

(~~d~~e) any court with prior continuing jurisdiction;

(3)–(8) [Unchanged.]

(C)–(D) [Unchanged.]

RULE 3.935. PRELIMINARY HEARING.

(A) [Unchanged.]

(B) Procedure.

(1)–(4) [Unchanged.]

(5) If the charge is a status offense in violation of MCL 712A.2(a)(2)-(4) or (d), the court must inquire if the juvenile or a parent is a member of any~~ American~~

Indian tribe ~~or band~~. If the juvenile is a member, or if a parent is a ~~tribal~~ member and the juvenile is eligible for membership in the tribe, the court must determine the identity of the tribe ~~or band~~ and ~~follow the procedures set forth in~~comply with MCR ~~3.980~~3.905 before proceeding with the hearing.

(6)-(8) [Unchanged.]

(C)–(F) [Unchanged.]

RULE 3.961. INITIATING CHILD PROTECTIVE PROCEEDINGS.

(A) [Unchanged.]

(B) Content of Petition. A petition must contain the following information, if known:

(1)–(4) [Unchanged.]

(5) The child's membership or eligibility for membership in an ~~American~~ Indian tribe ~~or band~~, if any, and the identity of the tribe.

(6) The type of relief requested. A request for removal of the child or a parent or for termination of parental rights at the initial disposition must be specifically stated. If the petition requests removal of an Indian child or if an Indian child was taken into protective custody pursuant to MCR 3.963 as a result of an emergency, the petition must specifically describe:

(a) the active efforts that have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family; and

(b) documentation, including attempts, to identify the child's tribe.

(7) [Unchanged.]

RULE 3.963. PROTECTIVE CUSTODY OF CHILD.

(A) Taking Custody Without Court Order. An officer

may without court order remove a child from the child's surroundings and take the child into protective custody if, after investigation, the officer has reasonable grounds to conclude that the health, safety, or welfare of the child is endangered. If the child is an Indian child who resides or is domiciled on a reservation, but is temporarily located off the reservation, the officer may take the child into protective custody only when necessary to prevent imminent physical harm to the child.

(B) Court-Ordered Custody.

(1) The court may issue a written order authorizing a child protective services worker, an officer, or other person deemed suitable by the court to immediately take a child into protective custody when, upon presentment of proofs as required by the court, the judge or referee has reasonable grounds to believe that the conditions or surroundings under which the child is found are such as would endanger the health, safety, or welfare of the child and that remaining in the home would be contrary to the welfare of the child. If the child is an Indian child who resides or is domiciled on a reservation, but is temporarily located off the reservation, the child is subject to the exclusive jurisdiction of the tribal court. However, the state court may enter an order for protective custody of that child when it is necessary to prevent imminent physical harm to the child. At the time it issues the order or as provided in MCR 3.965(D), the court shall make a judicial determination that reasonable efforts to prevent removal of the child have been made or are not required. The court may also include in such an order authorization to enter specified premises to remove the child.

(2)–(3) [Unchanged.]

(C) [Unchanged.]

RULE 3.965. PRELIMINARY HEARING.

(A) [Unchanged.]

(B) Procedure.

(1) The court must determine if the parent, guardian, or legal custodian has been notified, and if the lawyer-guardian ad litem for the child is present. The preliminary hearing may be adjourned for the purpose of securing the appearance of an attorney, parent, guardian, or legal custodian or may be conducted in the absence of the parent, guardian, or legal custodian if notice has been given or if the court finds that a reasonable attempt to give notice was made.

(2) The court must inquire if the child or either parent is a member of an Indian tribe. If the child is a member, or if a parent is a member and the child is eligible for membership in the tribe, the court must determine the identity of the child's tribe, notify the tribe, and, if the child was taken into protective custody pursuant to MCR 3.963(A) or the petition requests removal of the child, follow the procedures set forth in MCR 3.967. If necessary, the court may adjourn the preliminary hearing pending the conclusion of the removal hearing. A removal hearing may be held in conjunction with the preliminary hearing if all necessary parties have been notified as required by MCR 3.905, there are no objections by the parties to do so, and at least one expert witness is present to provide testimony.

(23)-(89) [Renumbered, but otherwise unchanged.]

~~(9) The court must inquire if the child or either parent is a member of any American Indian tribe or band. If the child is a member, or if a parent is a tribal member and the child is eligible for membership in the~~

~~tribe, the court must determine the identity of the child's tribe, notify the tribe or band, and follow the procedures set forth in MCR 3.980.~~

(10)-(11) [Unchanged.]

(12) If the court authorizes the filing of the petition, the court:

(a) may release the child to a parent, guardian, or legal custodian and may order such reasonable terms and conditions believed necessary to protect the physical health or mental well-being of the child; or

(b) may order placement of the child after making the determinations specified in subrules (C) and (D), if those determinations have not previously been made. If the child is an Indian child, the child must be placed in descending order of preference with:

(i) a member of the child's extended family,

(ii) a foster home licensed, approved, or specified by the child's tribe,

(iii) an Indian foster family licensed or approved by a non-Indian licensing authority,

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.

The court may order another placement for good cause shown. If the Indian child's tribe has established by resolution a different order of preference than the order prescribed above, placement shall follow that tribe's order of preference as long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in 25 USC 1915(b). The standards to be applied in meeting the preference requirements above shall be the prevailing social and cultural standards of the Indian community in which

the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(13) [Unchanged.]

(C)-(E) [Unchanged.]

RULE 3.967. REMOVAL HEARING FOR INDIAN CHILD.

(A) Child in Protective Custody. If an Indian child is taken into protective custody pursuant to MCR 3.963(A) or (B) or MCR 3.974, a removal hearing must be completed within 14 days after removal from a parent or Indian custodian unless that parent or Indian custodian has requested an additional 20 days for the hearing pursuant to 25 USC 1912(a) or the court adjourns the hearing pursuant to MCR 3.923(G). Absent extraordinary circumstances that make additional delay unavoidable, temporary emergency custody shall not be continued for more than 45 days.

(B) Child Not in Protective Custody. If an Indian child has not been taken into protective custody and the petition requests removal of that child, a removal hearing must be conducted before the court may enter an order removing the Indian child from the parent or Indian custodian.

(C) Notice of the removal hearing must be sent to the parties prescribed in MCR 3.921 in compliance with MCR 3.920(C)(1).

(D) Evidence. An Indian child may be removed from a parent or Indian custodian, or, for an Indian child already taken into protective custody pursuant to MCR 3.963 or MCR 3.974(B), remain removed from a parent or Indian custodian pending further proceedings, only upon clear and convincing evidence, including the testimony of at least one expert witness who has knowl-

edge about the child-rearing practices of the Indian child's tribe, that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, that these efforts have proved unsuccessful, and that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(E) A removal hearing may be combined with any other hearing.

(F) The Indian child, if removed from home, must be placed in descending order of preference with:

(1) a member of the child's extended family,

(2) a foster home licensed, approved, or specified by the child's tribe,

(3) an Indian foster family licensed or approved by a non-Indian licensing authority,

(4) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.

The court may order another placement for good cause shown. If the Indian child's tribe has established by resolution a different order of preference than the order prescribed in subrule (F), placement shall follow that tribe's order of preference as long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in 25 USC 1915(b).

The standards to be applied in meeting the preference requirements above shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

RULE 3.974. POST-DISPOSITIONAL PROCEDURES; CHILD AT HOME.

(A) Review of Child's Progress.

(1)–(2) [Unchanged.]

(3) Change of Placement. Except as provided in subrule (B), the court may not order a change in the placement of a child solely on the basis of a progress review. If the child over whom the court has retained jurisdiction remains at home following the initial dispositional hearing or has otherwise returned home from foster care, the court must conduct a hearing before it may order the placement of the child. Such a hearing must be conducted in the manner provided in MCR 3.975(E), except as otherwise provided in this subrule for Indian children. If the child is an Indian child, in addition to the hearing prescribed by this subrule, the court must also conduct a removal hearing in accordance with MCR 3.967 before it may order the placement of the Indian child.

(B) Emergency Removal; Protective Custody.

(1) General. If the child, over whom the court has retained jurisdiction, remains at home following the initial dispositional hearing or has otherwise returned home from foster care, the court may order ~~temporary removal of~~ the child to be taken into protective custody to protect the health, safety, or welfare of the child, pending an emergency removal hearing, except, that if the child is an Indian child and the child resides or is domiciled within a reservation, but is temporarily located off the reservation, the court may order the child to be taken into protective custody only when necessary to prevent imminent physical harm to the child.

(2) Notice. The court shall ensure that the parties are given notice of the hearing as provided in MCR 3.920 and MCR 3.921.

(3) Emergency Removal Hearing. If the court orders ~~removal of~~ the child to be taken into protective custody~~from the parent, guardian, or legal custodian~~ to protect the child's health, safety, or welfare, the court must conduct an emergency removal hearing no later than 24 hours after the child has been taken into custody, excluding Sundays and holidays as defined in MCR 8.110(D)(2). If the child is an Indian child, the court must also conduct a removal hearing in accordance with MCR 3.967 in order for the child to remain removed from a parent or Indian custodian. Unless the child is returned to the parent pending the dispositional review, the court must make a written determination that the criteria for placement listed in MCR 3.965(C)(2) are satisfied.

(a)–(b) [Unchanged.]

(C) Dispositional Review Hearing; Procedure. If the child is in placement pursuant to subrule (B), the dispositional review hearing must commence no later than 14 days after the child is placed by the court, except for good cause shown. The dispositional review hearing may be combined with the removal hearing for an Indian child prescribed by MCR 3.967. The dispositional review hearing must be conducted in accordance with the procedures and rules of evidence applicable to a dispositional hearing.

RULE 3.975. POST-DISPOSITIONAL PROCEDURES; CHILD IN FOSTER CARE.

(A)-(E) [Unchanged.]

(F) Criteria.

(1) Review of Case Service Plan. The court, in reviewing the progress toward compliance with the case service plan, must consider:

(a)–(d) [Unchanged.]

(e) any likely harm to the child if the child continues to be separated from his or her parent, guardian, or custodian; ~~and~~

(f) any likely harm to the child if the child is returned to the parent, guardian, or legal custodian~~.~~; and

(g) if the child is an Indian child, whether the child's placement remains appropriate and complies with MCR 3.967(F).

(2) Progress Toward Returning Child Home. The court must decide the extent of the progress made toward alleviating or mitigating conditions that caused the child to be, and to remain, in foster care.

(G)-(H) [Unchanged.]

RULE 3.976. PERMANENCY PLANNING HEARING.

(A)-(B) [Unchanged.]

(C) Notice. The parties entitled to participate in a permanency planning hearing include the:

(1) parents of the child, if the parent's parental rights have not been terminated,

(2) ~~the~~ child, if the child is of an appropriate age to participate,

(3) guardian,

(4) legal custodian,

(5) foster parents,

(6) preadoptive parents, ~~and~~

(7) relative caregivers, and

(8) if the child is an Indian child, the Indian child's tribe.

Written notice of a permanency planning hearing must be given as provided in MCR 3.920 and MCR 3.921(B)(2). The notice must include a brief statement of the purpose of the hearing, and must include a notice that the hearing may result in further proceedings to terminate parental rights. The notice must inform the parties of their opportunity to participate in the hearing and that any information they wish to provide should be submitted in advance to the court, the agency, the lawyer-guardian ad litem for the child, or an attorney for one of the parties.

(D)-(E) [Unchanged.]

RULE 3.977. TERMINATION OF PARENTAL RIGHTS.

(A) General.

(1) This rule applies to all proceedings in which termination of parental rights is sought. Proceedings for termination of parental rights involving an Indian child~~, as defined by 25 USC 1901 *et seq.*,~~ are governed by ~~MCR 3.980~~25 USC 1912 in addition to this rule.

(2)–(3) [Unchanged.]

(B)-(F) [Unchanged.]

(G) Termination of Parental Rights; Indian Child. In addition to the required findings in this rule, the parental rights of a parent of an Indian child must not be terminated unless:

(1) the court is satisfied that active efforts have been made to provide remedial service and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful, and

(2) the court finds evidence beyond a reasonable doubt, including testimony of at least one qualified expert witness, that parental rights should be terminated because continued custody of the child by the parent or Indian custodian will likely result in serious emotional or physical damage to the child.

(GH)-(JK) [Renumbered, but otherwise unchanged.]

RULE 3.980 AMERICAN INDIAN CHILDREN.

(A) Notice; Transfer. If any Indian child as defined by the Indian Child Welfare Act, 25 USC 1901 et seq., is the subject of a protective proceeding or is charged with an offense in violation of MCL 712A.2(a)(2)-(4) or (d), the following procedures shall be used:

(1) If the Indian child resides on a reservation or is under tribal court jurisdiction at the time of referral, the matter shall be transferred to the tribal court having jurisdiction.

(2) If the child does not reside on a reservation, the court shall ensure that the petitioner has given notice of the proceedings to the child's tribe and the child's parents or Indian custodian and, if the tribe is unknown, to the Secretary of the Interior.

(3) If the tribe exercises its right to appear in the proceeding and requests that the proceeding be transferred to tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer of the case to tribal court jurisdiction or the court finds good cause not to transfer. A perceived inadequacy of the tribal court or tribal services does not constitute good cause to refuse to transfer the case.

(B) Emergency Removal.

(1) An Indian child who resides or is domiciled on a reservation, but is temporarily located off the reserva-

~~tion, must not be removed from a parent or Indian custodian unless the removal is to prevent imminent physical harm to the child.~~

~~(2) An Indian child not residing or domiciled on a reservation may be temporarily removed if reasonable efforts have been made to prevent removal of the child, and continued placement with the parent or Indian custodian would be contrary to the welfare of the child.~~

~~(C) Removal Hearing.~~

~~(1) After Emergency Removal. If an Indian child is removed under subrule (B)(1) or (2), a removal hearing must be completed within 28 days of removal from the parent or Indian custodian.~~

~~(2) Non-Emergency Removal. Except in cases of emergency removal under subrules (B)(1) or (2), a removal hearing must be completed before an Indian child may be removed from the parent or Indian custodian.~~

~~(3) Evidence. An Indian child must not be removed from a parent or Indian custodian, or, for an Indian child removed under subrules (B)(1) or (2), remain removed from a parent or Indian custodian pending further proceedings, without clear and convincing evidence, including the testimony of at least one expert witness who has knowledge about the child-rearing practices of the Indian child's tribe, that services designed to prevent the break up of the Indian family have been furnished to the family and that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical injury to the child.~~

~~(4) A removal hearing may be combined with any other hearing.~~

~~(5) The Indian child, if removed from home, must be placed, in descending order of preference, with:~~

~~(a) a member of the child's extended family,~~

~~(b) a foster home licensed, approved, or specified by the child's tribe,~~

~~(c) an Indian foster family licensed or approved by a non-Indian licensing authority,~~

~~(d) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.~~

~~The court may order another placement for good cause shown.~~

~~(D) Termination of Parental Rights. In addition to the required findings under MCR 3.977, the parental rights of a parent of an Indian child must not be terminated unless there is also evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that parental rights should be terminated because continued custody of the child by the parent or Indian custodian will likely result in serious emotional or physical damage to the child.~~

RULE 5.109. NOTICE OF GUARDIANSHIP PROCEEDINGS CONCERNING INDIAN CHILD.

If an Indian child is the subject of a guardianship proceeding and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(2):

(1) in addition to any other service requirements, the petitioner shall notify the parent or Indian custodian and the Indian child's tribe, by personal service or by registered mail with return receipt requested, of the pending proceedings on a petition to establish guardianship over the Indian child and of their right of intervention on a form approved by the State Court

Administrative Office. If the identity or location of the parent or Indian custodian, or of the tribe, cannot be determined, notice shall be given to the Secretary of the Interior by registered mail with return receipt requested.

(2) the court shall notify the parent or Indian custodian and the Indian child's tribe of all other hearings pertaining to the guardianship proceeding as provided in MCR 5.105. If the identity or location of the parent or Indian custodian, or of the tribe, cannot be determined, notice of the hearings shall be given to the Secretary of the Interior. Such notice may be made by first-class mail.

RULE 5.125. INTERESTED PERSONS DEFINED.

(A) Special Persons. In addition to persons named in subrule (C) with respect to specific proceedings, the following persons must be served:

(1)–(7) [Unchanged.]

(8) In a guardianship proceeding for a minor, if the minor is an Indian child as defined by the Indian Child Welfare Act, 25 USC 1901 *et seq*., the minor's tribe and the Indian custodian, if any, and, if the Indian child's parent or Indian custodian, or tribe, is unknown, the Secretary of the Interior.

(B)-(E) [Unchanged.]

RULE 5.402. COMMON PROVISIONS.

(A)–(D) [Unchanged.]

(E) Indian Child; Definitions, Jurisdiction, Notice, Transfer, Intervention.

(1) If an Indian child, as defined by the Indian Child Welfare Act, 25 USC 1903, is the subject of a guardian-

ship proceeding under the Estates and Protected Individuals Code, the definitions in MCR 3.002 shall control. This does not include guardianships established under the Juvenile Code and MCR 3.979.

(2) If an Indian child is the subject of a petition to establish guardianship of a minor and an Indian tribe has exclusive jurisdiction as defined in MCR 3.002(2), the matter shall be dismissed.

(3) If an Indian child is the subject of a petition to establish guardianship of a minor and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(2), the court shall ensure that the petitioner has given notice of the proceedings to the persons prescribed in MCR 5.125(A)(8) and (C) in accordance with MCR 5.109.

(a) If either parent or the Indian custodian or the Indian child's tribe petitions the court to transfer the proceeding to the tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer of the case to tribal court jurisdiction or the court finds good cause not to transfer. In determining whether good cause not to transfer exists, the court shall consider the Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg No 228, 67590-67592, C.2-C.4. A perceived inadequacy of the tribal court or tribal services does not constitute good cause to refuse to transfer the case.

(b) The court shall not dismiss the matter until the transfer has been accepted by the tribal court.

(c) If the tribal court declines transfer, the Indian Child Welfare Act applies, as do the provisions of these rules that pertain to an Indian child (see 25 USC 1902, 1911[b]).

(d) A petition to transfer may be made at any time in accordance with 25 USC 1911(b).

(4) The Indian custodian of the child and the Indian child's tribe have a right to intervene at any point in the proceeding pursuant to 25 USC 1911(c).

RULE 5.404. GUARDIANSHIP OF MINOR.

(A) Petition for Guardianship of Minor. The petitioner shall state in the petition whether or not the minor is an Indian child or whether that fact is unknown. If the court requires the petitioner to file a social history before hearing a petition for guardianship of a minor, it shall do so on a form approved by the State Court Administrative Office. The social history for minor guardianship is confidential, and it is not to be released, except on order of the court, to the parties or the attorneys for the parties.

(B)–(F) [Unchanged.]

Staff Comment: These amendments incorporate provisions of the Indian Child Welfare Act into specific provisions within various rules relating to child protective proceedings and juvenile status offenses. The language is designed to make the rules reflect a more integrated approach to addressing issues specific to Indian children.

MCR 3.002(1)(c) defines "preadoptive placement" to mean the "temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but before or in lieu of adoptive placement, and . . . ." The phrase "in lieu of adoptive placement" is not intended to mean that it is permissible to leave a child in foster care indefinitely, in violation of MCL 712A.19b(6) or (7) or 45 CFR 1355.20, 45 CFR 1356.21, or 45 CFR 1356.50. Rather, it addresses situations where the parental rights to a child have been terminated and there is no permanency plan for adoption of the child. One example is when the child has been placed with a juvenile guardian and the guardianship is subsequently revoked. In this situation, jurisdiction over the child pursuant to MCL 712A.2(b) will be reinstated and the child is placed in foster care.

MCR 3.002(1): The definition of "child custody proceeding" is intended to apply the Indian Child Welfare Act to delinquency proceedings

if an "Indian child" is charged with a so-called status offense in violation of MCL 712A.2(a)(2)-(4) or (d). Delinquency proceedings involving an Indian child charged with any other non-status offense are generally not subject to the Indian Child Welfare Act; however, if the initial investigation or subsequent review of a non-status delinquency case reveals that the Indian child involved suffers from child abuse or neglect, a separate child protective proceeding may be initiated, which would be subject to the Indian Child Welfare Act.

The amendment of MCR 3.905(C)(1) states that a court shall consider guidelines established by the Bureau of Indian Affairs (BIA) in determining whether good cause not to transfer exists (Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg No 228, 67590-67592, C.2-C.4. [November 26, 1979]). Some examples of good cause are that the Indian tribe does not have a tribal court or that the Indian child is over 12 years old and objects to the transfer. For additional examples of good cause and relevant case law, see the BIA guidelines cited above and A Practical Guide to the Indian Child Welfare Act. (Native American Rights Fund, A Practical Guide to the Indian Child Welfare Act [Boulder, CO: Native American Rights Fund, 2007], 7.15 and 7.16, p 60.)

The staff comment is not an authoritative construction by the Court.

Adopted February 2, 2010, effective May 1, 2010 (File No. 2009-14)—REPORTER

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 7.101. PROCEDURE GENERALLY.

(A)-(H) [Unchanged.]

(I) Filing and Service of Briefs.

(1) Within 21 days after the trial court clerk notifies the parties that the record on appeal has been sent to the circuit court, the appellant must file a brief in the circuit court and serve it on the appellee. The appellee may file and serve a reply brief within 21 days after the appellant's brief is served on the appellee. The appel-

lant's brief must comply with MCR 7.212(B) and (C), and the appellee's brief must comply with MCR 7.212(B) and (D).

(2) [Unchanged.]

(J)-(P) [Unchanged.]

RULE 7.105. APPEALS FROM ADMINISTRATIVE AGENCIES IN CONTESTED CASES.

(A)-(J) [Unchanged.]

(K) Briefs and Arguments.

(1) Within 28 days after the record is filed with the court (see MCL 24.304[2]), the petitioner shall file with the court its brief, in the form provided in MCR 7.212(B) and (C), serve a copy on all respondents, and promptly file proof of that service with the court. Within 28 days after petitioner's brief is served, each respondent shall file with the court its brief, in the form provided in MCR 7.212(B) and (D), serve a copy on all other parties, and promptly file proof of that service with the court. The petitioner may file and serve a reply brief within 14 days after service of the respondent's brief. A 28-day extension of the time for filing a brief may be obtained on written stipulation of the parties or by order of the court. Further extension of time for filing of a brief can be obtained only on order of the court on motion for cause shown.

(2)-(4) [Unchanged.]

(L)-(O) [Unchanged.]

Staff Comment: This amendment clarifies that briefs filed in cases that involve an appeal to a circuit court from a district court or an appeal of a decision by a state administrative agency, board, or commission may not exceed 50 pages in length, similar to the length restriction in cases filed in the Court of Appeals.

The staff comment is not an authoritative construction by the Court.

Adopted February 2, 2010, effective April 1, 2010 (File No. 2009-26)—REPORTER

The period for public comment remains open until April 1, 2010, after which the Court may consider suggested revisions submitted during the comment period.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 5.105. MANNER AND METHOD OF SERVICE.

(A) [Unchanged.]

(B) Method of Service.

(1)-(3) [Unchanged.]

(4) E-mail. Unless otherwise limited or provided by this court rule, parties to a civil action or interested persons to a proceeding may agree to service by e-mail in the manner provided in and governed by MCR 2.107(C)(4).

(C) Petitioner, Service Not Required. For service of notice of hearing on a petition, the petitioner, although otherwise an interested person, is presumed to have waived notice and consented to the petition, unless the petition expressly indicates that the petitioner does not waive notice and does not consent to the granting of the requested prayers without a hearing. Although a petitioner or a fiduciary may in fact be an interested person, the petitioner need not indicate, either by written waiver or proof of service, that the petitioner has received a copy of any paper required by these rules to be served on interested persons.

(D) Service on Persons Under Legal Disability or Otherwise Legally Represented. In a guardianship or conservatorship proceeding, a petition or notice of hearing asking for an order that affects the ward or protected individual must be served on that ward or

protected individual if he or she is 14 years of age or older. In all other circumstances, service on an interested person under legal disability or otherwise legally represented must be made on the following:

(1) The guardian of an adult, conservator, or guardian ad litem of a minor or other legally incapacitated individual, except with respect to:

(a) a petition for commitment or

(b) a petition, account, inventory, or report made as the guardian, conservator, or guardian ad litem.

(2) The trustee of a trust with respect to a beneficiary of the trust, except that the trustee may not be served on behalf of the beneficiary on petitions, accounts, or reports made by the trustee as trustee or as personal representative of the settlor's estate.

(3) The guardian ad litem of any ~~unascertained or unborn~~ person, including an unascertained or unborn person, except as otherwise provided in subrule (D)(1).

(4)-(6) [Unchanged.]

For purposes of service, an emancipated minor without a guardian or conservator is not deemed to be under legal disability.

(E) [Unchanged.]

RULE 5.125. INTERESTED PERSONS DEFINED.

(A) [Unchanged.]

(B) Special Conditions for Interested Persons.

(1)-(2) [Unchanged.]

(3) Trust as Devisee. If either a trust or a trustee is a devisee, the trustee is the interested person. If no trustee has qualified, the interested persons are the ~~current~~ qualified trust beneficiaries described in MCL 700.7103(g)(i) and the nominated trustee, if any.

(4)-(5) [Unchanged.]

(C) Specific Proceedings. Subject to subrules (A) and (B) and MCR 5.105(E), the following provisions apply. When a single petition requests multiple forms of relief, the petitioner must give notice to all persons interested in each type of relief:

(1) The persons interested in an application or a petition to probate a will are the

(a) devisees,

(b) nominated trustee and ~~current~~ qualified trust beneficiaries described in MCL 700.7103(g)(i) of a trust created under the will,

(c) heirs,

(d) nominated personal representative, and

(e) trustee of a revocable trust described in MCL ~~700.7501(1)~~700.7605(1).

(2) The persons interested in an application or a petition to appoint a personal representative, other than a special personal representative, of an intestate estate are the

(a) heirs,

(b) nominated personal representative, and

(c) trustee of a revocable trust described in MCL ~~700.7501(1)~~700.7605(1).

(3) The persons interested in a petition to determine the heirs of a decedent are the presumptive heirs.

(4) The persons interested in a petition of surety for discharge from further liability are the

(a) principal on the bond,

(b) co-surety,

(c) devisees of a testate estate,

(d) heirs of an intestate estate,

(e) qualified trust beneficiaries, as referred to in MCL 700.7103(g)(i),

~~(e)~~ (f) protected person and presumptive heirs of the protected person in a conservatorship, and

~~(f)~~ (g) claimants.

(5) [Unchanged.]

(6) The persons interested in a proceeding for examination of an account of a fiduciary are the:

(a) devisees of a testate estate, and if one of the devisees is a trustee or a trust, the persons referred to in MCR 5.125(B)(3),

(b) heirs of an intestate estate,

(c) protected person and presumptive heirs of the protected person in a conservatorship,

(d) ward and presumptive heirs of the ward in a guardianship,

(e) claimants,

(f) settlor of a revocable trust,

(g) if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual, those persons who are entitled to be reasonably informed, as referred to in MCL 700.7603(2),

(h) current trustee,

~~(f)~~(i) ~~current~~ qualified trust beneficiaries described in MCL 700.7103(g)(i), for ~~in~~ a trust accounting, and

~~(g)~~(j) other persons whose interests would be adversely affected by the relief requested, including insurers and sureties who might be subject to financial obligations as the result of the approval of the account.

(7)-(31) [Unchanged.]

(32) Subject to the provisions of Part 3 of Article VII of the Estates and Protected Individuals Code, the persons interested in the modification or termination of a noncharitable irrevocable trust are:

(a) the qualified trust beneficiaries affected by the relief requested,

(b) the settlor,

(c) if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual, the settlor's representative, as referred to in MCL 700.7411(6);

(d) the trust protector, if any, as referred to in MCL 700.7103(n),

(e) the current trustee, and

(f) any other person named in the terms of the trust to receive notice of such a proceeding.

~~(32)~~(33) Subject to the provisions of Part 3 of Article VII of the Estates and Protected Individuals Code, the~~The~~ persons interested in a proceeding affecting a trust other than those already covered by subrules (C)(6), ~~and~~ (C)(28), and (C)(32) are:

(a) the qualified trust beneficiaries affected by the relief requested,

(b) the holder of a power of appointment affected by the relief requested,

~~(b)~~(c) the current trustee,

~~(c)~~(d) in a proceeding to appoint a trustee, the proposed ~~successor~~ trustee, ~~if any, and~~

~~(d) other persons whose interests are affected by the relief requested.~~

(e) the trust protector, if any, as referred to in MCL 700.7103(n),

(f) the settlor of a revocable trust, and

(g) if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual, those persons who are entitled to be reasonably informed, as referred to in MCL 700.7603(2).

(D)-(E) [Unchanged.]

RULE 5.201. APPLICABILITY.

Except for MCR 5.204 and MCR 5.208, which apply in part to trustees and trusts, rules~~Rules~~ in this subchapter contain requirements applicable to all fiduciaries except trustees and apply to all estates except trusts.

[MCR 5.208 is a new rule.]

RULE 5.208. NOTICE TO CREDITORS, PRESENTMENT OF CLAIMS.

(A) Publication of Notice to Creditors; Contents. Unless the notice has already been given, the personal representative must publish, and a special personal representative may publish, in a newspaper, as defined by MCR 2.106(F), in a county in which a resident decedent was domiciled or in which the proceeding as to a nonresident was initiated, a notice to creditors as provided in MCL 700.3801. The notice must include:

(1) The name, and, if known, last known address, date of death, and date of birth of the decedent;

(2) The name and address of the personal representative;

(3) The name and address of the court where proceedings are filed; and

(4) A statement that claims will be forever barred unless presented to the personal representative, or to both the court and the personal representative within 4 months after the publication of the notice.

(B) Notice to Known Creditors and Trustee. A per-

sonal representative who has published notice must cause a copy of the published notice or a similar notice to be served personally or by mail on each known creditor of the estate and to the trustee of a trust of which the decedent is settlor, as defined in MCL 700.7605(1). Notice need not be served on the trustee if the personal representative is the trustee.

(1) Within the time limits prescribed by law, the personal representative must cause a copy of the published notice or a similar notice to be served personally or by mail on each creditor of the estate whose identity at the time of publication or during the 4 months following publication is known to, or can be reasonably ascertained by, the personal representative.

(2) If, at the time of the publication, the address of a creditor is unknown and cannot be ascertained after diligent inquiry, the name of the creditor must be included in the published notice.

(C) Publication of Notice to Creditors and Known Creditors by Trustee. A notice that must be published under MCL 700.7608 must include:

(1) The name, and, if known, last known address, date of death, and date of birth of the trust's deceased settlor;

(2) The trust's name or other designation;

(3) The date the trust was established;

(4) The name and address of each trustee serving at the time of or as a result of the settlor's death;

(5) The name and address of the trustee's attorney, if any

and must be served on known creditors as provided in subrule (B) above.

(D) No Notice to Creditors. No notice need be given to creditors in the following situations:

(1) The decedent or settlor has been dead for more than 3 years;

(2) Notice need not be given to a creditor whose claim has been presented or paid;

(3) For a personal representative:

(a) The estate has no assets;

(b) The estate qualifies and is administered under MCL 700.3982, MCL 700.3983, or MCL 700.3987;

(c) Notice has previously been given under MCL 700.7608 in the county where the decedent was domiciled in Michigan.

(4) For a trustee, the costs of administration equal or exceed the value of the trust estate.

(E) Presentment of Claims. A claim shall be presented to the personal representative or trustee by mailing or delivering the claim to the personal representative or trustee, or the attorney for the personal representative or trustee, or, in the case of an estate, by filing the claim with the court and mailing or delivering a copy of the claim to the personal representative.

(F) A claim is considered presented

(1) on mailing, if addressed to the personal representative or trustee, or the attorney for the personal representative or trustee, or

(2) in all other cases, when received by the personal representative, or trustee or the attorney for the personal representative or trustee or in the case of an estate when filed with the court.

For purposes of this subrule (F), personal representative includes a proposed personal representative.

~~RULE 5.306. NOTICE TO CREDITORS, PRESENTMENT OF CLAIMS.~~

~~(A) Publication of Notice to Creditors; Contents. Unless the notice has already been given, the personal representative must publish, and a special personal representative may publish, in a newspaper, as defined by MCR 2.106(F), in a county in which a resident decedent was domiciled or in which the proceeding as to a nonresident was initiated, a notice to creditors as provided in MCL 700.3801. The notice must include:~~

~~(1) The name, and, if known, last known address, date of death, and date of birth of the decedent;~~

~~(2) The name and address of the personal representative;~~

~~(3) The name and address of the court where proceedings are filed; and~~

~~(4) A statement that claims will be forever barred unless presented to the personal representative, or to both the court and the personal representative within 4 months after the publication of the notice.~~

~~(B) Notice to Known Creditors and Trustee. A personal representative who has published notice must cause a copy of the published notice or a similar notice to be served personally or by mail on each known creditor of the estate and to the trustee of a trust of which the decedent is settlor, as defined in MCL 700.7501(1). Notice need not be served on the trustee if the personal representative is the trustee.~~

~~(1) Within the time limits prescribed by law, the personal representative must cause a copy of the published notice or a similar notice to be served personally or by mail on each creditor of the estate whose identity at the time of publication or during the 4 months~~

~~following publication is known to, or can be reasonably ascertained by, the personal representative.~~

~~(2) If, at the time of publication, the address of a creditor is unknown and cannot be ascertained after diligent inquiry, the name of the creditor must be included in the published notice.~~

~~(C) No Notice to Creditors. No notice need be given to creditors in the following situations:~~

~~(1) The estate has no assets;~~

~~(2) The estate qualifies and is administered under MCL 700.3982, MCL 700.3983, or MCL 700.3987;~~

~~(3) The decedent has been dead for more than 3 years;~~

~~(4) Notice has previously been given under MCL 700.7504 in the county where the decedent was domiciled in Michigan.~~

~~Notice need not be given to a creditor whose claim has been presented or paid.~~

~~(D)Presentment of Claims. A claim shall be presented to the personal representative by mailing or delivering the claim to the personal representative, or the personal representative's attorney, or by filing the claim with the court and mailing or delivering a copy of the claim to the personal representative.~~

~~(E) A claim is considered presented~~

~~(1) on mailing, if addressed to the personal representative or the personal representative's attorney, or~~

~~(2) in all other cases, when received by the personal representative or the personal representative's attorney or when filed with the court.~~

~~For purposes of this subrule, personal representative includes a proposed personal representative.~~

RULE 5.501. TRUST PROCEEDINGS IN GENERAL.

(A) Applicability. This subchapter applies to all trusts as defined in MCL ~~700.1107(m)~~700.1107(n), including a trust established under a will and a trust created by court order or a separate document.

(B) Unsupervised Administration of Trusts. Unless an interested person invokes court jurisdiction, the administration of a trust shall proceed expeditiously, consistent with the terms of the trust, free of judicial intervention and without court order, approval, or other court action. Neither registration nor a proceeding concerning a trust results in continued supervisory proceedings.

(C) Commencement of Trust Proceedings. A proceeding concerning a trust is commenced by filing a petition ~~in the court where the trust is or could be properly registered~~. Registration of the trust is not required for filing a petition.

(D) Appointment of Trustee not Named in Creating Document. An interested person may petition the court for appointment of a trustee when there is a vacancy in a trusteeship. ~~the order, will, or other document creating a trust does not name a trustee or when the person named in the creating document is either not available or cannot be qualified as trustee. The petitioner must give notice of hearing on the petition to the interested persons.~~ The court may issue an order appointing as trustee the person nominated in the petition or another person. The order must state whether the trustee must file a bond or execute an acceptance.

(E) Qualification of Trustee. A trustee appointed by an order of the court~~,~~ or nominated as a trustee in a will that has been admitted to probate ~~or nominated as a~~

~~successor in a document other than a will that created a trust~~ shall qualify by executing an acceptance indicating the nominee's willingness to serve. The trustee must serve the acceptance and order, if any, on the then known ~~current~~ qualified trust beneficiaries described in MCL 700.7103(g)(i) and, in the case of a testamentary trustee, on the personal representative of the decedent estate, if one has been appointed. No letters of trusteeship shall be issued by the court. The trustee or the attorney for the trustee may establish the trustee's incumbency by executing an affidavit to that effect, identifying the trustee and the trust ~~document~~ and indicating that any required bond has been filed with the court and is in force.

(F) Transitional Rule. A trustee of a trust under the jurisdiction of the court before April 1, 2000, may request an order of the court closing court supervision and the file. On request by the trustee or on its own initiative, the court may order the closing of supervision of the trust and close the file. The trustee must give notice of the order to all current trust beneficiaries. Closing supervision does not preclude any interested trust beneficiary from later petitioning the court for supervision. Without regard to whether the court file is closed, all letters of authority for existing trusts are canceled as of April 1, 2000, and the trustee's incumbency may be established in the manner provided in subrule (E).

~~RULE 5.503. NOTICE TO CREDITORS BY TRUSTEE OF REVOCABLE INTER VIVOS TRUST.~~

~~(A) Place of Publication, Proof. A notice that must be published under MCL 700.7504 must be published in a newspaper as defined by MCR 2.106(F) in the county in which the settlor was domiciled at the time of death. No~~

~~proof of publication need be filed in connection with unsupervised administration of a trust.~~

~~(B) When Notice is not Required. The trustee of a revocable inter vivos trust is not required to give notice to creditors in the following situations:~~

~~(1) The costs of trust administration equal or exceed the value of the trust estate, or~~

~~(2) The settlor has been dead for more than 3 years.~~

RULE 5.801. APPEALS TO OTHER COURTS.

(A) Right to Appeal. An interested person aggrieved by an order of the probate court may appeal as provided by this rule.

(B) Orders Appealable to Court of Appeals. Orders appealable of right to the Court of Appeals are defined as and limited to the following:

(1) a final order affecting the rights or interests of a party to a civil action commenced in the probate court under MCR 5.101(C);

~~(1)~~(2) a final order affecting the rights or interests of an interested person in a proceeding involving a decedent estate, the estate of a person who has disappeared or is missing, a conservatorship or other protective proceeding, the estate of an individual with developmental disabilities, or an inter vivos trust or a ~~testamentary~~ trust created under a will. These are defined as and limited to orders resolving the following matters:

(a) appointing or removing a personal representative, conservator, ~~or~~ trustee, or trust protector as referred to in MCL 700.7103(n), or denying such an appointment or removal;

(b) admitting or denying to probate of a will, codicil, or other testamentary instrument;

(c) determining the validity of a governing instrument;

~~(c)~~(d) interpreting or construing a ~~testamentary~~ governing instrument ~~or inter vivos trust~~;

~~(d)~~(e) approving or denying a settlement ~~of a contest~~ relating to ~~an inter vivos trust or a testamentary~~ a governing instrument;

(f) reforming, terminating, or modifying or denying the reformation, termination or modification of a trust;

(g) granting or denying a petition to consolidate or divide trusts;

~~(e)~~(h)discharging or denying the discharge of a surety on a bond from further liability;

~~(f)~~(i) allowing, ~~or rejecting~~disallowing, or denying a claim~~s~~;

~~(g)~~(j) assigning, selling, leasing, or encumbering any of the assets of an estate or trust;

~~(h)~~(k) authorizing or denying the continuation of a business;

~~(i)~~(l) determining special allowances in a decedent's estate such as a homestead allowance, an exempt property allowance, or a family allowance~~, or right to remain in a dwelling~~;

~~(j)~~(m) authorizing or denying rights of election;

~~(k)~~(n) determining heirs, ~~or~~ devisees, or beneficiaries;

~~(l)~~(o) determining title to or ~~claims to~~rights or interests in property;

~~(m)~~(p) authorizing or denying partition of property;

~~(n)~~(q) authorizing or denying specific performance;

~~(o)~~(r) ascertaining survivorship of parties;

~~(p)~~(s) granting or denying a petition to bar a mentally incompetent or minor wife from dower in the property of her living husband;

~~(q)~~(t) granting or denying a petition to determine *cy pres;*

~~(r)~~(u) directing or denying the making or repayment of distributions;

~~(s)~~(v) determining or denying a constructive trust;

~~(t)~~(w) determining or denying an oral contract relating to a will;

~~(u)~~(x) allowing or disallowing an account, fees, or administration expenses;

~~(v)~~(y) surcharging or refusing to surcharge a fiduciary or trust protector as referred to in MCL 700.7103(n);

~~(w)~~(z) determining or directing payment or ~~authorizing federal estate tax~~ apportionment of taxes;

~~(x)~~(aa) distributing proceeds recovered for wrongful death under MCL 600.2922;

~~(y) determining or directing payment of inheritance taxes~~;

~~(z)~~(bb) assigning residue;

(~~aa~~cc) granting or denying a petition for instructions;

(~~bb~~dd) authorizing disclaimers;~~.~~

(ee) allowing or disallowing a trustee to change the principal place of a trust's administration;

~~(2)~~(3) other appeals as may be hereafter provided by statute.

(C)-(F) [Unchanged.]

RULE 5.802. APPELLATE PROCEDURE; STAYS PENDING APPEAL.

(A) Procedure. Except as modified by this subchapter,

chapter 7 of these rules governs appeals from the probate court.

(B) Record.

(1) An appeal from the probate court is on the papers filed and a written transcript of the proceedings in the probate court or on a record settled and agreed to by the parties and approved by the court. ~~The appeal is not de novo.~~

(2) The probate register may transmit certified copies of the necessary documents and papers in the file if the original papers are needed for further proceedings in the probate court. The parties shall not be required to pay for the copies as costs or otherwise.

(C) [Unchanged.]

Staff Comment: These changes, submitted by the Probate and Estate Planning Council of the State Bar of Michigan and the Michigan Probate Judges Association, have been designed so that the rules conform to recently-enacted statutory changes creating the Michigan Trust Code. The amendments correct and insert cross-references to the applicable statutory provisions, and make other technical changes. In addition, new MCR 5.208 incorporates the notice requirements for both decedent estates and trusts currently contained in MCR 5.306 and MCR 5.503, and replaces those rules.

The staff comment is not an authoritative construction by the Court.

Entered February 2, 2010, effective immediately (File No. 2008-09)—REPORTER

On order of the Court, the proposed amendments of Rules 3.210 and 3.211 of the Michigan Court Rules having been published for comment at 483 Mich 1256-1260, and an opportunity having been provided for comment in writing and at a public hearing on January 27, 2010, the Court declines to modify the court rules. This administrative file is closed without further action.

Entered February 2, 2010, effective immediately (File No. 2009-11)—REPORTER

On order of the Court, the proposed amendment of Rule 6.302 of the Michigan Court Rules having been published for comment at 483 Mich 1252-1256, and an opportunity having been provided for comment in writing and at a public hearing on January 27, 2010, the Court declines to modify the court rule. This administrative file is closed without further action.

Adopted February 5, 2010, effective May 1, 2010 (File No. 2008-39)—REPORTER

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A) [Unchanged.]

(B) Presentence Report; Disclosure Before Sentencing. The court must provide copies of the presentence report to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at a reasonable time, but not less than two business days, before the day of sentencing. When providing the presentence report to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, the court shall inform them that the presentence report is confidential, and shall instruct them that they are prohibited from making a copy or otherwise creating an image of the report, and must return their single copy of the report to the court before or at the time of sentencing. If the presentence report is not made available to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at least two business days before the day of sentencing, the prosecutor and the defendant's lawyer, or

the defendant if not represented by a lawyer, shall be entitled, on oral motion, to an adjournment of the day of sentencing to enable the moving party to review the presentence report and to prepare any necessary corrections, additions, or deletions to present to the court. The presentence report shall not include the following information about any victim or witness: home address, home telephone number, work address, or work telephone number, unless an address is used to identify the place of the crime. The court may exempt from disclosure information or diagnostic opinion that might seriously disrupt a program of rehabilitation and sources of information that have been obtained on a promise of confidentiality. When part of the report is not disclosed, the court must inform the parties that information has not been disclosed and state on the record the reasons for nondisclosure. To the extent it can do so without defeating the purpose of nondisclosure, the court also must provide the parties with a written or oral summary of the nondisclosed information and give them an opportunity to comment on it. The court must have the information exempted from disclosure specifically noted in the report. The court's decision to exempt part of the report from disclosure is subject to appellate review.

(C)-(G) [Unchanged.]

RULE 6.610. CRIMINAL PROCEDURE GENERALLY.

(A)-(E) [Unchanged.]

(F) Sentencing.

(1) ~~At the~~ For sentencing, the court shall:

(a) require the presence of the defendant's attorney, unless the defendant does not have one or has waived the attorney's presence;

(b) ~~give the defendant's attorney or, if the defendant is not represented by an attorney, the defendant an oppor-~~

~~tunity to review the presentence report, if any, and to advise the court of circumstances the defendant believes should be considered in imposing sentence; and~~ provide copies of the presentence report (if a presentence report was prepared) to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at a reasonable time, but not less than two business days before the day of sentencing. When providing the presentence report to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, the court shall inform them that the presentence report is confidential, and shall instruct them that they are prohibited from making a copy or otherwise creating an image of the report, and must return their single copy of the report to the court before or at the time of sentencing. If the presentence report is not made available to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at least two business days before the day of sentencing, the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, shall be entitled, on oral motion, to an adjournment to enable the moving party to review the presentence report and to prepare any necessary corrections, additions or deletions to present to the court, or otherwise advise the court of circumstances the prosecutor or defendant believes should be considered in imposing sentence. The presentence report shall not include the following information about any victim or witness: home address, home telephone number, work address, work telephone number, or any other information prohibited from disclosure pursuant to MCL 780.751 *et seq.*, unless an address is used to identify the place of the crime.

(c) inform the defendant of credit to be given for time served, if any.

(G)-(H) [Unchanged.]

Staff Comment: The amendments of Rules 6.425 and 6.610 of the Michigan Court Rules were submitted by the Representative Assembly of the State Bar of Michigan. The amendments increase the time within which a court is required to provide copies of the presentence report to the prosecutor, the defendant's lawyer, or the defendant if not represented by a lawyer, to at least two business days before the day of sentencing. If the report is not made available at least two days before sentencing, the prosecutor or defendant's lawyer, or the defendant, when not represented by a lawyer, is entitled to an adjournment to prepare any necessary corrections, additions, or deletions to present to the court. The revisions of these rules also prohibit the inclusion of specific information in the report about the victim or witness, and require that the court instruct those who review the report that they are precluded from making a copy of the report and must return their copy to the court before or at the defendant's sentencing. The confidentiality provision is based on MCL 791.229.

The staff comment is not an authoritative construction by the Court.

Adopted February 16, 2010, effective May 1, 2010 (File No. 2009-13)—REPORTER.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 2.112. PLEADING SPECIAL MATTERS.

(A)-(K) [Unchanged.]

(L) Medical Malpractice Actions.

(1) In an action alleging medical malpractice filed on or after October 1, 1993, each party must file an affidavit as provided in MCL 600.2912d~~,~~ and 600.2912e. Notice of filing the affidavit must be promptly served on the opposing party. If the opposing party has appeared in the action, the notice may be served in the manner provided by MCR 2.107. If the opposing party has not appeared, the notice must be served in the manner provided by MCR 2.105. Proof of service of the notice must be promptly filed with the court.

(2) In a medical malpractice action, unless the court allows a later challenge for good cause:

(a) all challenges to a notice of intent to sue must be made by motion, filed pursuant to MCR 2.119, at the time the defendant files its first response to the complaint, whether by answer or motion, and

(b) all challenges to an affidavit of merit or affidavit of meritorious defense, including challenges to the qualifications of the signer, must be made by motion, filed pursuant to MCR 2.119, within 63 days of service of the affidavit on the opposing party. An affidavit of merit or meritorious defense may be amended in accordance with the terms and conditions set forth in MCR 2.118 and MCL 600.2301.

(M) [Unchanged.]

RULE 2.118. AMENDED AND SUPPLEMENTAL PLEADINGS.

(A)-(C) [Unchanged.]

(D) Relation Back of Amendment. An amendment that adds a claim or defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading. In a medical malpractice action, an amendment of an affidavit of merit or affidavit of meritorious defense relates back to the date of the original filing of the affidavit.

(E) [Unchanged.]

Staff Comment: The amendments of MCR 2.112 set a limit on the period for raising challenges to affidavits of merit and meritorious defense and notices of intent in medical malpractice actions. The amendments also allow revision under MCR 2.118 and MCL 600.2301. The amendment of MCR 2.118 explicitly states that the amended affidavit of merit or meritorious defense relates back to the date of the affidavit's original filing.

The staff comment is not an authoritative construction by the Court.

KELLY, C.J. (*concurring*). I concur in the adoption of the amendments of Michigan Court Rules 2.112 and 2.118. I write separately, however, to correct any misunderstanding left by the dissenting statements.

The amendments of MCR 2.112 and 2.118 serve to inject logic and equity into the procedural requirements governing medical malpractice cases. MCR 2.112(L)(2)(a), as amended, requires a defendant to challenge a notice of intent to sue in the defendant's first response to the complaint. This is not a novel concept. Rather, it is entirely consistent with the time limits imposed on defendants asserting other affirmative defenses. See, e.g., MCR 2.116(C)(1) to (3) and (5) to (7); MCR 2.116(D)(1) and (2). The affirmative defenses of lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process must be raised in a party's first motion under MCR 2.116 or in the party's responsive pleading, whichever is filed first. The affirmative defenses of (1) lack of legal capacity to sue, (2) that another action has been initiated between the same parties involving the same claim, (3) that the claim is barred because of release, payment, prior judgment, immunity granted by law, the statute of limitations, the statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment, and (4) that another disposition of the claim was made before commencement of the action must be raised in a party's responsive pleading unless the grounds are stated in a motion filed under MCR 2.116 before the party's first responsive pleading. These limits promote judicial economy and efficiency and ensure that preliminary issues are disposed of quickly.

As amended, MCR 2.112(L)(2)(b) permits a party to amend an affidavit of merit or an affidavit of meritorious defense in accordance with MCR 2.118 and MCL 600.2301. Indeed, our court rules explicitly favor amendments of pleadings. MCR 2.118(A)(1) provides that a party

may amend a pleading (1) once as a matter of course within 14 days after being served with a responsive pleading by an adverse party or (2) within 14 days after serving the pleading if it does not require a responsive pleading. MCR 2.118(A)(2) further states that leave to amend a pleading shall be freely given when justice requires it. Thus, any claim that the court rule amendments adopted today represent a radical departure from traditional procedural practice is unsupportable.

By statute, affidavits of merit must be filed in conjunction with medical malpractice complaints. MCL 600.2912d(1). Thus, they are essentially pleadings. The amendments of MCR 2.112(L) and 2.118(D) bring the procedural rules governing medical malpractice actions into conformity with the rules governing amendments of other pleadings. As amended, MCR 2.118(D) now permits relation back of amendments of affidavits of merit or affidavits of meritorious defense. Again, the court rule amendments merely bring medical malpractice procedural requirements in line with those applicable to other civil actions. As long as the amendment added a claim or a defense that arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading, our court rules *already* permitted the relation back of amendments of pleadings. The court rule amendments adopted today merely clarify that relation back includes medical malpractice claims. Indeed, there is no legal justification for preventing a party in a medical malpractice action from amending an affidavit of merit or an affidavit of meritorious defense when parties in other actions are freely and routinely permitted to do so.

The claim is made that these court rule amendments are inconsistent with *Kirkaldy v Rim*[1] and run afoul of the statute of limitations. However, the amendments do not overrule that decision, nor are they inconsistent with the statute of limitations. *Kirkaldy* held that if an affidavit of merit is successfully challenged, the proper remedy is dismissal without prejudice. The plaintiff is left with whatever time remains in the period of limitations to file a complaint with a conforming affidavit of merit.[2] Under our amended court rules, which are permissive in nature, affidavits of merit may be amended in accordance with MCL 600.2301 and relate back to the date of the original filing of the affidavit. MCL 600.2301 provides:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

Thus, the Legislature has made clear that, at a court's discretion, amendment should be permitted in furtherance of justice or when a defect in the proceedings does not affect the substantial rights of the parties. Our court rule amendments therefore reflect a balance between the remedy of dismissal without prejudice under *Kirkaldy* and leave to amend with relation back of the amended affidavits of merit.

If a court permits an amended affidavit of merit, MCR 2.118(D) applies. The amended affidavit of merit relates back. If a court denies a request to amend a

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[1] *Kirkaldy v Rim*, 478 Mich 581 (2007).

[2] *Id*. at 586.

defective affidavit of merit, then *Kirkaldy* provides the appropriate course of action. The action is dismissed without prejudice.

Irrespective of the amendments adopted today, the period of limitations for medical malpractice actions remains the same. It is merely the application of that limitations period that may change in certain circumstances. This change is premised on the Legislature's policy determination that, in some instances, a court may amend a pleading in furtherance of justice when the substantial rights of the parties are not affected.[3] Defendants still must be provided with a complaint and affidavit of merit within the applicable time. Defendants will still be on notice of the claims against them within the requisite time period and will be fully aware of the conduct, transaction, or occurrence at issue as set forth in the original pleadings.

Finally, today's court rule amendments do not tread on "substantive" law. Rules governing the filing and amendment of pleadings are inherently procedural in nature. Such rules do not modify or change the statutory period in which those pleadings must be filed. The amended rules do no more to alter the statutory period of limitations than the existing rules. Before these amendments, the court rules expressly permitted the amendment of pleadings and the relation back of amendments in other contexts. The amended rules do the same with respect to medical malpractice claims.

Hence, the period of limitations for medical malpractice claims remains unchanged. The court rule amendments simply permit parties in certain instances to amend affidavits of merit or affidavits of meritorious defense and

[3] MCL 600.2301.

cause them to relate back to the date of the originally filed affidavit. Accordingly, the court rule amendments are within this Court's authority to "promulgate and amend general rules governing practices and procedure in the supreme court and all other courts of record . . . ." MCL 600.223; see also Const 1963, art 6, § 5.

CORRIGAN, J. (*dissenting*). I join Justice MARKMAN's dissenting statement regarding the Court's adoption of the amendments of Rules 2.112 and 2.118 of the Michigan Court Rules. I write separately to address two points.

First, although a majority has now adopted amendments inconsistent with *Kirkaldy v Rim*, 478 Mich 581 (2007), during our October 8, 2009, public administrative conference, Justice CAVANAGH expressly asserted that the amendments of MCR 2.112 and MCR 2.118 would not affect the statute of limitations and that *Kirkaldy* remains good law. Specifically, after Justice HATHAWAY moved to adopt these amendments, Justice CAVANAGH stated:

> That's the proposal, Attachment A, of the October 1st? I would support that. I don't view- that proposal is silent as to the statute of limitations. So I don't see the statute of limitations restrictions that *Kirkaldy* pointed out are still on the books . . . . This does not obviate the statute of limitations in my view.[1]

When I asked Justice CAVANAGH, "So what is the objection to so stating in the rule as it seems that there is a disagreement with your position on relation back from Justice HATHAWAY?" he responded, "I don't think it's necessary."[2] Similarly, during our December 10, 2009,

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[1] See minutes 23:26 to 24:09 of the October 8, 2009, public administrative conference, available at <http://www.michbar.org/courts/virtualcourt.cfm> (accessed February 4, 2010).

[2] See minutes 24:10 to 24:23 of the October 8, 2009, public administrative conference, available at <http://www.michbar.org/courts/virtualcourt.cfm> (accessed February 4, 2010).

public administrative conference, Chief Justice KELLY asserted that "[i]t has to be pointed out that *Kirkaldy* is not being overruled here."[3] Nonetheless, Chief Justice KELLY contradicts her December 10, 2009, public view with her current suggestion that trial courts can choose to enforce either *Kirkaldy* or the court rules in a given case.[4] So overruling *Kirkaldy* is delegated to the trial bench as they see fit. *Kirkaldy* should remain "on the books" until a majority of this Court overrules it. Stated another way, "all lower courts and tribunals are bound by [*Kirkaldy*] and must follow it even if they believe that it was wrongly decided or has become obsolete."[5] Instead, Chief Justice KELLY candidly authorizes trial courts to overrule our opinions and modify the substantive law as they think best.

Second, in resolving whether *Kirkaldy* or the amendments of MCR 2.112 and MCR 2.118 govern future medical malpractice cases, the discerning lawyer should observe that these amendments implicate matters of substantive law. I acknowledge the Court's authority to "promulgate and amend general rules governing practices and procedure in the supreme court and all other courts of record . . . ."[6] As Justice MARKMAN cogently

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[3] See minutes 8:20 to 8:26 of the December 10, 2009, public administrative conference, available at <http://www.michbar.org/courts/virtualcourt.cfm> (accessed February 4, 2010).

[4] Specifically, Chief Justice KELLY states:

> If a court permits an amended affidavit of merit, MCR 2.118(D) applies. The amended affidavit of merit relates back. If a court denies a request to amend a defective affidavit of merit, then *Kirkaldy* provides the appropriate course of action. The action is dismissed without prejudice.

[5] *Paige v Sterling Hts*, 476 Mich 495, 524 (2006).

[6] MCL 600.223; see Const 1963, art 6, § 5 ("The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state.).

explains, however, the Legislature, and not this Court, is responsible for modifying the statute of limitations in medical malpractice cases. Notably, Justice HATHAWAY moved to adopt these amendments at the October 8, 2009 administrative conference in part because the Legislature "has had this bill [currently HB 4571] for over five years and has taken no action on it."[7] The speed with which the Legislature acts does not allow us to sidestep the legislative process. We lack the authority to enact provisions of substantive law.[8] This is not within our power as judges. Accordingly, I would not consider the relative lack of haste with which the Legislature acts as some sort of mandate for this Court to intervene and promulgate these amendments. If the Legislature adopts statutory provisions contrary to these amendments in the future, that statute should govern over these amended court rules.[9]

Immediately after the Court voted to adopt these amendments by a 4-3 vote during our December 10, 2009, administrative conference, Justice WEAVER said, "I think it will be obvious to people the misinterpretations that go on with what people say."[10] I agree. To avoid even the slightest misinterpretation about my colleagues' views regarding these amendments, I urge interested parties to watch the online videos on the State Bar of Michigan's website. Justices MARKMAN and

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[7] See minutes 13:00 to 13:07 of the October 8, 2009, public administrative conference, available at <http://www.michbar.org/courts/virtualcourt.cfm> (accessed February 4, 2010).

[8] *McDougall v Schanz*, 461 Mich 15, 27 (1999) ("[T]his Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law.").

[9] See *id*. at 37.

[10] See minutes 16:48 to 16:53 of the December 10, 2009, public administrative conference, available at <http://www.michbar.org/courts/virtualcourt.cfm> (accessed February 4, 2010).

YOUNG and I raised relevant and significant objections during the Court's October 8, 2009, and December 10, 2009, administrative conferences. Accordingly, I respectfully dissent from the Court's adoption of the amendments of MCR 2.112 and 2.118.

YOUNG, J. (*dissenting*). I fully join Justice MARKMAN's dissent from the adoption of the amendments to MCR 2.112 and MCR 2.118. Today one sees the handiwork of a new majority of this Court that is apparently indifferent to the chaos it sows in achieving the results it desires. Rather than overruling *Kirkaldy v Rim*[1] in the normal course, the new majority's impatience has caused it to *attempt* to do so by amendment of a court rule. As a result, litigants will now be forced into a Catch-22 and will be unwittingly compelled to choose between following the binding precedent of *Kirkaldy* or the inconsistent dictates of the amended rules adopted here.[2]

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[1] 478 Mich 581 (2007).

[2] As aptly noted by Justice MARKMAN, the adopted version of MCR 2.112(L)(b)(2) allows a party to file an amended affidavit of merit without the complaint being dismissed. However, *Kirkaldy requires* dismissal. Under the amended court rule, the suit is not dismissed because of the deficient affidavit of merit originally filed and, therefore, the adopted versions of MCR 2.112(L)(2)(b) and MCR 2.118(D) *appear* to permit a plaintiff to file an amended affidavit with no consideration of the time remaining in the period of limitations. This is not permitted but will undoubtedly result in many amendments being allowed beyond the statutory limitations period—contrary to *Kirkaldy*—and will lead to ancillary litigation to determine whether a live claim still exists. Chief Justice KELLY is apparently unconcerned about the effects of this situation on the bench and bar. The Chief Justice states that "the amendments do not overrule [*Kirkaldy*], nor are they inconsistent with the statute of limitations." Her first assertion is incorrect and her second is debatable. The Chief Justice simply fails to acknowledge the language in *Kirkaldy* that directly contradicts her assertion and the fact that the amended court rules and *Kirkaldy* require different outcomes when a party files a nonconforming affidavit of merit.

So I pose a simple question that the majority needs to, but cannot, answer:

> How should a sitting trial judge or a trial lawyer decide which affidavit of merit rules apply—those set forth in this new rule or those set forth in *Kirkaldy*?

If there is a calculus for making such a determination, the majority has not provided one.

The Chief Justice claims that the amended court rules are merely "permissive in nature" and therefore do not run afoul of *Kirkaldy*, which would only apply when "a court denies a request to amend a defective affidavit of merit . . . ." However, her attempt to cloak the amendment of an affidavit of merit in the discretion of a court to do so "in furtherance of justice or when a defect in the proceedings does not affect the substantial rights of the parties" is not compelling. Once a period of limitations has run, a court's allowance of *any* amendment to an affidavit of merit is necessarily prejudicial to a defendant and *will* affect the substantial rights of the parties, as the defendant has the right under *Kirkaldy* to dismissal of the cause of action without prejudice.

Justice CAVANAGH conceded at the public hearing that *Kirkaldy*'s restrictions regarding the statute of limitations are substantive in nature and remain good law. By injecting court rules into the system that directly contradict the binding precedent of this Court, the new majority harkens back to an earlier period when this Court so muddled the law that practitioners and judges had to invent rules to guess which inconsistent, but "binding," Supreme Court precedent controlled their particular case.

Litigants and trial court judges will now be forced to choose between two untenable positions: ignore either the binding precedent of *Kirkaldy* or the dictates of the

amended court rules. They will therefore be left to decide whether an amended affidavit of merit must be filed *before* the remaining time of the period of limitations expires. And they will be left to determine the effect of a late-filed amended affidavit of merit.

These rules provide yet another example of the new majority's consistent failure to enforce legislative tort reform measures.[3]

The intentional creation of such a patent conflict, with its attendant confusion and uncertainty, is the antithesis of our rulemaking power and is inconsistent with the proper functioning of a serious senior court.

MARKMAN, J. (*dissenting*). I dissent from the majority's adoption of the instant amendments to Michigan Court Rules 2.112 and 2.118.

First, I believe that these amendments are inconsistent with this Court's decision in *Kirkaldy v Rim,* 478 Mich 581 (2007), and that it is ill-advised as a general

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[3] See *Potter v McLeary*, 484 Mich 397, 431 (2009) (YOUNG, J., concurring in part and dissenting in part) ("[I]t is swiftly becoming increasingly acceptable for this Court to avoid attempting a precise or meaningful statutory analysis in favor of imprecise vagaries and broad pronouncements."); *Bush v Shabahang*, 484 Mich 156, 207-208 (2009) (MARKMAN, J., dissenting) ("[The majority opinion] creates a new standard for determining a notice's sufficiency that bears no relationship to the actual requirements set forth by the Legislature . . . ."); *Thorn v Mercy Mem Hosp*, 483 Mich 1122 (2009) (YOUNG, J., dissenting) ("[A] majority of this Court has declined to review [whether household services of a decedent are 'noneconomic damages' limited by MCL 600.1483]."); *Vanslembrouck v Halperin*, 483 Mich 965, 970 (2009) (CORRIGAN, J., dissenting) (in which the majority denied leave to appeal an erroneous lower court decision applying statute of limitations tolling to a saving provision despite "the Legislature['s] clearly distinguish[ing] saving provisions" from statutes of limitations); *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18, 22 (2009) (YOUNG, J., dissenting) ("[T]he majority opinion conflates the common-law concept of 'proximate causation' with the common-law concept of 'negligence,' a result not contemplated by the plain language of the comparative fault statutes.").

matter for this Court to reverse its own precedents by altering court rules. These amendments have received no adversarial briefing and no adversarial argument of the sort that normally accompanies this Court's reversing its own precedents. At the December 10, 2009, administrative conference, in response to Justice YOUNG's statement that these amendments are inconsistent with *Kirkaldy,* Justice WEAVER stated the following: "[T]his is simply your interpretation . . . . [J]ust saying that things are this, that, or the other doesn't make it so." Fair enough, and thus I would urge those who are interested in forming their own opinions to read both *Kirkaldy* and the amended court rules and compare their consistency.

In *Kirkaldy,* 478 Mich at 586, this Court held that if an affidavit of merit is successfully challenged, "the proper remedy is dismissal without prejudice." However, MCR 2.112(L)(2)(b), as amended, provides that "[a]n affidavit of merit or meritorious defense may be amended . . . ." Thus, although in *Kirkaldy* this Court held that "dismissal without prejudice" is the proper remedy for the filing of a defective affidavit, MCR 2.112(L)(2)(b) now provides that an opportunity to file an amended affidavit is the proper remedy.

In addition, in *Kirkaldy,* 478 Mich at 586, this Court held that if the court determines that the plaintiff's affidavit of merit is defective, plaintiff "would then have whatever time remains in the period of limitations within which to file a complaint accompanied by a conforming affidavit of merit." However, MCR 2.118(D), as amended, provides that "an amendment of an affidavit of merit or affidavit of meritorious defense relates back to the date of the original filing of the affidavit." Thus, although in *Kirkaldy* this Court held that an amended affidavit of merit had to be filed before

the period of limitations expired, MCR 2.118(D) now provides that the amended affidavit "relates back to the date of the original filing of the affidavit."[1] Under MCR 2.118(D), as amended, it is now unclear whether there is *any* time limitation on the filing of an amended affidavit of merit. Can a plaintiff file an amended affidavit of merit even after the period of limitations has expired (or at least would have expired if the case had been dismissed as is required by *Kirkaldy*)? What about the affidavit of meritorious defense? Does a defendant also have an unlimited amount of time in which to file an amended affidavit of meritorious defense? Do the parties even have to file amended affidavits, or can the court simply disregard any defects in the affidavits?

MCR 2.112(L)(2)(b), as amended, states that an affidavit "may be amended in accordance with the terms and conditions set forth in MCR 2.118 and MCL 600.2301." MCR 2.118(A)(1) states that "[a] party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party . . . ." However, MCR 2.118(A)(2) states that "a party may amend a pleading . . . by leave of the court" and that "[l]eave shall be freely given when justice so requires." And MCL 600.2301 states that "[t]he court . . . has [the] power to amend any . . . pleading . . . for the furtherance of justice, on such

[1] Although Chief Justice KELLY asserts that the instant amendments do not overrule *Kirkaldy,* she does not even make an attempt to explain how these amendments are consistent with that case. Indeed, by asserting that the amendments reflect a "balance between the remedy of dismissal without prejudice under *Kirkaldy* and leave to amend with relation back of amended affidavits of merit" and that "*Kirkaldy* provides the appropriate course of action" only "[i]f a court denies a request to amend a defective affidavit of merit," she necessarily acknowledges that the amendments are inconsistent with *Kirkaldy*.

terms as are just" and "[t]he court . . . shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties." It is unclear to me exactly how the majority intends to interpret these provisions in conjunction with one another, but given the majority's interpretation of MCL 600.2301 in conjunction with the statutory provisions applicable to notices of intent in *Bush v Shabahang,* 484 Mich 156 (2009), and the statement of Justice HATHAWAY (the author of *Bush*) at the October 8, 2009 administrative conference that "this is the same remedy that we addressed in *Bush* as it pertains to notices of intent and there is no reason to treat the two differently," to say that I am concerned that the affidavit requirement established by our Legislature will be rendered essentially meaningless is an understatement.

Although I opposed these revisions to our court rules, in an attempt to limit the destruction of *Kirkaldy* and the statute of limitations enacted by our Legislature, I did offer the following amendment to MCR 2.118(D) at the October 8, 2009 public administrative conference that was rejected by a 4-3 vote:

> In a medical malpractice action, an amendment of an affidavit of merit ~~or affidavit of meritorious defense~~ relates back to the date of the original filing of the affidavit as long as the amended affidavit was filed before the applicable statute of limitations expired. In addition, an amendment of an affidavit of meritorious defense relates back to the date of the original filing of the affidavit as long as the amended affidavit was filed within 60 days of the successful challenge. [Differences from version adopted today shown by strikethrough and underlining.]

Justice HATHAWAY stated that she opposed my amendment because it "would defeat the purpose of the

relation-back doctrine because the entire purpose of the relation-back doctrine is to remove the statute of limitations issue." Indeed, when asked by Justice CORRIGAN whether she believes that these court rule amendments will "wipe out statute of limitations defenses," Justice HATHAWAY replied in the affirmative.

Unlike Justice HATHAWAY, Chief Justice KELLY and Justice CAVANAGH stated at the administrative conferences that they do not believe that the instant court rule amendments will affect the statute of limitations. Indeed, in her concurring statement, Chief Justice KELLY states that "the period of limitations for medical malpractice claims remains unchanged."[2] Unfortunately, I am inclined to agree with Justice HATHAWAY. The period of limitations in a medical malpractice action is two years. MCL 600.5805(6). MCL 600.5856(a) provides that the filing of a complaint tolls the period of limitations, and MCL 600.2912d(1) requires a medical malpractice plaintiff to file an affidavit of merit with the complaint. In *Scarsella v Pollak*, 461 Mich 547 (2000), this Court held that the filing of a complaint without an affidavit of merit does not toll the period of limitations. In *Saffian v Simmons,* 477 Mich 8, 13 (2007), this Court held that the filing of a complaint with a defective affidavit of merit does toll the period of limitations, at least until the validity of the affidavit has been success-

[2] However, even Chief Justice KELLY admits, in her concurring statement that, although "the period of limitations for medical malpractice actions remains the same[,] . . . the application of that limitations period . . . may change in certain circumstances." While she downplays the significance of this by referring to it as "merely" the application of that limitations period, what is the point of a 2-year limitations period if by its "application" it can be extended to a 5-year, 10-year, or even a 20-year limitations period? At which point does the majority recognize that it has simply read "limitations" out of "limitations period?"

fully challenged. And in *Kirkaldy,* 478 Mich at 586, this Court held that when a plaintiff files a complaint with a defective affidavit, the plaintiff's complaint should be dismissed without prejudice and the plaintiff must file a complaint with a conforming affidavit of merit *before* the period of limitations expires. Under the newly amended court rules, however, I am very much concerned that a plaintiff will be allowed to file a defective affidavit, and then be allowed to file an amended affidavit and this amended affidavit will be allowed to be filed at any time because it will "relate[] back to the date of the original filing of the affidavit." That is, I am concerned that a plaintiff will be able to file a complaint with a defective affidavit of merit and then wait indefinitely to file an amended conforming affidavit, rendering the two-year period of limitations essentially meaningless. Chief Justice KELLY does not share this concern because "[d]efendants will still be on notice of the claims against them within the requisite time period and will be fully aware of the conduct, transaction, or occurrence at issue as set forth in the original pleadings." However, she misses the point. The Legislature has nowhere provided that a plaintiff is only required to *notify* the defendants of the claims against them within the requisite time period. Quite to the contrary, the Legislature has required that a plaintiff must file an *affidavit of merit* that contains specified statements within the requisite time period. Nevertheless, I do look forward to the responses of those justices who supported these amended court rules when a litigant, as is inevitable, seeks to take at face value their assertions that the new rules are not intended to have any impact on the medical malpractice statute of limitations.

Second, not only are the new rules inconsistent with *Kirkaldy*, and not only is it ill-advised for this

Court here to adopt rules that are inconsistent with its own precedents, but such rules may well be unconstitutional by failing to respect the command in article 6, § 5 of Michigan's constitution that court rules must confine themselves to matters of procedure, not substance. See *McDougall v Schanz*, 461 Mich 15 (1999). The thrust of these amendments certainly seems to be to effectively modify statutes of limitations in medical malpractice cases, a matter that this Court itself has previously determined constitutes substantive law and is properly the responsibility of the Legislature. See, for example, *Gladych v New Family Homes, Inc*, 468 Mich 594, 600-601 (2003) ("Statutes regarding periods of limitations are substantive in nature" and "to the extent [MCL 600.5856] enacts additional requirements regarding the tolling of the statute of limitations, the statute would supersede the court rule.").

In short, this Court lacks the constitutional authority to modify statutes of limitations. And, in fact, the Legislature is cognizant of its own authority in this realm, and its members have actively participated in an ongoing debate concerning this and related matters. That they have not affirmatively enacted *changes* in the law is not, as Justice HATHAWAY suggested at the October 8, 2009 administrative conference, a justification for this Court now acting on its own. Not only does a legislative body "act" when it *rejects* legislation as much as when it *enacts* legislation, but this Court simply lacks the authority to legislate on this subject matter regardless of whether we approve or disapprove of the law and whether the Legislature has or has not acted to "correct" what some justices may view as imperfections in that law.

I am also concerned that the amendments to MCR 2.112 and MCR 2.118 will further erode the medical

malpractice reforms that have been adopted by our Legislature and that have previously been subject to interpretation only in opinions of this Court. The amended rules are of a kind with this Court's recent decisions in *Bush* and *Potter v McLeary*, 484 Mich 397 (2009)—which at least had the virtue of being opinions of this Court—in that each plainly dismantles medical malpractice reforms that have been adopted by the people through their elected representatives in the Legislature. The amended rules will, I believe, further undermine reforms that were viewed as necessary by those whom our Constitution empowered to make such decisions. Piece by piece, these reforms are being dismantled by those on this Court whom the Constitution did *not* empower to make such decisions.

CORRIGAN and YOUNG, JJ., concurred with MARKMAN, J.

Adopted February 25, 2010, effective May 1, 2010 (File No. 2009-07)—REPORTER.

[Additions indicated by underlining and deletions indicated by overstriking.]

RULE 7.105. APPEALS FROM ADMINISTRATIVE AGENCIES IN "CONTESTED CASES."

(A) [Unchanged.]

(B) Scope; Timeliness of Appeal from Decision or Order of Michigan Department of Corrections Hearing Division.

(1) This rule governs an appeal to the circuit court from an agency decision in a contested case, except when a statute requires a different procedure. A petitioner intending to rely on a different procedure per-

mitted by statute shall identify the statutory procedure in the petition for review. Failure to do so waives the right to use the different procedure.

(2) The court need not dismiss an action incorrectly initiated under some other rule, if it is timely filed and served as required by this rule and the applicable statute. Instead, leave may be freely given, when justice requires, to amend an appeal and a response to conform to the requirements of this rule and otherwise proceed under this rule.

(3) For purposes of appeal of a final decision or order issued by the hearings division of the Michigan Department of Corrections, if an application for leave to appeal the decision or order is received by the court more than 60 days after the date of delivery or mailing of notice of the decision on rehearing, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the application as a pro se party, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to applications from decisions or orders of the hearings division rendered on or after March 1, 2010.

(C)-(O) [Unchanged.]

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.]

(2) An appeal of right in a criminal case must be taken

(a) in accordance with MCR 6.425(G)(3);

(b) within 42 days after entry of an order denying a timely motion for the appointment of a lawyer pursuant to MCR 6.425(G)(1);

(c) within 42 days after entry of the judgment or order appealed from; or

(d) within 42 days after the entry of an order denying a motion for a new trial, for directed verdict of acquittal, or to correct an invalid sentence, if the motion was filed within the time provided in MCR 6.419(B), 6.429(B), or 6.431(A), as the case may be.

A motion for rehearing or reconsideration of a motion mentioned in subrules (A)(1)(b) or (A)(2)(d) does not extend the time for filing a claim of appeal, unless the motion for rehearing or reconsideration was itself filed within the 21- or 42-day period.

(e) If a claim of appeal is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the claim as a pro se party, the claim shall be deemed presented for filing on the date of deposit of the claim in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to claims of appeal from decisions or orders rendered on or after March 1, 2010. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to appeal in a Michigan court.

(3) 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)-(H) [Unchanged.]

RULE 7.205. APPLICATION FOR LEAVE TO APPEAL.

(A) Time Requirements. An application for leave to appeal must be filed within

(1) 21 days after entry of the judgment or order to be appealed from or within other time as allowed by law or rule; or

(2) 21 days after entry of an order deciding a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed, if the motion was filed within the initial 21-day appeal period or within further time the trial court has allowed for good cause during that 21-day period.

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.

(3) If an application for leave to appeal in a criminal case is received by the court after the expiration of the periods set forth above or the period set forth in MCR 7.205(F), and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the application as a pro se party, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to applications for leave to appeal from decisions or orders rendered on or after March 1, 2010. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to appeal in a Michigan court.

(B)-(G) [Unchanged.]

RULE 7.302. APPLICATION FOR LEAVE TO APPEAL.

(A)-(B) [Unchanged.]

(C) When to File.

(1) Before Court of Appeals Decision. In an appeal before the Court of Appeals decision, the application must be filed within 42 days

(a) after a claim of appeal is filed in the Court of Appeals;

(b) after an application for leave to appeal is filed in the Court of Appeals; or

(c) after entry of an order by the Court of Appeals granting an application for leave to appeal.

(2) Other Appeals. Except as provided in subrule (C)(4), in other appeals the application must be filed within 42 days in civil cases, or within 56 days in criminal cases,

(a) after the Court of Appeals clerk mails notice of an order entered by the Court of Appeals;

(b) after the filing of the opinion appealed from; or

(c) after the Court of Appeals clerk mails notice of an order denying a timely filed motion for rehearing.

However, the time limit is 28 days where the appeal is from an order terminating parental rights or an order of discipline or dismissal entered by the Attorney Discipline Board.

(3) Later Application, Exception. Late applications will not be accepted except as allowed under this subrule. If an application for leave to appeal in a criminal case is received by the clerk more than 56 days after the Court of Appeals decision, and the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the application as a pro se party, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to applications from decisions of the Court of Appeals rendered on or after March 1, 2010. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to appeal in a Michigan court.

(4) Decisions Remanding for Further Proceedings. If the decision of the Court of Appeals remands the case to

a lower court for further proceedings, an application for leave may be filed within 28 days in appeals from orders terminating parental rights, 42 days in other civil cases, or 56 days in criminal cases, after

(a) the Court of Appeals decision ordering the remand,

(b) the Court of Appeals clerk mails notice of an order denying a timely filed motion for rehearing of a decision remanding the case to the lower court for further proceedings, or

(c) the Court of Appeals decision disposing of the case following the remand procedure, in which case an application may be made on all issues raised in the Court of Appeals, including those related to the remand question.

(5) Effect of Appeal on Decision Remanding Case. If a party appeals a decision which remands for further proceedings as provided in subrule (C)(4)(a), the following provisions apply:

(a) If the Court of Appeals decision is a judgment under MCR 7.215(E)(1), an application for leave to appeal stays proceedings on remand unless the Court of Appeals or the Supreme Court orders otherwise.

(b) If the Court of Appeals decision is an order other than a judgment under MCR 7.215(E)(1), the proceedings on remand are not stayed by an application for leave to appeal unless so ordered by the Court of Appeals or the Supreme Court.

(6) Orders Denying Motions to Remand. If the Court of Appeals has denied a motion to remand, the appellant may raise issues relating to that denial in an application for leave to appeal from the decision on the merits.

(D)-(H) [Unchanged.]

KELLY, C.J. (*concurring*). I concur in the adoption of the prison mailbox rule. It brings Michigan into conformity with the federal courts and the courts of other states that have such a rule.[1] In *Houston v Lack*,[2] the United States Supreme Court summarized the basis for the adoption of the federal rule:

> The situation of prisoners seeking to appeal without the aid of counsel is unique. Such prisoners cannot take the steps other litigants can take to monitor the processing of their notices of appeal and to ensure that the court clerk receives and stamps their notices of appeal before the . . . deadline. Unlike other litigants, *pro se* prisoners cannot personally travel to the courthouse to see that the notice is stamped "filed" or to establish the date on which the court received the notice. . . . [T]he *pro se* prisoner has no choice but to entrust the forwarding of his notice of appeal to prison authorities whom he cannot control or supervise and who may have every incentive to delay. No matter how far in advance the *pro se* prisoner delivers his notice to the prison authorities, he can never be *sure* that it will ultimately get stamped "filed" on time. . . . Unskilled in law, unaided by counsel, and unable to leave the prison, his control over the processing of his notice necessarily ceases as soon as he hands it over to the only public officials to whom he has access—the prison authorities—and the only information he will likely have is the date he delivered the notice to those prison authorities and the date ultimately stamped on his notice.[3]

Respectfully, Justice CORRIGAN's and Justice YOUNG's dissenting statements miss the purpose behind the rule. The central issue is equality of treatment, not the

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[1] FR App P 4(c)(1). Some form of the prison mailbox rule has been adopted in Alabama, Arizona, California, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Louisiana, Massachusetts, Mississippi, Nevada, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Utah, and Wisconsin. See Anno: *Application of "prisoner mailbox rule" by state courts under state statutory and common law*, 29 ALR6th 237.

[2] *Houston v Lack*, 487 US 266 (1988).

[3] *Id.* at 270-272.

length of time granted to file an appeal. The new rule is based on the fact that incarcerated persons are in a unique position: they are unable to ensure that, although they timely file their appeal, the clerk in the applicable court will receive it on time.[4] As the California Supreme Court has observed:

> The prison-delivery rule ensures that an unrepresented defendant, confined during the period allowed for the filing of an appeal, is accorded an opportunity to comply with the filing requirements fully comparable to that provided to a defendant who is represented by counsel or who is not confined. Affording such equality of treatment is as important under the current 60-day filing period as it was under the former 10-day filing period.[5]

Therefore, it is an inapt apples-to-oranges association to assert that "the generosity of our filing deadlines renders a mailbox rule unnecessary . . . ."[6]

As an illustration of my point, suppose that prisoner A delivers an appeal to the prison mail system one week in advance of the filing deadline. Further suppose that litigant B delivers an appeal to the clerk of the court five minutes before the clerk's office closes on the day his

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[4] Justice CORRIGAN's concern about "equally deserving beneficiaries" of a mailbox rule is easily answered. *Post* at __, citing *Houston*, 487 US at 277 (Scalia, J., dissenting). This Court has seen numerous prisoner appeals rejected as untimely despite the fact that they were delivered to the prison mail system before the filing deadline. In one case in which the appeal was not timely received, the prisoner placed it in the prison mail system more than two weeks before the filing deadline. See *In re Kinney*, 483 Mich 944 (2009) (KELLY, C.J., concurring). By contrast, I am unaware of any cases in which the appeals of litigants who are out of the country, soldiers on active duty, or hostages being held in a foreign country were rejected as untimely.

[5] *In re Jordan*, 4 Cal 4th 116, 119 (1992). *Jordan* retained the prison mailbox rule in California despite the fact that the California Legislature had recently lengthened the time of appeal from 10 days to 60 days after rendition of the judgment.

[6] *Post* at __ (YOUNG, J., dissenting).

appeal is due. Prisoner A's appeal, for whatever reason, does not arrive at the clerk's office until the day after A's filing deadline has passed. Under the former rules, A's appeal would be rejected, while B's would be accepted. What basis is there for this disparate treatment? Moreover, in what way does a prison mailbox rule "reward a lack of diligence and cunctatory behavior"[7] when A did all that he could to file his appeal timely and, in fact, filed it long before B filed his?

Adoption of this rule will make the treatment of those who seek appellate review in Michigan more equal. It will do much to remedy an existing flaw. I therefore concur with the order adopting the prison mailbox rule in this state.

CORRIGAN, J. (*dissenting*). I would not adopt the so-called "prison mailbox rule," which creates inequities among litigants and hinders finality for litigants, the state, and crime victims. As noted by Justice YOUNG, Michigan already has an inordinately generous method for ensuring that all parties—including imprisoned parties—have sufficient time to assemble and file appeals; we allow parties 12 months to file late appeals if they did not timely file appeals of right or applications for leave to appeal. MCR 7.205(F)(3). This lengthy deadline permits equal treatment of any party, including a prison inmate, who may have difficulty accessing the United States Postal Service mail or obtaining documents to support his appeal. It also permits our court clerks to accept an inmate's filing without the need for proof or debate concerning when he placed his documents in the outgoing mail. The prison mailbox rule that the Court now adopts, however, unnecessarily favors prisoners by extending their rights to appeal and

[7] *Post* at __ (YOUNG, J., dissenting).

thereby delays finality of their cases. The rule clearly does not engender equality of treatment, but establishes special treatment for prisoners only.

Only a minority of jurisdictions have adopted prison mailbox rules.[1] Most significantly, Michigan's appellate court rules differ significantly from those jurisdictions with prison mailbox rules. My research has yet to identify a state court system that uses a prison mailbox rule and *also* gives litigants 12 months to apply for late appeals. Rather, states with mailbox rules afford shorter periods for appeal. Commonly, they give parties 30[2] or 42[3] days within which to appeal; some states also allow an additional 30-day extension of the period for appeal upon a showing of good cause or excusable neglect.[4]

Indeed, the federal system—which employs a prison mailbox rule on which Michigan's new rule is modeled—provides only 10 days during which a criminal defendant may file an appeal. FR App P 4(b)(1). Further, the federal mailbox rule—which originated from *Houston v Lack,* 487 US 266 (1988)—arose from the United States Supreme Court's interpretation of Rule 4(a)(1) of the Federal Rules of Appellate Procedure. The Court concluded that a pro se defendant who is incarcerated in a federal prison "files" his notice of appeal under this rule when he delivers it to prison authorities. See *O'Rourke v State*, 782 SW2d 808, 809 (Mo App, 1990). But many states have rejected the application of *Houston* to the

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[1] See Anno: *Application of "prisoner mailbox rule" by state courts under state statutory and common law,* 29 ALR6th 237, for information on the minority of states that have adopted such rules.

[2] E.g., Massachusetts, Mass R App P 4(b); Mississippi, Miss R App P 4(a); Ohio, Ohio R App P 4(a).

[3] E.g., Alabama, Ala R App P 4(b)(1); Idaho, Idaho App R 14(a).

[4] E.g., Massachusetts, Mass R App P 4(c); Mississippi, Miss R App P 4(g).

text of individual state court rules. See *id.* and cases cited therein. Michigan's rule, MCR 7.202(4), clearly states that " 'filing' means the delivery of a document to 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." I would continue to adhere to this text, which provides a bright line, certain rule that applies to all litigants.

A mailbox rule also singles out prisoners for special treatment although other parties have difficulty accessing the United States Postal Service mail or assembling documents in support of their appeals. On this point, I note Justice Scalia's dissent in *Houston,* 487 US at 277, where, in criticizing the majority's interpretation of FR App P 4(a)(1), he listed equally deserving beneficiaries of a mailbox rule, stating:

> It would be within the realm of normal judicial creativity (though in my view wrong) to interpret the phrase "filed with the clerk" to mean "mailed to the clerk," or even "mailed to the clerk or given to a person bearing an obligation to mail to the clerk." But interpreting it to mean "delivered to the clerk or, if you are a prisoner, delivered to your warden" is no more acceptable than any of an infinite number of variants, such as: "delivered to the clerk or, if you are out of the country, delivered to a United States consul"; or "delivered to the clerk or, if you are a soldier on active duty in a war zone, delivered to your commanding officer"; or "delivered to the clerk or, if you are held hostage in a foreign country, meant to be delivered to the clerk."

Justice Scalia's comments persuade me that we need a single, definite rule to make clear when an appeal is filed. If this Court makes an exception for one category of appellants, we exclude other worthy groups. The current 12-month extension for late appeals, MCR 7.205(F)(3), is preferable because it benefits all litigants

equally and establishes a reliable date after which litigants, the state, and crime victims may be generally assured that a case is final.

In sum, the new rule both fails to improve our current system and creates new problems and inequities. Because the rule delays finality, I support shortening our current 12-month period for late appeal in accord with the appeals periods in other states with mailbox rules; I would not further delay finality by tacking a prison mailbox rule onto our current scheme of generous appellate deadlines.

YOUNG, J. (*dissenting*). Michigan currently has some of the longest appellate filing deadlines in the nation. An appeal of right in a criminal case must be filed within 42 days. MCR 7.204(A)(2). If a defendant does not perfect an appeal within that time frame, the defendant's delayed application for leave to appeal can be filed and considered for up to 12 months. MCR 7.205(F)(3). These generous appellate filing deadlines enable imprisoned persons ample time to file their appeals, and are generous precisely to accommodate the unique circumstances of prisoners. Certainly, a dilatory prisoner may be more disadvantaged than a dilatory member of the public. However, imprisonment is not without its inconveniences. Thus, the "length of time granted to file an appeal" is precisely the mechanism that ensures the "equality of treatment" that Chief Justice KELLY believes to be so pivotal.

Rather than acknowledge that the generosity of our filing deadlines renders a mailbox rule unnecessary, the majority incentivizes delay by tardy filers who apparently cannot file their papers within either a 42-day period *or* a 365-day period. While the mailbox rule is premised on the federal system, the majority fails to acknowledge that inmates in the

federal system have only 10 days in which to file their application. FR App P 4(b)(1)(A). The mailbox rule adopted might be justified if a Michigan prisoner, like a prisoner in the federal system, had only 10 days to appeal. However, there is almost no justification in our system where we have provided as much as one year to file an appeal. I believe that the public can readily understand the relationship that the Chief Justice KELLY denies.

It is one thing to ensure that imprisoned defendants have fair access to the courts. It is entirely another to reward a lack of diligence and cunctatory behavior. Because the majority today has promoted the latter, I respectfully dissent from the creation of a mailbox rule.

Staff Comment: These amendments create a prison mailbox rule, which allow a claim of appeal or application for leave to appeal to be deemed presented for filing when a prison inmate acting pro se places the legal documents in the prison's outgoing mail. The rule applies to appeals from administrative agencies, appeals from circuit court (both claims of appeal and applications for leave to appeal), and appeals from decisions of the Court of Appeals to the Supreme Court.

The staff comment is not an authoritative construction by the Court.

Adopted March 16, 2010, effective immediately (File No. 2009-04)—REPORTER.

[Additions are indicated by underlining and deletions by strikethrough.]

RULE 2.003. DISQUALIFICATION OF JUDGE.

(A)-(C) [Unchanged.]

(D) Procedure.

(1)(a) *Time for Filing in the Trial Courts*. To avoid delaying trial and inconveniencing the witnesses, ~~a~~all motions ~~to~~ for disqualification~~y~~ must be filed within 14

days ~~after~~of the ~~moving party~~ discovery~~s~~ of the ground~~s~~ for disqualification. If the discovery is made within 14 days of the trial date, the motion must be made forthwith.

(b) *Time for Filing in the Court of Appeals.* All motions for disqualification must be filed within 14 days of disclosure of the judges' assignment to the case or within 14 days of the discovery of the grounds for disqualification. If a party discovers the grounds for disqualification within 14 days of a scheduled oral argument or argument on the application for leave to appeal, the motion must be made forthwith.

(c) *Time for Filing in the Supreme Court*. If an appellant is aware of grounds for disqualification of a justice, the appellant must file a motion to disqualify with the application for leave to appeal. All other motions must be filed within 28 days after the filing of the application for leave to appeal or within 28 days of the discovery of the grounds for disqualification. If a party discovers the grounds for disqualification within 28 days of a scheduled oral argument or argument on the application for leave to appeal, the motion must be made forthwith.

All requests for review by the entire Court pursuant to subsection (3)(b) must be made within 14 days of the entry of the decision by the individual justice.

(d) *Untimely Motions.* Untimely motions in the trial court, the Court of Appeals, and the Supreme Court may be granted for good cause shown. If a motion is not timely filed in the trial court, the Court of Appeals, or the Supreme Court, untimeliness~~, including delay in waiving jury trial~~, is a factor in deciding whether the motion should be granted.

(2)-(4) [Unchanged.]

(E) [Unchanged.]

Staff Comment: The amendment of MCR 2.003(D) establishes time requirements for filing motions for disqualification in the trial courts, Court of Appeals, and the Supreme Court.

The staff comment is not an authoritative construction by the Court.

AMENDMENTS OF MICHIGAN RULES OF EVIDENCE

Adopted August 25, 2009, effective September 1, 2009 (File No. 2007-13)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION.

(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Appearance of Parties and Witnesses. The court shall exercise reasonable control over the appearance of parties and witnesses so as to (1) ensure that the demeanor of such persons may be observed and assessed by the fact-finder and (2) ensure the accurate identification of such persons.

(b)-(c) [Relettered (c)-(d), but otherwise unchanged.]

CORRIGAN, J. (*concurring*). I concur in the Court's adoption of this amendment. Requiring trial courts to "exercise reasonable control over the appearance of

parties and witnesses" is consistent with the historical importance in our legal system of the trier of fact's assessment of a witness's demeanor and with the constitutional right of a criminal defendant to confront his accusers face to face.

I. THE UNDERLYING CASE

This rule amendment arose from a small claims action in Michigan's 31st District Court. The plaintiff, Ginah Muhammad, wore a *niqab*, a garment that covered her entire face, except for a slit for her eyes. As Muhammad was preparing to testify, Judge Paul Paruk asked her to remove her *niqab*:

> "One of the things I need to do as I am listening to testimony is I need to see your face and I need to see what's going on and unless you take [niqab] off, I can't see your face and I can't tell whether you're telling me the truth or not and I can't see certain things about your demeanor and temperament that I need to see in a court of law." [*Muhammad v Paruk*, 553 F Supp 2d 892, 896 (ED Mich, 2008), quoting the small claims hearing transcript.]

Muhammad replied:

> "I'm a practicing Muslim and this is my way of life and I believe in the Holy Koran and God is first in my life. I don't have a problem with taking my veil off if it's a female judge, so I want to know do you have a female that I could be in front of then I have no problem but otherwise, I can't follow that order." [*Id.*]

Judge Paruk explained that no female judge was available and suggested that the veil was a "custom thing" rather than a "religious thing." Muhammad strongly objected to that characterization. Judge Paruk gave Muhammad a choice between removing the veil and having the case dismissed. Muhammad chose not to remove her

veil and Judge Paruk dismissed the case without prejudice. *Id*.

Muhammad subsequently filed a suit under 42 USC 1983 against Judge Paruk in federal district court, alleging a violation of her right of free exercise of religion under the First Amendment and her civil right to access to the courts. District Judge John Feikens declined to exercise jurisdiction over the case. Muhammad appealed to the United States Court of Appeals for the Sixth Circuit. *Muhammad v Paruk*, No. 08-1754 (CA 6, filed June 4, 2008).

II. DEMEANOR EVIDENCE AND THE CONFRONTATION CLAUSE[1]

As Judge Learned Hand pointed out in *Dyer v MacDougall*, 201 F2d 265, 268-269 (CA 2, 1952):

> It is true that the carriage, behavior, bearing, manner and appearance of a witness—in short, his "demeanor"—is a part of the evidence. . . . [S]uch evidence may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.

The importance of demeanor evidence is even more fundamental in a criminal case. The right of a criminal defendant "to be confronted with the witnesses against him," US Const, Am VI, has "a lineage that traces back to the beginnings of Western legal culture." *Coy v Iowa*, 487 US 1012, 1015 (1988). "[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as essential to a fair

[1] I refer the reader to Timothy A. Baughman's excellent discussion of relevant Confrontation Clause cases in his May 25, 2009, letter to this Court, which is included as an appendix to this statement.

trial in a criminal prosecution." *Id*. at 1017 (quotation marks and citation omitted).

In *Coy*, the trial court permitted two child witnesses against the defendant to testify behind a screen that prevented them from seeing the defendant. The jury convicted the defendant of two counts of lascivious acts with a child. *Id*. at 1014. The United States Supreme Court reaffirmed that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Id*. at 1016. Writing for the majority, Justice Scalia concluded that the defendant's right of confrontation was violated: "It is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter." *Id*. at 1020. The Court "le[ft] for another day . . . the question whether any exceptions exist." *Id*. at 1021.

In *Maryland v Craig*, 497 US 836, 843 (1990), the witness—a child the defendant was accused of sexually assaulting—was permitted to testify using a one-way closed circuit television procedure established by Maryland statute. The statute permits a trial court to take testimony using this procedure if it finds that testifying in the courtroom would cause the child such serious emotional distress that the child would be unable to reasonably communicate. *Id*. at 840-842. The procedure allowed the defendant and the jury to see the witness but prevented the witness from seeing the defendant. *Id*. at 841, 843.

The Court opined that although the right of a criminal defendant to meet face to face with the witnesses against him was not absolute, *id*. at 844, "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the

reliability of the testimony is otherwise assured." *Id*. at 850. The Court emphasized that although Maryland's procedure does not permit face-to-face confrontation, it "preserves all of the other elements of the confrontation right: The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies." *Id*. at 851. The Court opined that "the presence of these other elements of confrontation—oath, cross-examination, and observation of a witness' demeanor—adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." *Id*. It concluded that the use of the procedure at issue, "where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause." *Id*. at 852.[2]

In addition, state and federal courts have recently considered whether and under what circumstances testimony taken while a witness's eyes or face are not visible to the trier of fact violates a criminal defendant's right of confrontation. In *Morales v Artuz*, 281 F3d 55 (CA 2, 2002), the trial court permitted a key witness to testify while wearing sunglasses after she refused to take them off because of her fear. It concluded that any infringement on the defendant's right to confront the

[2] In a dissenting opinion joined by Justices Brennan, Marshall, and Stevens, Justice Scalia criticized the majority's holding as "antitextual" : "Whatever else it may mean in addition, the defendant's constitutional right to be confronted with the witnesses against him means, always and everywhere, at least what it explicitly says: the right to meet face to face all those who appear and give evidence at trial." *Id*. at 862-863 (Scalia, J., dissenting) (quotation marks and citations omitted).

witness was outweighed by the necessity of the witness's testimony. *Id*. at 57. The Second Circuit acknowledged that there was "some impairment" of the jury's ability to assess the witness's demeanor. *Id*. at 60. It noted that "[s]eeing a witness's eyes has sometimes been explicitly mentioned as of value in assessing credibility." *Id*. It concluded, however, that "[t]he obscured view of the witness's eyes . . . resulted in only a minimal impairment of the jurors' opportunity to assess her credibility" because "the jurors had an entirely unimpaired opportunity to assess the delivery of [the witness's] testimony, notice any evident nervousness and observe her body language," in addition to "their consideration of the substance of her testimony, assessing her opportunity to observe, the consistency of her account, any hostile motive, and all the other traditional bases for evaluating testimony." *Id*. at 61-62.[3]

In *Romero v State*, 173 SW3d 502 (Tex Crim App, 2005), the trial court permitted the witness to testify wearing a baseball cap, dark sunglasses, and a jacket with an upturned collar, after the witness refused to enter the courtroom without his "disguise" because of his fear of the defendant. The Texas Court of Criminal Appeals held that this violated the defendant's right to confront his accusers. Citing *Craig*, it started with the proposition that "[a]n encroachment upon face-to-face confrontation is permitted only when necessary to

[3] Because the case was before the court on habeas review, the applicable standard required the court to consider whether the state courts unreasonably applied clearly established federal law as determined by the United States Supreme Court. 28 USC 2254(d). The court "doubt[ed] that permitting [the witness] to testify behind dark sunglasses was contrary to constitutional law established by the Supreme Court, but even if the law of the Confrontation Clause, as established by the Supreme Court is . . . a generalized right to face-to-face confrontation, the state courts did not make an unreasonable application of such law. *Morales*, *supra* at 62.

further an important public interest and when the reliability of the testimony is otherwise assured." *Id*. at 505, citing *Craig*, *supra* at 850. "Whether the reliability of the testimony is otherwise assured turns upon the extent to which the proceedings respect the four elements of confrontation: physical presence, oath, cross-examination, and observation of demeanor by the trier of fact." *Id*., citing *Craig*, *supra* at 846. The Texas court observed that, unlike in *Craig*, *both* the "physical presence" and "observation of demeanor" elements were impaired. *Id*. at 505-506. With respect to the observation of demeanor, the court stated that while the witness's disguise, in itself, may be relevant to the jury's assessment of demeanor, that was no substitute for the ability to observe the witness's face "the most expressive part of the body and something that is traditionally regarded as one of the most important factors in assessing credibility. To hold otherwise is to remove the 'face' from 'face-to-face' confrontation." *Id*. at 506.

Thus, the United States Supreme Court has recognized the value of face-to-face confrontation, and state and federal courts have applied the principles announced in *Coy* and *Craig* to trial proceedings in which witnesses were permitted to testify with their faces or eyes obscured. These decisions clearly illustrate the Confrontation Clause implications of a witness's appearance. MRE 611, as amended, requires trial courts to consider whether the witness's attire will inhibit the ability of the trier of fact to assess demeanor so much that it gives rise to a violation of the criminal defendant's right of confrontation. Because a trial judge who permits a witness to testify with her face hidden from the trier of fact may cause a violation of a criminal defendant's right to confront the witnesses against him, I urge trial courts to use caution in allowing this practice in criminal cases.

III. EXCEPTIONS TO THE PRACTICE OF VEILING

In light of the case that gave rise to this rule amendment and the opposition to the amendment on religious freedom grounds, it is also worth noting that some scholars suggest that "Islamic law accommodates exceptions to the practice of veiling because of 'necessity.' " *Freeman v Dep't of Highway Safety & Motor Vehicles*, 924 So 2d 48, 52 (Fla App, 2006) (describing the expert testimony of Dr. Kahaled Abou El Fadl.) According to "Islam Question & Answer," a website that "aims to provide intelligent, authoritative responses to anyone's question about Islam,"[4] "[t]he most correct opinion . . . is that it is obligatory [for a woman] to cover [her] face,"[5] but in certain exceptional situations, a woman may uncover her face in the presence of men other than her husband and close male family members. Among 12 listed exceptions are "Testimony" and "In court cases." Under the exception for "Testimony," "[i]t is permissible for a woman to uncover her face when she is giving testimony in court, whether she is a witness in a case or is there to witness a deal, and it is permissible for the qaadi (judge) to look at her in order to know who she is and to protect the rights of all concerned."[6] Similarly, under the exception for "court cases," the website states: "It is permissible for a woman to uncover her face in front of a qaadi (judge) who is to rule either in her favour or against her, and in this situation he may

[4] According to the website, "[t]he responses are handled by Sheikh Muhammad Salih al-Munajjid, using only authentic, scholarly sources based on the Quran and sunnah, and other reliable contemporary scholarly opinions." According to the website, Sheikh Muhammed Salih Al-Munajjid is "a known Islamic lecturer and author." <http://islamqa.com/en/ref/islamqapages/ 2> (accessed June 29, 2009).

[5] <http://islamqa.com/en/ref/cat/56&page=4> (accessed June 29, 2009).

[6] *Id*.

look at her face in order to know who she is and for the sake of protecting people's rights."[7]

In addition, Dawud Walid, "a leading voice for Muslims & Islam in Michigan,"[8] wrote about this issue before this Court's May 12, 2009, public hearing. Although Walid expressed his belief that an exception should be made for Muslim women who "believe sincerely that it is their bona fide religious right under the United States Constitution to wear [the *niqab*] in front of judges," he noted:

> In regards to wearing niqab in the front of judges, scholars of all schools of thought overwhelmingly state that niqab should not be worn in front of judges because facial expressions are a tool in which [sic] judges use to gauge the veracity of testimony. In Neo-Hanbali Saudi Arabia, which is the most "conservative" country in the Muslim world, women must remove niqab in front of judges.[9]

Amended MRE 611 is consistent with the historical value of the trier of fact's assessment of witness demeanor and with a criminal defendant's right to confront his accusers face to face. The suggestion that the practice of veiling sometimes yields to similar principles strengthens my support for the amendment.

MARKMAN, J. (*concurring*). I support the Court's adoption of MRE 611(b), which requires a trial court to exercise reasonable control over the appearance of parties

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[7] *Id*.

[8] Information here is from "Weblog of Dawud Walid": "The official blog of Dawud Walid, a leading voice for Muslims & Islam in Michigan." (accessed June 11, 2009). Walid is also the Executive Director of the Michigan Chapter of the Council on American-Islamic Relations (CIAR). See the CIAR website: (accessed June 29, 2009).

[9] "Drama in MI Regarding Niqab in Courts," May 11, 2009 <http://dawudwalid.wordpress.com/2009/05/page/2/> (accessed June 29, 2009). Walid also noted his personal belief "from an Islamic perspective that Muslim women should not wear niqab in front of judges."

and witnesses to (a) ensure that the demeanor of such persons may be observed and assessed by the fact-finder; (b) ensure the accurate identification of such persons; and (c) enforce the constitutional guarantee that a criminal defendant be "confronted with the witnesses against him." US Const, Am VI; Const 1963, art 1, § 20.

One of the hallmarks of our civilization is the equal application of the rule of law, i.e., the proposition that rights and responsibilities under our legal system apply equally to all, whatever a person's race, religion, or nationality, whatever a person's wealth or station. This is one of the most distinctive and remarkable attributes of our constitutional system, and it is imperative that this equal rule of law not be diluted, or subordinated to other considerations.

To paraphrase the United States Supreme Court in *Employment Div, Dep't of Human Resources of Oregon v Smith*, 494 US 872, 884-885 (1990),[1] critics of the Court's new rule essentially "contend that plaintiff's religious motivation for refusing to abide by the requirements of our legal system places her beyond the reach of a law that is not specifically directed at her practice." The Supreme Court responded to this argument by observing:

> [Critics] assert, in other words, that "prohibiting the free exercise of religion" includes requiring any individual to observe a generally applicable law . . . . [But] if prohibiting the exercise of religion . . . is not the object of the [law], but merely the incidental effect of a generally applicable and otherwise valid [law], the First Amendment has not been offended.

* * *

[1] In *Smith* the United States Supreme Court held that Oregon's prohibition of the use of peyote in religious ceremonies, and the denial of unemployment benefits to persons discharged for such use, did not violate the Free Exercise Clause of the First Amendment.

> To make an individual's obligation to obey such law contingent upon the law's coincidence with his religious beliefs, . . . "to become a law unto himself", . . . contradicts both constitutional tradition and common sense. [*Id*. at 878-884.]

And, as the Court stated in *Lyng v Northwest Indian Cemetery Protective Ass'n*, 485 US 439, 448, 452 (1988), "[t]he free exercise clause . . . does not afford an individual a right to dictate the conduct of the Government's internal procedures. . . . [G]overnment simply could not operate if it were required to satisfy every citizen's religious needs and desires."[2] (Citation and quotation marks omitted.)

Indeed, even under the test established in *Sherbert v Verner*, 374 US 398 (1963), which the United States Supreme Court rejected in *Smith*, whereby governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest, it can hardly be disputed that there is a "compelling governmental interest" in support of the requirement that a witness or party be required to remove veils, face coverings, masks, or any other obscuring garments. It is a "compelling interest" born of our society's commitment to a legal system in which all persons are treated equally. It is a "compelling interest" born of a commitment to a legal system in which the search for truth is paramount, and in which this search may require judges and juries to assess the credibility of parties and witnesses by, among other means, evaluating their

[2] See also *Braunfeld v Brown*, 366 US 599, 606 (1961): "[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference. . . . Consequently, it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in . . . disadvantage to some religious sects . . . ."

expressions and demeanor.[3] It is a "compelling interest" born of a commitment to a system in which appellate courts accord deference to lower courts largely because of the ability of such courts to directly assess witness credibility. And it is a "compelling interest" born of a commitment to a system in which criminal defendants possess the constitutional right to a face-to-face confrontation with their accusers. *Coy v Iowa*, 487 US 1012 (1988).[4]

The dissenting justices would allow an exception to our new rule that would provide that a witness could not be precluded from testifying for reasons having to do with a "sincerely held religious belief."[5] What the dissenting justices fail to recognize is that, while freedom of belief is absolute, freedom of conduct is not. *Bowen v Roy*, 476 US 693, 699 (1986) (denying a parent the right to not have her child assigned a social security number over her religious objections). The government is generally not required to conduct its affairs in accordance with the individual beliefs of particular citizens

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[3] As observed in *United States v Walker*, 772 F2d 1172, 1179 (CA 5, 1985): "The facial expressions of a witness may convey much more to the trier of facts than do the spoken words." (Citation and quotation marks omitted.)

[4] See, e.g., *People v Sammons*, 191 Mich App 351 (1991), where a confidential informant was allowed to testify while wearing a mask. The Court of Appeals remanded for a new hearing stating: "Because the masking of the prosecution's chief witness precluded the trial judge from adequately observing the witness' demeanor when testifying, we are constrained to find that the procedure of masking denied defendant a critical aspect of his confrontation rights."

[5] In *Romero v State*, 173 SW3d 502 (Tex Crim App, 2005) a key prosecution witness who was fearful of the defendant was allowed to testify wearing dark sunglasses, a baseball cap pulled down over his forehead, and a long-sleeved jacket with its collar turned up and fastened so as to obscure his mouth, jaw, and the lower half of his nose. The court reversed defendant's conviction, holding that his Sixth Amendment right to confrontation had been violated.

when it possesses some legitimate governmental interest. *Id.* Moreover, as explained earlier, a law does not offend the Free Exercise Clause of the First Amendment if it is neutral towards religion and only incidentally affects religion, as long as it is "generally applicable and otherwise valid." *Smith*, 494 US at 878. Adopting the amendment favored by the dissenting justices would, of course, nullify the entire purpose of the proposed rule by making every witness a law unto himself or herself, commanding that different rules apply to different witnesses, and eroding traditional rules of fair procedure in the courtroom. Their amendment gives only the illusion of addressing the problem that has prompted the new rule.

I am persuaded that adopting a religious exception would be ill-advised because it would effectively require judges to decide what constitutes a "religion," what constitutes the tenets of that faith, which of these tenets are "central" to that faith, and what is the degree of sincerity of the person asserting his or her faith as a justification for disparate treatment.[6] Judges are not theologians or religious scholars, and, if there is anything that threatens to inappropriately intertwine church and state, it is not the equal application of our legal rules and procedures, without regard to race, religion, or nationality, but rather it is a system in

[6] See, e.g., *Freeman v Dep't of Highway Safety & Motor Vehicles*, 924 So 2d 48, 52 (Fla App, 2006), in which the Florida Court of Appeals upheld a state law mandating that state driver's licenses bear a "full-face" photograph of the license holder, over the objections of a driver who regularly wore a veil over her face for religious reasons. In reaching its decision, the court cited and relied on expert testimony that Islamic law accommodates exceptions to the practice of veiling because of "necessity," including medical necessity, burial identification, and identification for purposes of receiving bequests or inheritances.

which lawyers in robes are invested with decision-making responsibility over such threshold questions.

In summary, parties and witnesses are not a law unto themselves, and they cannot unilaterally determine the rules and procedures under which they will participate in our legal process. Instead, there are rules and procedures—in this instance, having a pedigree of half a millennium or so[7]—by which our system seeks to discern the truth and thereby to resolve cases and controversies. No individual has a right to require that this country compromise what may well be its crowning achievement, a system in which all stand on equal terms before the law.

KELLY, C.J. *(concurring in part and dissenting in part)*. I would adopt the amendment with the addition of the following language: "Provided, however, that no person shall be precluded from testifying on the basis of clothing worn because of a sincerely held religious belief."

I believe that the amendment as adopted can deny the free exercise of religion guaranteed by both the Michigan and United States constitutions.[1] My proposed addition avoids violations of this fundamental right.

The amendment arose from a small claims action in Michigan's 31st District Court. Ginah Muhammed, the plaintiff, is a practicing Muslim who wears a *niqab*, a veil that covers her face, except for her eyes. When the case came before the court, the judge told Ms. Muhammed that she must remove her *niqab* to allow him to evaluate her credibility. She explained that her religion prevented her from following that order, stat-

[7] Indeed, we are told in *Coy*, 487 US at 1016, that the right of an accused to meet his or her accuser face to face existed under Roman law.

[1] US Const, Am I; Const 1963, art 1, § 4 ("The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his [or her] religious belief.").

ing: "I don't have a problem with taking my veil off if it's a female judge, so I want to know do you have a female that I could be in front of then I have no problem but otherwise, I can't follow that order." The judge gave Ms. Muhammed an ultimatum: either remove her veil or her case would be dismissed. She refused to remove the veil and the judge dismissed the case.

Michigan has traditionally afforded strong protection to the free exercise of religion. As this Court has recognized:

> [T]he right to the free exercise of religion was heralded as one of the Bill of Rights' most important achievements. Indeed, Jefferson proclaimed that "[n]o provision in our constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority."[2]

Consistently with the high value placed on the freedom to exercise one's religion, Michigan courts analyze free exercise claims using a strict scrutiny test.[3] "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[4]

It is also clear that the government and litigants have a compelling interest in confronting witnesses and determining their credibility in courts of law. The right

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[2] *People v DeJonge (After Remand)*, 442 Mich 266, 278 (1993) (citation omitted).

[3] See, e.g., *McCready v Hoffius*, 459 Mich 131, 143-144 (1998) vacated and remanded in part on other grounds 459 Mich 1235 (1999). Under this test, Michigan courts determine whether: (1) the belief at issue is sincerely held; (2) the belief at issue is religiously motivated; (3) the regulation at issue burdens the exercise of the belief at issue; (4) a compelling state interest justifies the burden at issue; and (5) there is a less obtrusive form of regulation available to the state. *Id*. at 144.

[4] *Wisconsin v Yoder*, 406 US 205, 215 (1972).

of confrontation is fundamental.[5] But the right to the free exercise of religion is no less fundamental. I believe that a judge must not require a plaintiff to choose between removing her *niqab* or having her case dismissed if a less obtrusive way exists to assess her credibility.

As is evidenced by Ms. Muhammed's litigation, other ways do exist. Her case could have been transferred to a female judge. Or, the male judge assigned to her case could have assessed Ms. Muhammed's credibility without requiring her to remove her *niqab*.

It is not unheard of that a trier of fact in a court proceeding is unable to view the face of a party or witness. The Confrontation Clause is not thereby violated. For example, there are blind jurors. New York courts have explicitly upheld the ability of a blind juror to sit in a jury trial.[6] New York recognized that "a long list of factors besides demeanor [can] be used in evaluating a witness' testimony."[7]

Likewise, several states have enacted statutes that expressly prohibit the exclusion of blind jurors based on their disability.[8] "[A]lthough a blind juror cannot rely on sight, the individual can certainly hear the witness testify, hear the quaver in a voice, listen to the witness clear his or her throat, or analyze the pause between question and answer, then add these sensory impressions to the words spoken and assess the witness's credibility."[9]

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[5] US Const, Am VI.

[6] *People v Caldwell*, 159 Misc 2d 190 (1993).

[7] *Id*. at 192-193.

[8] Va Code Ann 8.01-337; Tex Gov't Code Ann 62.104(a) and (b); SC Code Ann 14-7-810(3); Mass Gen Laws Ann, ch 234, § 4.

[9] *Galloway v Superior Court of Dist of Columbia*, 816 F Supp 12, 17 (D DC, 1993).

Also, there are blind judges. Respected judges in Michigan have been blind, including recently retired Judge Paul S. Teranes of the Wayne Circuit Court. The nation's first blind federal trial judge, the Honorable Richard Conway Casey, faced questions at his confirmation hearings regarding his ability to measure the credibility of a witness he could not see. He responded that visual elements could be distracting. The true measure of credibility, he said, is whether the details in the testimony fit together in a coherent, logical way.[10] The United States Senate did not let his disability prevent his confirmation.

In another example, courts routinely permit the admission of testimony although the speaker never appears in court. The Michigan Rules of Evidence permit statements made at a former trial or deposition to be introduced when the speaker does not testify.[11] Similarly, excited utterances, present sense impressions, statements regarding existing states of mind and statements made for the purpose of medical treatment are all admissible at trial absent the declarant.[12]

Obviously, if the declarant is not present, the declarant cannot be confronted in person; his or her face cannot be viewed. Nonetheless, his or her credibility can be judged. And one can more effectively confront and determine the credibility of a witness wearing a niqab than one can confront and determine the credibility of an absent, faceless deponent.

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[10] See Larry Neumeister, Blind Federal Judge an Inspiration, <http://www.jwen.com/rp/articles/ blindjudge.html> (accessed October 28, 2001).

[11] MRE 804(b)(1) and (5).

[12] See MRE 803(1) through (4).

Moreover, numerous empirical studies support the proposition that viewing a witness's face does not necessarily enhance someone's ability to discern the witness's honesty.[13] In fact, one study found that judges who attempted to determine credibility on the basis of facial expressions were able to detect untruthfulness only 57 percent of the time.[14] People are better able to identify deception by listening to a witness's voice than by observing his or her face.[15]

In any event, our research has disclosed no case in which the Confrontation Clause has been violated because a witness covered his or her face with religious garb. Justice CORRIGAN in her statement and Prosecutor Baughman in his attached letter address the importance of the Confrontation Clause. But, significantly, neither cites a case involving the freedom of religion. And neither cites a case in which the Confrontation Clause has been held to trump the Free Exercise of Religion Clause.

The law of foreign jurisdictions does not apply in Michigan. Nonetheless, Justice CORRIGAN cites a foreign jurisdiction that requires the *niqab* be removed before a judge. It is worth noting that, in certain foreign jurisdictions, women enjoy greater rights under the law than in the jurisdiction mentioned by Justice CORRIGAN. And in the former jurisdictions, the religious significance of the *niqab* has received greater respect in courts.

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[13] See, e.g., Wellborn, *Demeanor*, 76 Cornell L R 1075 (1991) (collecting studies); Blumenthal, *A wipe of the hands, a lick of the lips: The validity of demeanor evidence in assessing witness credibility*, 72 Neb L R 1157 (1993) (same).

[14] See Ekman & O'Sullivan, *Who can catch a liar?*, 46 Am Psychologist 913, 916 (1991).

[15] See DePaulo et al., *Attentional determinants of success at detecting deception and truth*, 8 Personality & Social Psychology Bull 273 (1982).

For example, the Judicial Studies Board of Britain released a memorandum to guide judges confronted with a witness who wears a *niqab* in court. The board recognized that "there is room for diversity in our system of justice and there should be a willingness to accommodate different practices and approaches to religious cultural observances."[16] The board explained that it should not be assumed "that it is inappropriate for a woman to give evidence in court wearing the full veil."[17] In New Zealand, judges are authorized to allow a witness to give evidence through alternative means that do not interfere with "the linguistic or cultural background or religious beliefs of the witness."[18]

The amendment that the Court has adopted has been opposed by the American Civil Liberties Union of Michigan, the Michigan Civil Rights Commission, and a consortium of religious, domestic violence, and cultural diversity organizations. I agree with them that a judge should not force a woman who wears a *niqab* because of a sincerely held religious belief to remove it before testifying in court. I agree that such a practice is unnecessary in order to protect the right of confrontation given that less obtrusive means exist to satisfy that right.

I would support the proposed amendment if it included the exception for sincerely held religious beliefs that I have proposed.

HATHAWAY, J., concurred with KELLY, C.J.

Staff Comment: This amendment explicitly states that a judge shall establish reasonable standards regarding the appearance of parties and witnesses to evaluate the demeanor of those individuals and to ensure accurate identification.

The staff comment is not an authoritative construction by the Court.

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[16] Judicial Studies Board, Equal Treatment Advisory Committee, *Guidance on Wearing of the Veil or Niqab in Court*, ch 3.3 at 3, 6.

[17] *Id.*

[18] *Evidence Act* 2006, 2006 PA 69, § 103 (NZ).

APPENDIX

May 25, 2009

Mr. Corbin Davis
Clerk
Michigan Supreme Court

Re: ADM File No. 2007-13.

Dear Clerk Davis:

Below are my comments with respective to Administrative File 2007-13. The comment period has closed, and the public hearing has been held; I regret my tardiness with regard to this proposal. But I was surprised to see those who, by their own statement, are "strong advocate[s] of the Confrontation Clause and the rights of criminal defendants" (comments of ACLU of Michigan) take the view that allowing a witness to testify in a criminal prosecution with his or her face covered would not violate the confrontation clause rights of a criminal defendant. There is little question, it seems to me, that attorneys representing defendants in criminal prosecutions will take a different view (indeed, it seems to me they are virtually ethically so required). Because that view has not been expressed to the court, I make the following comments. Though I have views with regard to this subject with civil cases, I limit myself here to criminal cases.

The Supreme Court Cases

A. Coy v Iowa[1]

The defendant was charged with sexually assaulting two 13-year-old girls. As allowed by statute, the trial judge permitted these witnesses to testify at trial behind a screen, lit so that they could not see the defendant at all, and he could dimly make them out. The Supreme Court said that "We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact" and that "[t]he Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who

[1] 487 U.S. 1012,108 S.Ct. 2798,101 L.Ed.2d 857 (1988)

testify against him, and the right to conduct cross-examination." The use of the screen was held unconstitutional on the facts of the case. But left open was "whether any exceptions exist."

B. Maryland v Craig[2]

The defendant was prosecuted for a sexual assault on a 6-year-old child. Statute permitted the taking of the testimony by way of a one-way closed circuit television feed, on a finding that this was necessary to prevent trauma to the child. While the defendant could see the face of the witness, as could the jury, the witness-victim would not see the defendant. This process was upheld in a 5-4 opinion. The Court concluded that though the witness could not see the defendant as she testified, the procedure was permissible—on the proper statutory showing—because it "preserve[d] *all of the other elements* of the confrontation right: The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the *judge, jury, and defendant are able to view (albeit by video monitor) the demeanor* (and body) of the witness as he or she testifies.. . .the presence of these other elements of confrontation-oath, cross-examination, and *observation of the witness' demeanor*-adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony" (emphasis supplied). Emphasized, then, was that both jury and defendant could see the face of the witness.[3] Given current Confrontation Clause developments, I find it doubtful that even this exception—permitting the witness to avoid "face-to-face" confrontation with the defendant so long as both the defendant and jury may observe the face of the witness—would survive today.

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[2] 497 U.S. 836,110 S.Ct. 3157,111 L.Ed.2d 666 (1990).

[3] And Justice Scalia, for the dissenters, found this inadequate:

> The reasoning is as follows: The Confrontation Clause guarantees not only what it explicitly provides for-"face-to-face" confrontation-but also implied and collateral rights such as cross-examination, oath, and observation of demeanor (TRUE); the purpose of this entire cluster of rights is to ensure the reliability of evidence (TRUE); the Maryland procedure preserves the implied and collateral rights (TRUE), which adequately ensure the reliability of evidence (perhaps TRUE); therefore the Confrontation Clause is not violated by denying what it explicitly provides for-"face-to-face" confrontation (unquestionably FALSE). This reasoning abstracts from the right to its purposes, and then eliminates the right. It is wrong because the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was "face-to-face" confrontation.
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> 497 U.S. 836, 862, 110 S.Ct. 3157, 3172.

The "Disguise" Cases

Several cases have considered the confrontation clause implications when witnesses are allowed to obscure their faces from the view of the defendant and the jury (which was not the case—something emphasized by the Court—in *Craig*). In *Romero v State*[4] the witness wore dark sunglasses, a baseball cap pulled down over his forehead, and a long-sleeved jacket with its collar turned up and fastened so as to obscure his mouth, jaw, and the lower half of his nose—in essence, as the court put it, the effect was "to hide almost all of his face from view." The witness insisted on this arrangement, refusing to otherwise testify, even if it meant his jailing, because he was afraid of the defendant, given what he had seen him do during the crime (the witness was not the victim, but observed an exchange of gunfire between the defendant and a security guard at a nightclub). The court found *Craig* distinguishable because the jury and the defendant here were unable to assess the demeanor of the witness, something *Craig* had emphasized was present in that case. To hold otherwise, said the court is "to remove the 'face' from "face-to-face confrontation."

Another "sunglasses/disguise" case is *Commonwealth v Lynch*.[5] Defendant claimed a prosecution witness had worn sunglasses during his testimony—there was no other evidence of any part of the witness's face being covered—but there had been no objection at trial, and defendant's trial counsel did not remember sunglasses at all, while his co-counsel believed the witness wore tinted glasses that were not very dark. The prosecutor did not believe the witness wore sunglasses during testimony, and the court found that defendant's claim foundered on the facts. But even in the event the witness had worn sunglasses, the court concluded that the wearing of dark glasses "does not prevent exposure of a witness's face." So long as the face of the witness was visible, then, the court found no confrontation clause violation.

In *Morales v Artuz*[6] a principal witness, who was sighted, was permitted to testify wearing dark sunglasses ("you couldn't see through them" to see the eyes of the witness) because of her fear. The court agreed that the right of confrontation was "impaired" to some extent—"to the extent that the right assures an opportunity for the defendant and especially the jurors to see the witness's eyes in order to consider her demeanor as an aid to assessing her credibility, some impairment occurred." But the case was on federal habeas review, and the standard to be applied was whether the state courts had "unreasonably applied settled federal law as determined by the United States Supreme Court" in upholding the testimony, and the court did not find that standard met and so affirmed the denial of the writ.

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[4] 173 SW 3d 502 (2005).

[5] 789 NE2d 1052 (Mass, 2003).

[6] 281 F3d 55 (CA 2, 2002).

Conclusion

Though the law is not clear, the strong trend is toward strengthening not weakening confrontation clause protections. And even *Craig*, which allowed the witness to avoid face-to-face confrontation with the defendant, did so only on a showing of need, *and* because both the defendant and the jury could see the face of the witness. The "disguise" and sunglasses cases tend to turn on whether the remainder of the witness's face is open to view (and I suspect the use of dark sunglasses by a sighted witness without some medical necessity may, after *Crawford*, receive closer scrutiny). I do not think significant obstruction of the visage of a witness in a criminal case would survive confrontation-clause scrutiny, and I hope it is beyond argument that prosecution witnesses and defense witnesses should not be treated differently in this regard. It is thus vitally important that the court make it clear that a witness in a criminal case must testify without significant obscuring of the face. Again, while I have my own views with regard to civil cases, I will leave that question alone.

The views laid out here are my own and are not intended to represent the views of my Office.

Sincerely,

Timothy A. Baughman

ADOPTION OF LOCAL COURT RULES

SIXTH JUDICIAL CIRCUIT

Adopted October 13, 2009, effective immediately (File No. 2009-15)—REPORTER.

RULE 2.612. SOCIAL SECURITY NUMBER REDACTION LOCAL COURT RULE.

I. Scope

This local rule is issued in accordance with Michigan Court Rules 2.119 and 2.612(A) and Supreme Court Administrative Order No. 2006-2. The local rule establishes the procedure by which the court will process motions to redact identified social security numbers and other personal information from specified documents filed on or after March 1, 2006.

II. Procedure

A. A party[1] may file a motion to redact one's social-security number[2] (SSN) or other personal information

[1] As used in this local administrative order, "party" includes the named party, counsel representing the named party, the next friend, a guardian ad litem, a personal representative, a guardian, and a conservator. This definition also includes individuals who discover their social security number (SSN) or other personal information included in a case file.

[2] Social security number means a complete, unredacted nine-digit social security number.

from any document in which it is not required by statute, court rule, court order, or as required for identification purposes.

1. A party requesting redaction of an SSN or other personal information shall identify the document containing the SSN or other personal information, the date the document was filed with the Court, and the page and line number where the SSN or other personal information is located.

2. Multiple documents and locations may be identified in a single motion.

3. Pursuant to Michigan Court Rules (MCR) 2.119 and Administrative Order (AO) No. 2006-2, a separate motion is required for each case that contains one's SSN or other personal information.

B. A party shall serve a copy of the motion to redact an SSN or other personal information on opposing parties as required by MCR 2.119(C). In addition, when the person files the motion for redaction, the person shall provide an extra copy for the court administrator marked "court administrator copy." The court clerk must transmit the copy to the court administrator's office.

1. Opposing parties may object to the motion within seven days after service of the motion. An objecting party shall also notice the objections for hearing and file a praecipe before the assigned judge.

2. Unless otherwise ordered by the Court, all motions to redact an SSN or other personal information shall be decided without oral argument as provided at MCL 2.119(E)(2).

C. After the period to respond to the motion has elapsed, the motion to redact the SSN or other personal information and any response shall be reviewed by the

Court. The standards shall include that the motion complies with the requirements of MCR 2.119, MCR 2.612(A), AO 2006-2, and this order and shall be limited to motions to redact an SSN and other personal information. If the court grants the motion, the court shall enter an order allowing the information to be redacted. The order shall be made part of the court record.

MICHIGAN RULES OF PROFESSIONAL CONDUCT

Adopted December 15, 2009, effective nine months after entry by the Court (September 15, 2010) (File No. 2008-13)—REPORTER.

[This is a new rule.]

RULE 1.15A. TRUST ACCOUNT OVERDRAFT NOTIFICATION.

(a) Scope. Lawyers who practice law in this jurisdiction shall deposit all funds held in trust in accordance with Rule 1.15. Funds held in trust include funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, executor or otherwise.

(1) "Lawyer" includes a law firm or other organization with which a lawyer is professionally associated.

(2)For any trust account which is an IOLTA account pursuant to Rule 1.15, the "Notice to Eligible Financial Institution" shall constitute notice to the depository institution that such account is subject to this rule. Lawyers shall clearly identify any other accounts in which funds are held in trust as "trust" or "escrow" accounts, and lawyers must inform the depository institution in writing that such other accounts are trust accounts for the purposes of this rule.

(b) Overdraft Notification Agreement Required. In addition to meeting the requirements of Rule 1.15, each bank, credit union, savings and loan association, sav-

ings bank, or open-end investment company registered with the Securities and Exchange Commission (hereinafter "financial institution") referred to in Rule 1.15 must be approved by the State Bar of Michigan in order to serve as a depository for lawyer trust accounts. To apply for approval, financial institutions must file with the State Bar of Michigan a signed agreement, in a form provided by the State Bar of Michigan, that it will submit the reports required in paragraph (d) of this rule to the Grievance Administrator and the trust account holder when any properly payable instrument is presented against a lawyer trust account containing insufficient funds or when any other debit to such account would create a negative balance in the account, whether or not the instrument or other debit is honored and irrespective of any overdraft protection or other similar privileges that may attach to such account. The agreement shall apply to the financial institution for all of its locations in Michigan and cannot be canceled except on 120 days notice in writing to the State Bar of Michigan. Upon notice of cancellation or termination of the agreement, the financial institution must notify all holders of trust accounts subject to the provisions of this rule at least 90 days before termination of approved status that the financial institution will no longer be approved to hold such trust accounts.

(c) The State Bar of Michigan shall establish guidelines regarding the process of approving and terminating "approved status" for financial institutions, and for other operational procedures to effectuate this rule in consultation with the Grievance Administrator. The State Bar of Michigan shall periodically publish a list of approved financial institutions. No trust account shall be maintained in any financial institution that has not

been so approved. Approved status under this rule does not substitute for "eligible financial institution" status under Rule 1.15.

(d) Overdraft Reports. The overdraft notification agreement must provide that all reports made by the financial institution contain the following information in a form acceptable to the State Bar of Michigan:

(1) The identity of the financial institution

(2) The identity of the account holder

(3) The account number

(4) Information identifying the transaction item

(5) The amount and date of the overdraft and either the amount of the returned instrument or other dishonored debit to the account and the date returned or dishonored, or the date of presentation for payment and the date paid.

The financial institution must provide the information required by the notification agreement within five banking days after the date the item was paid or returned unpaid.

(e) Costs. The overdraft notification agreement must provide that a financial institution is not prohibited from charging the lawyer for the reasonable cost of providing the reports and records required by this rule, but those costs may not be charged against principal, nor against interest or dividends earned on trust accounts, including earnings on IOLTA accounts payable to the Michigan State Bar Foundation under Rule 1.15. Such costs, if charged, shall not be borne by clients.

(f) Notification by Lawyers. Every lawyer who receives notification that any instrument presented against the trust account was presented against insufficient funds or that any other debit to such account would create a negative balance in the account, whether

or not the instrument or other debit was honored, shall, upon receipt of a request for investigation from the Grievance Administrator, provide the Grievance Administrator, in writing, within 21 days after issuance of such request, a full and fair explanation of the cause of the overdraft and how it was corrected.

(g) Every lawyer practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the requirements mandated by this rule and shall be deemed to have consented under applicable privacy laws, including but not limited to those of the Gramm-Leach-Bliley Act, 15 USC 6801, to the reporting of information required by this rule.

Staff Comment: This new rule, submitted by the State Bar of Michigan and supported by the Attorney Grievance Commission, requires attorneys to maintain client trust accounts in approved financial institutions. The State Bar of Michigan will establish guidelines for approving and terminating "approved status" for financial institutions, and will periodically publish a list of approved financial institutions. The financial institutions become approved by, among other requirements, agreeing to notify the Grievance Administrator and the lawyer if a lawyer's trust account is overdrawn. If the Grievance Administrator sends the lawyer a request for investigation based on the overdraft, the lawyer is required to submit an explanation of the overdraft to the Grievance Administrator within 21 days.

The staff comment is not an authoritative construction by the Court.

SUPREME COURT CASES

DEPARTMENT OF AGRICULTURE
v APPLETREE MARKETING, LLC

Docket No. 137552. Argued October 7, 2009 (Calendar No. 7). Decided March 10, 2010.

The Department of Agriculture and the Michigan Apple Committee brought an action in the Kent Circuit Court against Appletree Marketing, L.L.C., and its manager and sole member, Steven Kropf, after Appletree (an apple distributor) failed to remit to the committee assessments that Appletree collected from apple producers under the Agricultural Commodities Marketing Act (ACMA), MCL 290.651 *et seq*. Plaintiffs alleged that Appletree had violated the ACMA and that Appletree and Kropf had committed common-law and statutory conversion. Defendants consented to a judgment against Appletree to settle the ACMA claim of failure to remit the assessments, but sought summary disposition of the conversion claims, contending that the ACMA provided the exclusive remedies available to plaintiffs. The court, George S. Buth, J., dismissed the conversion claims with prejudice. The Court of Appeals, METER, P.J., and HOEKSTRA and SERVITTO, JJ., affirmed, holding that because any claim that Appletree wrongfully spent the money held in trust was based on the duties that the ACMA imposed on it, the ACMA provided the exclusive remedies. The Court of Appeals also held that the trial court did not err by dismissing the conversion claims against Kropf because he could not be liable under the ACMA and thus could not be personally liable in any regard. 280 Mich App 635 (2008). The Supreme Court granted plaintiffs' application for leave to appeal. 483 Mich 1000 (2009).

In a unanimous opinion by Justice YOUNG, the Supreme Court *held*:

The ACMA does not provide the exclusive remedies for its violation and did not supersede preexisting statutory remedies or abrogate common-law remedies. A plaintiff may pursue an action against a corporate official in the official's personal capacity when the plaintiff alleges harm by that official's own tortious conduct.

1. MCL 290.669 does not limit the remedies the director of the department may pursue. Rather, it contemplates remedies, such as

those for conversion, in addition to those provided by the ACMA. MCL 600.2919a(2), the statutory conversion provision, also indicates that statutory conversion claims are cumulative in nature. Absent a legislative intent to do so, a statute does not eliminate preexisting duties, rights, and remedies. Separate from defendants' statutory duties under MCL 290.669 to collect funds on behalf of plaintiffs and hold those funds in trust, defendants also owed plaintiffs an independent duty not to convert those funds. Thus, plaintiffs' claims for statutory conversion did not arise under MCL 290.669.

2. Common-law conversion existed before the enactment of the ACMA. It consists of any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights in that property. It may occur when a person properly in possession of property uses it in an improper way, for an improper purpose, or by delivering it without authorization to a third party. A conversion claim can be distinct from an ACMA claim. A conversion claim does not arise from a distributor's mere failure to deduct or remit assessments due the committee; refusal to deliver possession pursuant to a lawful demand is only evidence of conversion rather than conversion itself. A conversion claim arises from the distributor's breach of its separate and independent duty not to exert wrongful dominion over the committee's personal property. While an ACMA claim arises when the distributor fails to collect or remit assessments when due, a conversion claim arises when the distributor wrongfully exerts dominion over the committee's property, which can occur before or after the remittance is due. Moreover, the committee can recover the assessments plus costs and expenses in an ACMA action, but can also recover exemplary damages in a conversion action. Plaintiffs' property rights in the assessments exist only because of the ACMA, but the alleged wrongful conduct was actionable at common law and is distinct from the wrongful conduct addressed by the ACMA. Thus, the ACMA did not abrogate common-law claims for conversion.

3. Corporate officials may be held personally liable for their individual tortious acts done in the course of business, regardless of whether they were acting for their personal benefit or the corporation's benefit. Officers may be individually liable when they personally cause their corporation to act unlawfully. It is not necessary to pierce the corporate veil to hold corporate officials liable for their own intentional torts. Kropf can be held personally liable for any intentional torts that he is proved to have committed in the course of operating his business. Plaintiffs need not allege a

violation of the ACMA in relation to Kropf to hold him personally liable for his separate tort of conversion.

Reversed and remanded for further proceedings.

1. AGRICULTURE — REMEDIES — AGRICULTURAL COMMODITIES MARKETING ACT — CONVERSION — COMMON-LAW CONVERSION.

The Agricultural Commodities Marketing Act does not provide the exclusive remedies for its violation and does not supersede preexisting statutory remedies or abrogate common-law remedies; remedies for conversion are cumulative to remedies provided under the act (MCL 290.669, 600.2919a).

2. CORPORATIONS — LIMITED LIABILITY COMPANIES — OFFICIALS OF CORPORATIONS — TORTS — INTENTIONAL TORTS — PIERCING THE CORPORATE VEIL.

Corporate officials may be held personally liable for their individual tortious acts done in the course of business, regardless of whether they were acting for their personal benefit or the corporation's benefit; it is not necessary to pierce the corporate veil to hold corporate officials personally liable for their intentional torts.

White, Schneider, Young & Chiodini, P.C. (by *James J. Chiodini* and *Shirlee M. Bobryk*), for the Department of Agriculture and the Michigan Apple Committee.

Miller Johnson (by *J. Scott Timmer*) for Appletree Marketing, L.L.C., and Steven Kropf.

Amici Curiae:

Fahey Schultz Burzych Rhodes PLC (by *Stephen J. Rhodes*) for the Michigan Asparagus Advisory Board, the Michigan Onion Committee, the Michigan Plum Advisory Board, the Michigan Soybean Promotion Committee, the Michigan Bean Commission, the Corn Marketing Program of Michigan, Potato Growers of Michigan, Inc., and the Cherry Marketing Institute.

YOUNG, J. This case requires this Court to determine whether the remedies provided for a breach of the Agricultural Commodities Marketing Act (ACMA) supersede remedies provided by statute under the Revised

Judicature Act (RJA) or abrogate those traditionally available at common law. We must further decide whether the member-manager of a limited liability company who causes his business to breach common law and statutory duties may be held independently liable for his personal torts.

We conclude that the ACMA does not provide the exclusive remedy for its violation and thus does not supersede preexisting statutory remedies or abrogate common law remedies. Therefore, plaintiffs may pursue cumulative remedies provided by the ACMA as well as common law and statutory conversion. Furthermore, Michigan law is well settled that a plaintiff may pursue an action against a corporate official in his personal capacity when the plaintiff alleges that the official's own tortious conduct harmed the plaintiff. We hold that the trial court erred by dismissing plaintiffs' actions for conversion against defendant Steven Kropf. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the Kent Circuit Court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

The facts of the instant case are not disputed by any party. The Michigan Legislature enacted the ACMA[1] to provide "a procedure whereby marketing programs could be established for a wide variety of Michigan's agricultural products."[2] In this case, the agricultural product is apples. Pursuant to the ACMA, Michigan apple producers created plaintiff Michigan Apple Committee (the Committee), an agency within plaintiff Michigan Department of Agriculture (the Department).

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[1] MCL 290.651 *et seq*.

[2] *Dukesherer Farms, Inc v Dep't of Agriculture Director (After Remand)*, 405 Mich 1, 9; 273 NW2d 877 (1979).

The Committee is funded through assessments placed on the purchase price charged to apple distributors. Under the ACMA, apple distributors deduct the assessments from payments sent to producers, hold the funds in trust, and remit the funds to the Committee on a periodic basis.[3]

Defendant Appletree Marketing, L.L.C. (Appletree), was an apple distributor managed by defendant Steven Kropf, Appletree's sole member. Although Appletree collected assessments for 2004 and 2005, it failed to remit any funds to the Committee. Instead, Appletree used the money to pay the company's other debts.

When a distributor fails to remit assessed funds, the ACMA allows the Committee to file a written complaint with the director of the Department. The director investigates and requests remittance; after 30 days, the director may file a complaint in court.[4] The Department and director each followed these procedures in the instant case. When Appletree—by this time a bankrupt and defunct corporation—failed to pay upon demand, plaintiffs filed a complaint against Appletree and Kropf to recover the 2004 assessments ($26,305.98) and subsequently amended the complaint to include the 2005 assessments ($28,878.66). Plaintiffs alleged that Appletree violated the ACMA,[5] and that both Appletree and Kropf committed common law and statutory conversion.[6]

Defendants consented to a judgment of $55,184.64 against Appletree to settle plaintiffs' ACMA claim. However, defendants sought summary disposition on

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[3] MCL 290.655(e) ("All assessments collected or deducted shall be considered trust funds and be remitted quarterly or more frequently if required by the marketing program to the appropriate committee.").

[4] MCL 290.655(f).

[5] MCL 290.655.

[6] MCL 600.2919a (statutory conversion).

plaintiffs' conversion claims, arguing that the ACMA provided the exclusive remedies for the failure to remit the assessment funds because the act created new rights and prescribed particular remedies. The trial court agreed and dismissed with prejudice plaintiffs' conversion claims against both Appletree and Kropf, entering a final judgment against Appletree based on liability under the ACMA in the amount of $77,051.23.[7]

The Court of Appeals affirmed the trial court's judgment, holding that any claim that Appletree wrongfully spent the money held in trust was based entirely on the duty imposed on Appletree by the ACMA. Because "plaintiffs' common-law and statutory conversion claims do not exist without the ACMA," the ACMA provided the exclusive remedies.[8] Similarly, the Court reasoned that because Kropf could not be liable under the ACMA, he could not be personally liable in any regard; thus, the trial court did not err by dismissing the claims of conversion against him.

We granted plaintiffs' application for leave to appeal, directing the parties to address the following issues:

> (1) whether the plaintiffs may simultaneously pursue claims against Appletree Marketing, LLC for alleged violations of the Agricultural Commodities Marketing Act, MCL 290.651 *et seq.*, and for common-law and statutory conversion under MCL 600.2919a; and (2) whether, under the circumstances of this case, the plaintiffs may pursue claims for common-law and statutory conversion against Appletree's principal, Steven Kropf.[9]

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[7] This amount included the unpaid assessments, statutory interest pursuant to MCL 290.672 (1 percent a month), attorney fees, audit expenses, and other costs. See MCL 290.655(f).

[8] *Dep't of Agriculture v Appletree Marketing, LLC*, 280 Mich App 635, 645; 761 NW2d 277 (2008).

[9] *Dep't of Agriculture v Appletree Marketing, LLC*, 483 Mich 1000, 1000-1001 (2009).

II. STANDARD OF REVIEW

Whether the ACMA provides plaintiffs' exclusive statutory remedy is a matter of statutory interpretation. Accordingly, our review is de novo.[10] Whether the ACMA abrogates claims for common law conversion is also a question of law, which we likewise review de novo.[11]

III. ANALYSIS

A. THE ACMA DOES NOT ABROGATE CONVERSION CLAIMS

We must first determine whether the ACMA displaces other statutory and common law causes of action. Plaintiffs urge this Court to recognize that the Legislature explicitly, and in unequivocal language, intended that any avenues for relief that the ACMA provides are cumulative to traditional common law or statutory remedies. Defendants and the courts below relied almost exclusively on the proposition that "[i]f 'a statute gives new rights and prescribes new remedies, such remedies must be strictly pursued; and a party seeking a remedy under the act is confined to the remedy conferred thereby and to that only.' "[12] Defendants argue, and the courts below agreed, that this rule of statutory construction displaces the plain reading advanced by plaintiffs. While the proposition is generally a correct statement of law for construing statutes that create new causes of action, it cannot be applied in a manner that conflicts with the plain language prescribed by the Legislature.

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[10] See *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

[11] See *Kaiser v Allen*, 480 Mich 31, 35; 746 NW2d 92 (2008).

[12] *Dep't of Agriculture*, 280 Mich App at 642, quoting *Monroe Beverage Co, Inc v Stroh Brewery Co*, 454 Mich 41, 45; 559 NW2d 297 (1997).

1. STATUTORY CONVERSION

In interpreting statutory language, this Court's primary goal is to give effect to the Legislature's intent. If the Legislature has clearly expressed its intent in the language of a statute, that statute must be enforced as written, free of any "contrary judicial gloss."[13]

In analyzing the relevant statutes, we turn first to the specific statutory language of the ACMA. The ACMA's enforcement provision provides, in relevant part:

> The director may institute an action necessary to enforce compliance with this act, a rule promulgated under this act, or a marketing agreement or program adopted under this act and committed to his or her administration. *In addition to any other remedy provided by law*, the director may apply for relief by injunction to protect the public interest without being compelled to allege or prove that an adequate remedy at law does not exist.[14]

The plain language of the statute does not limit the remedies the director may pursue. Contrary to defendants' argument that the ACMA provides the exclusive remedies, the language provides that "*any* other remed[ies]" may be pursued "[i]n *addition*" to those explicitly described. "Any" is defined as "every; all."[15] Clearly, this language is not exclusive of other remedies outside the ACMA.

While the emphasized text is an introductory clause to the statutory authorization permitting the director to obtain an injunction, it is not solely a limitation on the injunctive remedy. This statutory language contem-

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[13] *Morales v Auto-Owners Ins Co (After Remand)*, 469 Mich 487, 490; 672 NW2d 849 (2003) (quotation marks and citation omitted).

[14] MCL 290.669 (emphasis added).

[15] *Random House Webster's College Dictionary* (1997).

plates *both* an action necessary to enforce the ACMA *and* an injunction *in addition to any other remedy provided by law*. Defendants read the ACMA as though the phrase "[i]n addition to any other remedy provided by law" actually says "in addition to any other remedy *provided by the ACMA*." It clearly does not. Thus, to give meaning to the phrase "any other remedy *provided by law*" we must conclude that it means remedies *in addition* to those in the ACMA, such as those for conversion.

We next turn to the specific language used in the statutory conversion provision. MCL 600.2919a(2) provides that relief for a claim of statutory conversion "is in addition to any other right or remedy the person may have at law or otherwise."[16] This clear, unambiguous

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[16] In full, MCL 600.2919a provides:

> (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:
>
> (a) Another person's stealing or embezzling property or converting property to the other person's own use.
>
> (b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted.
>
> (2) The remedy provided by this section is in addition to any other right or remedy the person may have at law or otherwise.

MCL 600.2919a became effective in its present form on June 16, 2005, after amendment by 2005 PA 44. Before its amendment, MCL 600.2919a applied only to third parties who aided another's act of conversion or embezzlement, and did not apply to the person who directly converted or embezzled, as it does now. While the parties dispute which version of the RJA applies, for present purposes, the current version is substantially similar to the former version given that, in both, the statutory remedy provided is "in addition to" other remedies at law.

language explicitly indicates the cumulative nature of statutory conversion claims. Furthermore, as noted, the ACMA does not contain an exclusive remedy provision that would explicitly prevent such cumulative claims.[17] The Legislature has used expansive language indicating an intent to provide the broadest possible application, and thus allow cumulative remedies.

Thus, we conclude from a plain reading of both statutes that the cumulative nature of the remedies each permits is undeniable. Both the ACMA and MCL 600.2919a provide remedies that are *in addition to* other remedies at law and thus do not conflict. Therefore, the statutes should be applied as written, and the remedy in MCL 600.2919a must be allowed in addition to the remedy provided in the ACMA.

On examination, these statutory provisions appear relatively straightforward: they allow cumulative remedies. However, because the lower courts relied so heavily on the cases applying an interpretative proposition stated in *Monroe Beverage Co, Inc v Stroh Brewery Co*[18] to contradict the actual language of the statutes, it behooves us to examine this proposition to illustrate why it was misapplied.

In *Monroe Beverage*, the plaintiff alleged that the defendant violated the former Liquor Control Act (LCA)[19] when it failed to consider transferring distribution rights to the plaintiff. The defendant had no such obligation at common law, and the LCA limited enforcement to " 'a wholesaler with which the supplier has an

[17] For example, the Legislature explicitly created this type of provision in the dramshop act, MCL 436.1801(10): "This section provides the exclusive remedy for money damages against a licensee arising out of the selling, giving, or furnishing of alcoholic liquor."

[18] 454 Mich 41; 559 NW2d 297 (1997).

[19] MCL 436.1 *et seq.*, repealed by 1998 PA 58; see MCL 436.2301(a).

agreement.' "[20] Because the plaintiff conceded that it did not have an agreement with the defendant, the Court held that the plaintiff could not recover under the LCA.[21] On these facts, this Court concluded that "[i]t is well established that '[w]here a statute gives new rights and prescribes new remedies, such remedies must be strictly pursued; and a party seeking a remedy under the act is confined to the remedy conferred thereby and to that only.' "[22]

Most significant for the purposes of this case, this Court remanded to the Court of Appeals to consider whether the plaintiff could pursue its common law negligence claim against the defendant. The Court of Appeals held that the plaintiff's negligence claim failed because the defendant did not owe the plaintiff a duty to review its transfer request independent of the LCA.[23] Thus, the LCA provided the exclusive remedy for such a failure, but excluded the plaintiff from its protections.

Later, in *South Haven v Van Buren Co Bd of Comm'rs*,[24] the plaintiff city sought restitution after the defendant presented a road millage proposal in violation of a statute requiring such proposals to provide for the distribution of the tax levies to the city. This Court concluded that the defendant had violated the statute. However, after quoting *Monroe Beverage*, the Court held that "[b]ecause nothing in the statute indicates any legislative intent to allow plaintiff to pursue a claim for restitution of misallocated funds, and the Legisla-

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[20] *Monroe Beverage*, 454 Mich at 44, quoting MCL 436.30b(28).

[21] *Id.* at 44.

[22] *Id.* at 45, quoting *Lafayette Transfer & Storage Co v Michigan Pub Utilities Comm*, 287 Mich 488, 491; 283 NW 659 (1939).

[23] *Monroe Beverage Co, Inc v Stroh Brewery Co (On Remand)*, 224 Mich App 366, 369; 568 NW2d 687 (1997).

[24] 478 Mich 518; 734 NW2d 533 (2007).

ture explicitly granted such authority to the Attorney General alone, plaintiff cannot seek restitution of the misallocated funds in this case."[25] This Court added, however, that the plaintiff could have obtained injunctive relief enjoining the collection of the millage or refunding collected taxes to taxpayers because "this Court has permitted [such relief] when a government official does not conform to his or her statutory duty to distribute funds in a specified manner."[26] Thus, the plaintiff was limited by the remedy provided in the statute, but could have obtained an equitable injunctive remedy that preexisted and was independent of the statutory remedy. It was critical to the Court's analysis that the Legislature granted the Attorney General the exclusive right to vindicate the violation at issue there. This Court held that the previously permitted injunctive relief remained available, and thus the proposition stated in *Monroe Beverage* was not applied to abrogate preexisting claims.

A review of these cases makes clear that neither is controlling under the facts presented here. In *Monroe Beverage*, there was no preexisting civil action for the claimed wrongful conduct; rather, the relevant statutory provisions provided the sole legal obligation and thus remedy. Here, in contrast, converting another's property was actionable by statute prior to the ACMA's enactment. Once defendants' original duty to hold plaintiffs' funds in trust arose, defendants had an *independent* fiduciary duty not to convert the trust funds they held. The proposition articulated in *Monroe*

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[25] *Id.* at 530-531.

[26] *Id.* at 531, citing *Thomson v City of Dearborn*, 347 Mich 365; 79 NW2d 841 (1956) (injunctive relief against misappropriation of funds), and *City of Jackson v Revenue Comm'r*, 316 Mich 694, 719; 26 NW2d 569 (1947) (holding that constitutional amendment was "self-executing" and could be enforced by mandamus to compel the distribution of levied funds).

Beverage does not serve to eliminate *preexisting* duties, rights, and remedies. In this case, independent of the ACMA, defendants owed plaintiffs a duty not to convert their property. Accordingly, plaintiffs' conversion claim did not arise "under the act" and *Monroe Beverage* is not dispositive. More important, the ACMA explicitly states that its remedies are not exclusive.

Ultimately, the proposition articulated in *Monroe Beverage* should not be applied as a general statement concerning statutes that provide new rights and remedies irrespective of the specific language of such statutes. It should not, in other words, be applied outside the facts that give rise to its application or in a manner that is contrary to the plain meaning of statutory language. This is because the Legislature is capable of permitting cumulative remedies, as is the case with the statutory language present here. We therefore hold that the ACMA and MCL 600.2919a clearly permit cumulative remedies.

2. COMMON LAW CONVERSION

These same principles—particularly our conclusions regarding the language of the enforcement provision of the ACMA—are equally applicable when determining whether the common law conversion claim was abrogated. We note that under our constitution, "[t]he common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed."[27]

Common law conversion existed before the ACMA and consists of any "distinct act of domain wrongfully exerted over another's personal property in denial of or

[27] Const 1963, art 3, § 7.

inconsistent with the rights therein."[28] Conversion may occur when a party properly in possession of property uses it in an improper way, for an improper purpose, or by delivering it without authorization to a third party.[29]

This Court's recent ruling in *Cooper v Auto Club Ins Ass'n*[30] provides additional guidance. In *Cooper*, the plaintiffs asserted a common law fraud claim against their no-fault insurer, alleging that the defendant fraudulently induced them to accept unreasonably low compensation for attendant-care services provided by their mother. The Court held that "the no-fault act, which provides the remedy for injuries arising out of 'the ownership, maintenance, or use of a motor vehicle,' MCL 500.3105(1), does not abrogate actions arising out of the breach of other common-law duties."[31] This Court held that the plaintiffs' fraud action was distinct from an action claiming that an insurer refused to pay no-fault benefits to its insured because

> (1) a fraud action requires an insured to prove several elements that are different from those required in a no-fault action; (2) a fraud action accrues at a different time than a no-fault action; and (3) a fraud action permits an insured to recover a wide range of damages that are not available in a no-fault action.[32]

Comparing the two claims, this Court stated that

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[28] *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992); see also *Thoma v Tracy Motor Sales, Inc*, 360 Mich 434, 438; 104 NW2d 360 (1960); *Nelson & Witt v Texas Co*, 256 Mich 65, 70; 239 NW 289 (1931).

[29] *Foremost*, 439 Mich at 391; *Thoma*, 360 Mich at 438; *Johnston v Whittemore*, 27 Mich 463, 468-469 (1873).

[30] 481 Mich 399; 751 NW2d 443 (2008).

[31] *Id.* at 411.

[32] *Id.* at 407.

> [u]nlike a no-fault claim, a fraud claim does not arise from an insurer's mere omission to perform a contractual or statutory obligation, such as its failure to pay all the [personal protection insurance] benefits to which its insureds are entitled. Rather, it arises from the insurer's breach of its separate and independent duty not to deceive the insureds, which duty is imposed by law as a function of the relationship of the parties.[33]

Furthermore, the Court observed that a first-party no-fault claim arises when the insurer fails to pay, but a fraud claim arises when the fraud is perpetrated.[34] Finally, in a first-party no-fault action, the insured may only recover no-fault benefits, but in a fraud action the insured may recover attorney fees, emotional-distress damages, and exemplary damages.[35]

Similarly, a conversion claim can be distinct from an ACMA claim. First, unlike an ACMA claim, a conversion claim does not arise from a distributor's mere "fail[ure] to deduct or remit any assessment due to the committee . . . ."[36] Indeed, " 'refusal to deliver possession pursuant to a lawful demand is not conversion but only evidence of a conversion.' "[37] A conversion claim arises from the distributor's breach of its separate and independent duty not to exert wrongful dominion over the Committee's personal property. Second, an ACMA claim arises when the distributor fails to collect or remit

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[33] *Id.* at 409.

[34] *Id.*

[35] *Id.*

[36] MCL 290.655(f).

[37] *Bush v Hayes*, 286 Mich 546, 551; 282 NW 239 (1938), quoting *Guarantee Bond & Mortgage Co v Hilding*, 246 Mich 334, 344; 224 NW 643 (1929); see also 2 Cooley, Torts (4th ed), § 335, p 519 ("The refusal to surrender possession in response to a demand is not of itself a conversion; it is only evidence of a conversion, and like other inconclusive acts is open to explanation.").

assessments when they are due, but a conversion claim arises whenever the distributor wrongfully exerts dominion over the Committee's property; this can occur at any time, before or after the remittance is due. Third, in an ACMA action, the Committee can recover the assessments plus costs and expenses, but in a conversion action the Committee can recover exemplary damages.

Although the ACMA collection scheme is new, the obligation to maintain another's property held in trust is not.[38] While it is true that plaintiffs' ownership of the assessments arises under the ACMA—and thus the *property right* that plaintiffs seek to enforce exists only due to the ACMA—the alleged wrongful *conduct* was actionable at common law and is distinct from the wrongful conduct addressed in the ACMA. Moreover, because an action for conversion existed at common law, this case is significantly distinct from *Monroe Beverage*, in which there was no prior existing common law action.

We cannot conclude, as defendants urge, that the ACMA remedies must be exclusive because defendants would not have had any duty to remit the funds absent the ACMA. As plaintiffs note, one's duty as a trustee must arise from agreement or, as here, by law. The common law then delineates that duty and provides remedies to the rightful possessor in the event of misuse of the property. The lower courts erred by focusing on how defendants came into possession of the property rather than on defendants' actions after possession of the property was lawfully gained. The ACMA assigns distributors the role of statutory trustees of the assessments due to the Committee. The Legislature included no language suggesting that it intended to avoid the

[38] See, e.g., *Bd of Fire & Water Comm'rs of Marquette v Wilkinson*, 119 Mich 655; 78 NW 893 (1899).

imposition of common law liability for conversion in violation of the fiduciary duties created by the ACMA. Therefore, just as for claims of statutory conversion, we hold that the ACMA did not abrogate common law claims for conversion.

B. PERSONAL LIABILITY OF KROPF

The final issue before this Court is whether plaintiffs may pursue claims for common law and statutory conversion against Appletree's principal, Steven Kropf. Plaintiffs allege that Kropf, as the sole member and manager of Appletree, converted the unremitted funds for a use other than the one for which they were held in trust.

Michigan law has long provided that corporate officials may be held personally liable for their individual tortious acts done in the course of business, regardless of whether they were acting for their personal benefit or the corporation's benefit.[39] Moreover, as Michigan courts have recognized, "[o]fficers of a corporation may be held individually liable when they personally cause

[39] See, e.g., *Allen v Morris Bldg Co*, 360 Mich 214, 218; 103 NW2d 491 (1960) ("The proofs show that [defendant] was the majority stockholder, president, and in control of defendant corporation's activities, and that he personally supervised the operations of which complaint is made herein. He participated in the tort and is liable with the corporate defendant."), citing *Wines v Crosby & Co*, 169 Mich 210; 135 NW 96 (1912); *Moore v Andrews*, 203 Mich 219, 232-233; 168 NW 1037 (1918) (holding that an action for conversion may lie against directors, officers, or agents of a corporation to a person injured by their torts); see also 2 Restatement Agency, 3d, § 7.01, p 115 ("An agent is subject to liability to a third party harmed by the agent's tortious conduct. Unless an applicable statute provides otherwise, an actor remains subject to liability although the actor acts as an agent or an employee, with actual or apparent authority, or within the scope of employment.").

their corporation to act unlawfully."[40] Indeed, this Court held a corporate official individually liable for a conversion claim in *Bush v Hayes*.[41] There, a supervisor was held liable for conversion for his personal tortious misconduct when the plaintiff's products (beans) over which the supervisor had control were moved and never returned. On appeal of a directed verdict in favor of the defendants, the Court explained:

> The trial judge erred in instructing the jury that to hold the defendants liable there must be evidence showing that they converted the beans to their own use. If there has been a conversion in which they participated they are liable. It is of no consequence whether they acted for the corporation or acted for themselves if they were active participants in converting beans which belonged to plaintiff. They are liable for the torts which they commit, be it for themselves or for another.[42]

Defendants further argue that plaintiffs must "pierce the corporate veil" in order to hold Kropf personally liable. However, we have never required that a plaintiff pierce the corporate veil in order to hold corporate officials liable for *their own* tortious misconduct, and thus it is unnecessary to pierce the corporate veil in this case. Conversion is an intentional tort,[43] and piercing the corporate veil is not necessary to a determination of personal liability for intentional torts: regardless of the corporate form, officers remain personally liable for their intentional and criminal conduct.

There is no question that, if the facts prove either common law or statutory conversion, Kropf can be held

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[40] *Livonia Bldg Materials Co v Harrison Constr Co*, 276 Mich App 514, 519; 742 NW2d 140 (2007).

[41] *Bush*, 286 Mich at 548-549.

[42] *Id.* at 549-550.

[43] *Foremost*, 439 Mich at 391.

personally liable and may not hide behind the corporate form in order to prevent liability for his active participation in the tort.[44] Moreover, plaintiffs need not allege a violation of the ACMA in relation to Kropf in order to hold him personally liable for the separate personal tort of conversion.

IV. CONCLUSION

We hold that the ACMA does not supersede claims of statutory conversion or abrogate claims of common law conversion, and thus plaintiffs may pursue remedies under the ACMA cumulative to remedies for conversion. We further hold that Steven Kropf may be held personally liable for any intentional torts he is proved to have committed in the course of operating his business. Accordingly, the judgment of the Court of Appeals is reversed, and this case is remanded to the trial court for further proceedings consistent with this opinion.

KELLY, C.J., and CAVANAGH, WEAVER, CORRIGAN, MARKMAN, and HATHAWAY, JJ., concurred with YOUNG, J.

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[44] We note that any conversion claims against defendants are not currently before this Court, and thus we refrain from any comment or judgment on their merits.

DAWE v DR REUVEN BAR-LEVAV & ASSOCIATES, PC

Docket No. 137092. Argued November 3, 2009 (Calendar No. 3). Decided March 30, 2010.

Elizabeth Dawe brought an action in the Oakland Circuit Court against Dr. Reuven Bar-Levav & Associates, P.C., the estate of Reuven Bar-Levav, M.D., and Leora Bar-Levav, M.D., after Joseph Brooks, a former psychiatric patient of defendants who had attended group therapy sessions with plaintiff, shot plaintiff and others during a group therapy session. Plaintiff alleged that defendants were liable under MCL 330.1946 for their failure to warn or protect plaintiff because Brooks had made threatening statements to defendants and gave defendants a manuscript that could have been considered a threat of violence against members of the group. Plaintiff also alleged that defendants committed common-law medical malpractice by breaching the standard of care owed to her as a patient when Brooks was negligently placed in her therapy group even though defendants knew or should have known that he was not a suitable candidate for group therapy. The court, Charles W. Simon, J., denied defendants' motion for summary judgment. The court also denied defendants' motion at the close of plaintiff's proofs for a partial directed verdict on the failure-to-warn-or-protect claim, and the jury returned a verdict in plaintiff's favor. The court subsequently denied defendants' motions for judgment notwithstanding the verdict and for a new trial. The Court of Appeals, WHITBECK, C.J., and K. F. KELLY, J. (SMOLENSKI, P.J., dissenting), reversed with regard to the trial court's denial of the motion for a directed verdict, vacated the judgment, and remanded the case for entry of an order dismissing plaintiff's claims. The Court of Appeals concluded that MCL 330.1946 placed specific limitations on a mental health professional's duty to warn or protect third parties and therefore abrogated all common-law claims for failure to warn or protect. 279 Mich App 552 (2008). Plaintiff sought leave to appeal, and defendants sought leave to cross-appeal. The Supreme Court granted plaintiff leave to appeal and left defendants' application for leave to cross-appeal pending. 483 Mich 999 (2009).

In a unanimous opinion by Justice CAVANAGH, the Supreme Court *held*:

MCL 330.1946 did not abrogate a patient's common-law medical malpractice claim against a mental health professional when the mental health professional's separate duty arising out of his or her relationship with the patient would apply and no threat "as described" in MCL 330.1946(1) was communicated to the mental health professional.

1. Under the common law, as a general rule, one person has no duty to aid or protect another. An exception applies, however, when a special relationship exists between the plaintiff and the defendant. The psychiatrist-patient relationship is a special relationship that places on psychiatrists a duty to exercise reasonable care to protect their patients.

2. The common law remains in force until modified. The abrogative effect of a statutory scheme is a question of legislative intent. When exercising its authority to modify the common law, the Legislature should do so in no uncertain terms.

3. The Legislature only partially abrogated a mental health professional's common-law duties when it enacted MCL 330.1946. That statute only modified a mental health professional's common-law duty to warn or protect a third person when a threat "as described" in MCL 330.1946(1) was communicated to the mental health professional. The statutory duty arises when (1) a patient makes a threat of physical violence, (2) the threat is against a reasonably identifiable third person (including another patient of the mental health professional), and (3) the patient has the apparent intent and ability to carry out the threat. The statute does not completely abrogate a mental health professional's separate common-law special relationship duty to protect his or her patients by exercising reasonable care, and a plaintiff may pursue a claim against the mental health professional based on that theory of liability.

4. The statutory duty was not triggered in this case because the threat was not a threat "as described" in MCL 330.1946(1). That does not mean, however, that the common-law special relationship duty also did not apply in this case.

Reversed, leave to cross-appeal denied, and case remanded to the Court of Appeals for consideration of remaining issues raised on appeal.

NEGLIGENCE — MENTAL HEALTH PROFESSIONALS — PATIENTS — COMMON-LAW DUTIES TO PATIENTS — DUTY TO WARN OR PROTECT PATIENTS.

MCL 330.1946 places a duty on mental health professionals to warn or protect third persons in situations involving a threat "as described" in MCL 330.1946(1), but the statute did not completely

abrogate a mental health professional's separate common-law duty of exercising reasonable care to protect his or her patient arising out of the mental health professional's special relationship with the patient.

Mark Granzotto, P.C. (by *Mark Granzotto*), and *Haas & Goldstein, P.C.* (by *Justin Haas*), for plaintiff.

Collins, Einhorn, Farrell & Ulanoff, P.C. (by *Noreen L. Slank* and *Geoffrey M. Brown*), for defendants.

CAVANAGH, J. In this case we must decide whether a plaintiff-patient may pursue a common-law medical malpractice claim against his or her mental health professional when the mental health professional allegedly negligently placed the plaintiff in danger of harm at the hands of another patient or whether the Mental Health Code, in MCL 330.1946, abrogated such a common-law claim. We hold that MCL 330.1946 did not abrogate a plaintiff-patient's common-law medical malpractice claim when the mental health professional's separate duty arising out of his or her special relationship with the patient would apply and no "threat as described in [MCL 330.1946(1)]" was communicated to the mental health professional. MCL 330.1946(1). Therefore, we reverse the judgment of the Court of Appeals.

I. FACTS AND PROCEDURE

On June 11, 1999, Joseph Brooks, a former psychiatric patient of defendants[1] Dr. Reuven Bar-Levav and

[1] We note that Dr. Reuven Bar-Levav's first name has been misspelled throughout these proceedings. Because Dr. Reuven Bar-Levav is deceased, his estate is a party to this case, along with Dr. Reuven Bar-Levav & Associates, P.C., and Dr. Leora Bar-Levav. For simplicity, we will refer to Dr. Reuven Bar-Levav as a defendant and to "defendants" generally.

Dr. Leora Bar-Levav and a former participant in the group therapy sessions attended by plaintiff, Elizabeth Dawe, entered defendants' office with a handgun. Brooks shot and killed Dr. Reuven Bar-Levav without warning. Brooks then entered the back office area and fired the gun into a room where plaintiff was participating in a group therapy session. Brooks killed one patient and wounded others, including plaintiff. After firing multiple rounds into the group therapy room, Brooks committed suicide.

Plaintiff sued defendants, alleging that they were liable for common-law medical malpractice and under MCL 330.1946 for failure to warn her of or protect her from a threat. Plaintiff claimed that Brooks had previously made threatening statements to defendants and that he had demonstrated his ability to carry out the threats when he came to defendants' office with a gun on an earlier occasion.[2] Further, plaintiff claimed that Brooks gave defendants a "manuscript" that could be considered a threat of violence against other members of his group therapy sessions, including plaintiff. Finally, plaintiff alleged that defendants committed common-law medical malpractice by breaching their standard of care to plaintiff as a patient by negligently placing Brooks in her group therapy session when they knew or should have known that Brooks was not a suitable candidate for group therapy.

The trial court denied defendants' motion for summary disposition, and the case was heard by a jury. The trial court also denied defendants' motion at the close of

[2] While in individual treatment, Brooks told a therapist at defendants' office that he had recently purchased a gun and contemplated going to New Hampshire to kill his ex-girlfriend's mother and commit suicide. The therapist asked Brooks to bring the gun to the office and, when Brooks did so, confiscated the gun and gave it to Brooks's father.

plaintiff's proofs for a partial directed verdict on plaintiff's failure-to-warn-or-protect claim under MCL 330.1946. The jury returned a verdict in favor of plaintiff, and defendants moved for judgment notwithstanding the verdict (JNOV) and for a new trial, both of which the trial court denied.

Defendants appealed, and, in a split decision, the Court of Appeals reversed the trial court's denial of defendants' motion for a directed verdict, vacated the judgment, and remanded the case for entry of an order granting defendants' motion for a directed verdict. *Dawe v Dr Reuvan Bar-Levav & Assoc, PC*, 279 Mich App 552; 761 NW2d 318 (2008). The Court of Appeals majority concluded that MCL 330.1946 placed specific limitations on a mental health professional's duty to warn or protect third persons and, therefore, abrogated all common-law claims for failure to warn or protect. The dissent would have affirmed the trial court's denial of defendants' request for relief because the dissent believed that MCL 330.1946 did not affect defendants' common-law duty to avoid placing others in danger of harm at the hands of a patient. We granted leave to appeal. *Dawe v Dr Reuvan Bar-Levav & Assoc, PC*, 483 Mich 999 (2009).

II. STANDARD OF REVIEW

This case involves statutory interpretation, which presents a question of law that this Court reviews de novo. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

III. ANALYSIS

The issue before this Court is whether plaintiff-patient may pursue a common-law medical malpractice claim against defendants for breach of the applicable

standard of medical care or whether MCL 330.1946 abrogates all common-law claims against a mental health professional for failure to warn third persons or protect them from harm, including the duty to warn or protect patients. Specifically, we must decide whether our Legislature intended to entirely abrogate a mental health professional's common-law duty to warn or protect and limit that duty to only the types of threats described in MCL 330.1946(1) or, alternatively, whether it intended to limit the scope of the duty to warn or protect third persons but did not intend to completely abrogate the common-law "special relationship" duty of reasonable care to protect patients.

The Court of Appeals majority concluded that "MCL 330.1946 preempts the field on the issue of a mental-health professional's duty to warn or protect others, including the psychiatrist's other patients"; therefore, defendants "had no common-law duty to protect [plaintiff] . . . ." *Dawe*, 279 Mich App at 568. We disagree. We hold that MCL 330.1946 did not completely abrogate a mental health professional's common-law duty of reasonable care to protect his or her patients and that plaintiff may pursue a claim against defendants based on that theory of liability.

A. A PSYCHIATRIST'S COMMON-LAW DUTY

Before the enactment of MCL 330.1946, a psychiatrist's duty to warn or protect was governed entirely by the common law. Under the common law, "as a general rule, there is no duty that obligates one person to aid or protect another." *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). There is, however, an exception to this general rule when a "special relation-

ship" exists between the plaintiff and the defendant.[3] *Id.* As this Court has stated:

> The rationale behind imposing a duty to protect in these special relationships is based on control. In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is best able to provide a place of safety. [*Id.*]

Notably, Michigan caselaw considers the psychiatrist-patient relationship a special relationship that places on psychiatrists a duty of reasonable care to protect their patients. See *Murdock v Higgins*, 454 Mich 46, 55 n 11; 559 NW2d 639 (1997), citing *Williams*, 429 Mich at 499; *Sierocki v Hieber*, 168 Mich App 429, 434; 425 NW2d 477 (1988), citing *Duvall v Goldin*, 139 Mich App 342, 351; 362 NW2d 275 (1984).

In the psychiatrist-patient context, the common-law duty not only requires a psychiatrist to protect his or her patients but also to warn third persons or protect them from harm by a patient under certain circumstances, regardless of the psychiatrist's relationship with that third person. The status of the duty owed to third persons in Michigan law, however, was unclear before MCL 330.1946 was adopted. The duty was first recognized in Michigan in a Court of Appeals case that adopted the reasoning of the seminal California Supreme Court case, *Tarasoff v Regents of the Univ of California*, 17 Cal 3d 425; 131 Cal Rptr 14; 551 P2d 334 (1976). *Davis v Lhim*, 124 Mich App 291, 298-301; 335

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[3] This Court has determined that a "special relationship" exists in a variety of situations. For example, this Court has classified the common carrier-passenger, innkeeper-guest, landlord-tenant, employer-employee, and doctor-patient relationships as special relationships. *Murdock v Higgins*, 454 Mich 46, 55 n 11; 559 NW2d 639 (1997); see, also, *Farwell v Keaton*, 396 Mich 281, 290 n 4; 240 NW2d 217 (1976).

NW2d 481 (1983), rev'd on other grounds sub nom *Canon v Thumudo*, 430 Mich 326 (1988). In *Tarasoff*, the California Supreme Court held that psychiatrists have a duty to warn or protect a third person if the psychiatrists "in fact determined that [the patient] presented a serious danger of violence to [the third person], or pursuant to the standards of their profession should have so determined, but nevertheless failed to exercise reasonable care to protect [the third person] from that danger." *Tarasoff*, 17 Cal 3d at 450.

Although this Court later reversed *Davis*, we specifically declined to address at that time "whether a duty to warn should be imposed upon mental health professionals to protect third persons from dangers posed by patients." *Canon*, 430 Mich at 355.[4] We did not foreclose the possibility of a common-law duty of mental health professionals to warn third persons or protect them from harm by their patients in Michigan. Indeed, we recognized that other jurisdictions had found a duty of psychiatrists to warn or protect third persons, "the seminal case being *Tarasoff* . . . ." *Id*. at 355 n 18. Therefore, before the enactment of MCL 330.1946, psychiatrists in Michigan owed a common-law duty of reasonable care to their patients that arose out of the special relationship and, potentially, a duty to warn third persons of or protect them from potential dangers posed by their patients.

B. A MENTAL HEALTH PROFESSIONAL'S STATUTORY DUTY UNDER MCL 330.1946

Since *Canon*, our Legislature has codified a mental health professional's duty to warn or protect third

[4] Rather, in *Canon,* we consolidated three cases addressing the liability of government-employed mental health professionals and determined that those cases were controlled by governmental-immunity issues.

persons from harm by his or her patients. In 1989, the Legislature enacted MCL 330.1946(1), which states in its current form:

> If a patient communicates to a mental health professional who is treating the patient a threat of physical violence against a reasonably identifiable third person and the recipient has the apparent intent and ability to carry out that threat in the foreseeable future, the mental health professional has a duty to take action as prescribed in [MCL 330.1946(2)]. Except as provided in this section, a mental health professional does not have a duty to warn a third person of a threat as described in this subsection or to protect the third person.

The issue here, therefore, is to what extent MCL 330.1946 abrogated a mental health professional's common-law duty.

C. ABROGATION

The common law remains in force until modified. *Wold Architects & Engineers v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006). The abrogative effect of a statutory scheme is a question of legislative intent, and "legislative amendment of the common law is not lightly presumed." *Id.* Rather, the Legislature "should speak in no uncertain terms" when it exercises its authority to modify the common law. *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006). Additionally, "[t]he Legislature is presumed to know of the existence of the common law when it acts." *Wold Architects,* 474 Mich at 234. Keeping these rules concerning abrogation in mind, we must consider the language of MCL 330.1946 and determine whether the Legislature intended to completely abrogate a mental health professional's common-law duty to warn or protect others when it enacted the statute. We hold that it did not.

Although the Legislature partially abrogated a mental health professional's common-law duties, the language of the statute expressly limits its own scope. The final sentence of MCL 330.1946(1) states that "[e]xcept as provided in this section, a mental health professional does not have a duty to warn a third person of a threat *as described in this subsection* or to protect the third person." (Emphasis added.) The type of threat described in subsection (1) is "a threat of physical violence against a reasonably identifiable third person . . . ." MCL 330.1946(1). Further, the patient making the threat must have "the apparent intent and ability to carry out that threat in the foreseeable future" before a mental health professional's duty under MCL 330.1946(1) is triggered. Therefore, MCL 330.1946(1) only modified a mental health professional's common-law duty to warn or protect a *third person* when a "threat as described in [MCL 330.1946(1)]" was communicated to the mental health professional because the statute only places a duty on mental health professionals to warn third persons of or protect them from the danger presented by a threat "as described" in MCL 330.1946(1). This statutory duty only arises if three criteria are met: (1) a patient makes a threat of physical violence, (2) the threat is against a reasonably identifiable third person, and (3) the patient has the apparent intent and ability to carry out the threat. If these three criteria are not met, the mental health professional's duty under the statute is not triggered.[5] Thus, on its

[5] After its enactment by 1989 PA 123, the Legislature amended MCL 330.1946(1) in 1995 PA 290. Before the 1995 amendments, MCL 330.1946(1) stated, in relevant part:

> If a patient communicates to a mental health practitioner who is treating the patient a threat of physical violence against a reasonably identifiable third person and the *patient* has the

face, the statute does not completely abrogate a mental health professional's separate common-law special relationship duty to protect his or her patients by exercising reasonable care.

We note that a mental health professional's patient could be a "third person" under MCL 330.1946(1). Therefore, MCL 330.1946 did abrogate that portion of a mental health professional's common-law duty to his or her patients that requires the mental health professional to warn one patient of threats by or protect that patient from a second patient to the extent that the statute applies, that is, when the second patient (1) makes a threat of physical violence, (2) the threat is against a reasonably identifiable third person (i.e., the first patient), and (3) the second patient has the apparent intent and ability to carry out the threat. MCL

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apparent intent and ability to carry out that threat in the foreseeable future, the mental health practitioner has a duty to take action as prescribed in [MCL 330.1946(2)]. [Emphasis added.]

"Recipient" is defined in MCL 330.1100c(12) as "an individual who receives mental health services from the department, a community mental health services program, or a facility or from a provider that is under contract with the department or a community mental health services program."

Arguably, changing the third use of "patient" in the preamendment statute to "recipient" in the current version of MCL 330.1946(1) limited the scope of a mental health professional's duty to warn under MCL 330.1946(1) to only threats made by *recipients* as defined in MCL 330.1100c(12). This change is only potentially significant when a "patient" who is not a "recipient" makes a threat that would otherwise trigger a mental health professional's duty under MCL 330.1946 to warn or protect a third person. Here, although Brooks was a "patient" who was not a "recipient," he did not make a threat against a "reasonably identifiable third person" and, therefore, could not have triggered defendants' duty under MCL 330.1946(1) to warn or protect a third person. As a result, even applying the pre-1995 version of the statute, defendants would not have had a duty to warn or protect third persons under MCL 330.1946(1). Thus, we will not consider the effect of the 1995 amendments here.

330.1946(1). Under these limited circumstances, a mental health professional would only have a duty to his or her patient (in responding to the threat) to take the actions described in MCL 330.1946(2). Even in that situation, however, MCL 330.1946 would not abrogate the mental health professional's other common-law special relationship duties to his or her patients, i.e., duties unrelated to responding to such a threat.

This conclusion is reinforced by the fact that, unlike some other statutory schemes, the statutory language in MCL 330.1946(1) is not so comprehensive as to indicate that it is intended to completely abrogate the common law in this area. For example, in *Hoerstman Gen Contracting*, 474 Mich at 72-76, we held that the Legislature intended to completely abrogate the common law of accord and satisfaction when it enacted article 3 of the Uniform Commercial Code. In that case we concluded that the statute completely abrogated the common law because the statute was "comprehensive" and it was "intended to apply to nearly every situation involving negotiable instruments." *Id.* at 74. Further, we noted that the statutory language "completely covers the details of accord and satisfactions." *Id*. Finally, we noted that the statute included exceptions to or conditions on the statute's application and concluded that "[t]heir enumeration eliminates the possibility of [there] being other exceptions under the legal maxim *expressio unius est exclusio alterius*."[6] *Id.* Because there was no exception or condition listed under which the common law of accord and satisfaction would apply, we

[6] " 'The expression of one thing is the exclusion of another.' " *Hoerstman Gen Contracting*, 474 Mich at 74 n 8, quoting Black's Law Dictionary (7th ed), p 1635.

concluded that the Legislature "clearly intended that the statute would abrogate the common law on this subject." *Id.* at 75.

In contrast, MCL 330.1946(1) is not comprehensive and does not cover all the details of a mental health professional's duty to provide reasonable care. In fact, the statutory language is expressly limited to warning or protecting third persons under very limited circumstances, i.e., when (1) a patient makes a threat of physical violence, (2) the threat is against a reasonably identifiable third person, and (3) the patient has the apparent intent and ability to carry out the threat. The statutory language never addresses a mental health professional's other common-law duties to his or her patients. Therefore, on its face, the statute only defines a mental health professional's duty to warn or protect a third person from a "threat as described in [MCL 330.1946(1)]." Nothing in the statute indicates that the Legislature intended to completely abrogate a mental health professional's common-law special relationship duty to his or her patients. While it is true that a person may simultaneously be a "patient" and a "third party," that does not mean that only the statutory duty *or* the common-law duty could apply. Rather, both duties could apply if all the requirements to trigger the duties are met, or, as in this case, only one duty could apply. The statutory duty to warn or protect a third person was not triggered in this case because the threat was not a "threat as described in [MCL 330.1946(1)]." However, this does not mean that the common-law special relationship duty also did not apply. Therefore, MCL 330.1946 is not "intended to apply to nearly every situation" in which a mental health professional's duty to provide reasonable care may arise because it does not address a mental health professional's common-law special relationship duty to protect his or her patients-

in the absence of a "threat as described in [MCL 330.1946(1)]."[7] See *Hoerstman Gen Contracting*, 474 Mich at 74.

We do not pass judgment on the merits of plaintiff's medical-malpractice claim on the facts of this case. Our holding is limited only to whether MCL 330.1946 abrogated all common-law duties owed by mental health professionals to their patients, which we hold it did not. Thus, there may be claims alleging a breach of a mental health professional's special relationship duty of reasonable care that are cognizable under Michigan law.

IV. CONCLUSION

We hold that the Legislature did not intend to completely abrogate a mental health professional's common-law duty to his or her patients when it enacted MCL 330.1946. Thus, we reverse the judgment of the Court of Appeals. Further, we now consider defendants' pending application for leave to cross-appeal and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to cross-appeal, we remand this case to the Court of Appeals for consideration of the issues raised by defen-

[7] Indeed, as the Court of Appeals dissent noted, courts have held that a defendant may be held liable for harm caused by others if it was foreseeable that the defendant's own actions would lead to the infliction of harm by others. *Dawe*, 279 Mich App at 576-577 (SMOLENSKI, P.J., dissenting) (indicating, for example, that a defendant may be liable for harms inflicted by others who stole the defendant's car after he left the car unlocked with the keys inside and that a father who provided a loaded gun to his mentally ill son while the son was in an agitated state may be civilly liable for a murder committed by his son). Yet if MCL 330.1946(1) were interpreted to completely abrogate a mental health professional's common-law duty, mental health professionals would have no duty to protect others, including their patients, from harm that results from the mental health professional's own negligent handling of a patient in the absence of a "threat as described in [MCL 330.1946(1)]." *Id.* at 577.

dants that were not addressed in its opinion because it found the issue under MCL 330.1946 determinative.[8]

KELLY, C.J., and WEAVER, CORRIGAN, YOUNG, MARKMAN, and HATHAWAY, JJ., concurred with CAVANAGH, J.

[8] In particular, we direct the Court's attention to the jury instructions, which may not have properly distinguished between the statutory and common-law claims in this case.

PEOPLE v WILDER

Docket No. 137562. Argued October 6, 2009 (Calendar No. 4). Decided March 30, 2010.

Darrell Wilder was charged with first-degree home invasion, MCL 750.110a(2), being a felon in possession of a firearm, MCL 750.224f, and possessing a firearm during the commission of a felony, MCL 750.227b. The felon-in-possession charge was dismissed, and following a bench trial the court, Leonard Townsend, J., convicted defendant of third-degree home invasion, MCL 750.110a(4), and felony-firearm. Defendant appealed, asserting that the conviction of third-degree home invasion violated his due process rights because that crime is a cognate offense rather than a necessarily included lesser offense of first-degree home invasion. The Court of Appeals, TALBOT and MURRAY, JJ. (METER, P.J., concurring), agreed and vacated defendant's convictions and sentences in an unpublished opinion per curiam, issued October 21, 2008 (Docket No. 278737). The Supreme Court granted the prosecution's application for leave to appeal. 483 Mich 922 (2009).

In an opinion by Justice HATHAWAY, joined by Justices WEAVER, CORRIGAN, YOUNG, and MARKMAN, the Supreme Court *held*:

Third-degree home invasion under MCL 750.110a(4)(a) is a necessarily included lesser offense of first-degree home invasion.

1. MCL 768.32(1) permits a trier of fact to find a defendant guilty of a lesser offense if the lesser offense is necessarily included in the greater offense, that is, when the elements necessary for the commission of the lesser offense are subsumed in the elements necessary for the commission of the greater offense. A cognate offense, on the other hand, shares several elements with and is of the same class or category as the greater offense, but contains elements not found in the greater offense. A trier of fact may not find a defendant not guilty of a charged offense but guilty of a cognate offense because the defendant would not have had notice of all the elements of the offense that he or she was required to defend against.

2. First-degree home invasion and third-degree home invasion can be committed several different ways, each of which involves alternative elements necessary to complete the crime. The Court

of Appeals concluded that third-degree home invasion cannot be a necessarily included lesser offense of first-degree home invasion because one or more of the alternative elements of third-degree home invasion are distinct from the elements of first-degree home invasion. A proper analysis, however, requires a more narrowly focused evaluation of the statutory elements at issue when dealing with degreed offenses that can be committed by alternative methods. Not all possible statutory alternative elements of the lesser offense need to be subsumed in the elements of the greater offense for the lesser offense to be a necessarily included lesser offense.

3. In this case, one must examine the offense of first-degree home invasion as charged and determine whether the elements of third-degree home invasion as convicted are subsumed in the charged offense. The elements of first-degree home invasion that were charged in this case were that defendant entered a dwelling without permission, committed a larceny while present in the dwelling, and was armed with a dangerous weapon. The elements used to convict defendant of third-degree home invasion under MCL 750.110a(4)(a) were that defendant entered a dwelling without permission and while present in the dwelling committed a misdemeanor. Every felony larceny necessarily includes within it a misdemeanor larceny, so third-degree home invasion under MCL 750.110a(4)(a) is a necessarily included lesser offense of first-degree home invasion.

4. Defendant's due process rights were not violated because he was convicted of a necessarily included lesser offense of the crime with which he was charged.

Justice CORRIGAN, concurring, agreed that third-degree home invasion under MCL 750.110a(4)(a) is a necessarily included lesser offense of first-degree home invasion. She wrote separately to express continued adherence to the view expressed in her dissent in *People v Nyx*, 479 Mich 112, 154-179 (2007), that when the Legislature has formally divided an offense into degrees, MCL 768.32(1) permits a fact-finder to convict a defendant of a legislatively denominated inferior degree of the charged offense if a rational view of the evidence supports the conviction.

Reversed; convictions and sentences reinstated.

Justice CAVANAGH, joined by Chief Justice KELLY, concurring in part and dissenting in part, agreed that defendant's due process rights were not violated because charging him with first-degree home invasion on the basis of committing a larceny put defendant on notice that he needed to defend against each element of a larceny crime. Justice CAVANAGH did not join the majority opinion

in full, however, because he believed that it interpreted the word "inferior" in MCL 768.32 in a manner contrary to the established definition and historical use of the term.

BURGLARY — HOME INVASION — ELEMENTS OF HOME INVASION — NECESSARILY INCLUDED LESSER OFFENSES.

Third-degree home invasion under MCL 750.110a(4)(a) is a necessarily included lesser offense of first-degree home invasion (MCL 750.110a[2], [4]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, and *Timothy A. Baughman*, Chief of Research, Training, and Appeals, for the people.

State Appellate Defender (by *Valerie R. Newman*) for defendant.

Amicus Curiae:

Brian A. Peppler, *Jeffrey R. Fink*, and *Judith B. Ketchum* for the Prosecuting Attorneys Association of Michigan.

HATHAWAY, J. We granted leave to appeal in this case to consider the limited issue of whether third-degree home invasion, MCL 750.110a(4), is a necessarily included lesser offense of first-degree home invasion, MCL 750.110a(2). We hold that third-degree home invasion under MCL 750.110a(4)(a) is a necessarily included lesser offense of first-degree home invasion because all the elements required to convict defendant of third-degree home invasion under that subdivision are subsumed within the elements that would have been necessary to convict defendant of first-degree home invasion. Accordingly, we reverse the Court of Appeals' judgment and reinstate defendant's convictions and sentences.

I. FACTS AND PROCEEDINGS

Defendant Darrell Wilder appeared uninvited at Denise Carter's home very early in the morning on December 30, 2006. Ms. Carter recognized him as her son's cousin and opened the main door. Defendant opened the outer storm door and entered Ms. Carter's home without permission. Defendant then walked past Ms. Carter and started unplugging her television set. While doing so he stated, "Auntee, I love you, but this has nothing to do with you. [T]his is because of your son." When Ms. Carter protested, defendant lifted his shirt to display a gun in his waistband. Defendant then took the television with the help of a friend and put it into a waiting car. Ms. Carter told her grandchildren, who had also witnessed the intrusion, to call the police.

Defendant was arrested and charged, as a third-offense habitual offender,[1] with first-degree home invasion,[2] being a felon in possession of a firearm,[3] and possessing a firearm during the commission of a felony.[4] The felon-in-possession charge was dismissed, and the case proceeded to trial on the first-degree home-invasion and felony-firearm counts. After a two-day bench trial, defendant was convicted of third-degree home invasion[5] and felony-firearm. The trial court summarized its findings as follows:

> Now the Court heard the testimony of the complainant, and the children who were at the house. And there was no question about who the person was.
>
> They never tried to embellish their testimony and said that he broke into the house. They never said he pulled a gun, just said that he pulled up his shirt.

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[1] MCL 769.11.

[2] MCL 750.110a(2).

[3] MCL 750.224f.

[4] MCL 750.227b.

[5] MCL 750.110a(4).

> They identified him because everybody knew the man, so there isn't much of an argument about identification.
>
> I think the People have proven beyond a reasonable doubt that [sic] the crime of Home Invasion Third Degree. That he entered without permission; he walked right past her, and took property out.
>
> And when there was any suggestion of resistance, he pulled up his shirt and showed that he was armed. And that was that.
>
> So, the People have to show that the defendant entered without permission, for the purpose of committing a misdemeanor, taking property, or committing a felony.
>
> That his body did go in, so he entered without the owner's permission.

Defendant appealed in the Court of Appeals, asserting, among other things, that his conviction of third-degree home invasion violated his due process rights because that crime is a cognate offense, not a necessarily included lesser offense, of the charged crime of first-degree home invasion. The Court of Appeals agreed with defendant and vacated his convictions.[6] The Court of Appeals opined that a conviction of third-degree home invasion is based on the commission of or intent to commit a misdemeanor. In contrast, a conviction of first-degree home invasion is based on the commission of or intent to commit a felony, an element that it concluded is distinct from the commission of, or intent to commit, a misdemeanor.[7] As a result, the Court of Appeals concluded that third-degree home invasion is a cognate offense of first-degree home invasion and, accordingly, the trial court could not convict

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[6] *People v Wilder*, unpublished opinion per curiam of the Court of Appeals, issued October 21, 2008 (Docket No. 278737).

[7] *Id.* at 4.

defendant of the lesser crime.[8] The prosecution applied for leave to appeal in this Court. This Court granted leave to consider the limited issue of whether third-degree home invasion is a necessarily included lesser offense of first-degree home invasion.[9]

II. STANDARD OF REVIEW

Whether third-degree home invasion is a necessarily included lesser offense of first-degree home invasion is a question of law that this Court reviews de novo.[10] Defendant additionally asserts that his due process rights under the Fourteenth Amendment were violated, which is a constitutional question that this Court also reviews de novo.[11]

III. ANALYSIS

The issue before us is whether third-degree home invasion is a necessarily included lesser offense of first-degree home invasion and, consequently, whether defendant's convictions should be reinstated. Our analysis begins with a review of the statutory basis for lesser-offense instructions. MCL 768.32(1) provides in relevant part:

> Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, *may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to*

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[8] *Id.*

[9] *People v Wilder*, 483 Mich 922 (2009).

[10] *In re Investigation of March 1999 Riots in East Lansing*, 463 Mich 378, 383; 617 NW2d 310 (2000).

[11] *Sidun v Wayne Co Treasurer*, 481 Mich 503, 508; 751 NW2d 453 (2008).

> *that charged in the indictment,* or of an attempt to commit that offense. [Emphasis added.]

In *People v Cornell*,[12] this Court considered what constitutes an "offense inferior to that charged" within the meaning of MCL 768.32(1). In its discussion of inferior offenses, the *Cornell* Court opined that " 'the word "inferior" in the statute does not refer to inferiority in the penalty associated with the offense, but, rather, to the absence of an element that distinguishes the charged offense from the lesser offense.' "[13]

On this basis, the *Cornell* Court concluded that MCL 768.32(1) permits the trier of fact to find a defendant guilty of a lesser offense if the lesser offense is necessarily included in the greater offense. A lesser offense is necessarily included in the greater offense when the elements necessary for the commission of the lesser offense are subsumed within the elements necessary for the commission of the greater offense.[14]

Necessarily included lesser offenses are distinguishable from cognate offenses. Cognate offenses share several elements and are of the same class or category as the greater offense, but contain elements not found in the greater offense.[15] As a result, a cognate offense is *not* an inferior offense under MCL 768.32(1). Accordingly, the trier of fact may not find a defendant not guilty of a charged offense but guilty of a cognate offense because the defendant would not have had notice of all the elements of the offense that he or she was required to defend against.[16]

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[12] *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002).

[13] *Id.* at 355, quoting *People v Torres (On Remand)*, 222 Mich App 411, 420; 564 NW2d 149 (1997).

[14] *Cornell*, 466 Mich at 357; see also *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003).

[15] *Cornell*, 466 Mich at 345.

[16] *Id.* at 354-355, 359.

In applying these principles to the present case, we must review the home invasion statutes to determine whether the elements of third-degree home invasion, MCL 750.110a(4), are subsumed within the elements of first-degree home invasion, MCL 750.110a(2).

MCL 750.110a(2) sets forth the elements of the crime of first-degree home invasion:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling.

MCL 750.110a(4) sets forth the elements of the crime of third-degree home invasion:

> A person is guilty of home invasion in the third degree if the person does either of the following:
>
> (a) Breaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor.
>
> (b) Breaks and enters a dwelling or enters a dwelling without permission and, at any time while the person is entering, present in, or exiting the dwelling, violates any of the following ordered to protect a named person or persons:

(*i*) A probation term or condition.

(*ii*) A parole term or condition.

(*iii*) A personal protection order term or condition.

(*iv*) A bond or bail condition or any condition of pretrial release.

A review of these statutes demonstrates that both first-degree home invasion and third-degree home invasion can be committed in several different ways, each of which involves alternative elements necessary to complete the crime.

The alternative elements of first-degree home invasion can be broken down as follows:

Element One: The defendant *either*:

1. breaks and enters a dwelling or

2. enters a dwelling without permission.

Element Two: The defendant *either*:

1. intends when entering to commit a felony, larceny, or assault in the dwelling or

2. at any time while entering, present in, or exiting the dwelling commits a felony, larceny, or assault.

Element Three: While the defendant is entering, present in, or exiting the dwelling, *either*:

1. the defendant is armed with a dangerous weapon or

2. another person is lawfully present in the dwelling.

The alternative elements of third-degree home invasion can be broken down as follows:

Element One: The defendant *either*:

1. breaks and enters a dwelling or

2. enters a dwelling without permission.

Element Two: The defendant:

1. intends when entering to commit a misdemeanor in the dwelling, or

2. at any time while entering, present in, or exiting the dwelling commits a misdemeanor, or

3. while entering, present in, or exiting the dwelling violates any of the following ordered to protect a named person or persons:

a. probation term or condition, or

b. parole term or condition, or

c. personal protection order term or condition, or

d. bond or bail condition or any condition of pretrial release.

The Court of Appeals opined that third-degree home invasion cannot be a necessarily included lesser offense of first-degree home invasion because one or more of the possible alternative elements of third-degree home invasion are distinct from the elements of first-degree home invasion. In doing so, it failed to confine its analysis to the elements at issue in this case; rather, it based its decision on an analysis of alternative elements that were not at issue. The Court reasoned that if there *could* be any instance in which the underlying misdemeanor is not subsumed within the predicate felony, then the entire crime is a cognate offense. We disagree with this rationale.

We conclude that a more narrowly focused evaluation of the statutory elements at issue is necessary when dealing with degreed offenses that can be committed by alternative methods. Such an evaluation requires examining the charged predicate crime to determine whether the alternative elements of the lesser crime committed are subsumed within the charged offense. As long as the elements at issue are subsumed within the charged offense, the crime is a necessarily included lesser offense. Not all possible statutory alternative elements of the lesser offense need to be subsumed within the elements of

the greater offense in order to conclude that the lesser offense is a necessarily included lesser offense. Accordingly, in order to determine whether the specific elements used to convict defendant of third-degree home invasion in this case constitute a necessarily included lesser offense of first-degree home invasion, one must examine the offense of first-degree home invasion as charged and determine whether the elements of third-degree home invasion as convicted are subsumed within the charged offense.

The record in this case indicates that defendant was charged with first-degree home invasion for entering the complainant's home without permission, taking property out of the home, and displaying a gun in his waistband. The trial court convicted defendant of third-degree home invasion under MCL 750.110a(4)(a) by finding that defendant entered the home without permission and committed a misdemeanor (larceny). Thus, we need only examine the elements of third-degree home invasion under MCL 750.110a(4)(a) to determine whether the crime, when committed in that specific manner, is a necessarily included lesser offense of the charged crime of first-degree home invasion.

In the instant case, it is clear that third-degree home invasion under MCL 750.110a(4)(a) is a necessarily included lesser offense of first-degree home invasion because all the elements required to convict defendant of third-degree home invasion under that subdivision are subsumed within the elements of first-degree home invasion. The elements of first-degree home invasion, MCL 750.110a(2), as *charged* in this case are:

> Element One: Defendant entered a dwelling without permission.
>
> Element Two: Defendant, while present in the dwelling, committed a larceny.

> Element Three: While present in the dwelling, defendant was armed with a dangerous weapon.

The elements of third-degree home invasion, MCL 750.110a(4)(a), used to *convict* defendant were:

> Element One: Defendant entered a dwelling without permission.
>
> Element Two: Defendant, while present in the dwelling, committed a misdemeanor.

A misdemeanor offense is necessarily included in a larceny offense if all the elements necessary to commit the misdemeanor are subsumed within the elements necessary to commit the larceny.[17] The second element of the lesser crime, *commission of a misdemeanor while present in the dwelling*, is subsumed within the second element of the greater crime charged, *commission of a larceny while present in the dwelling*, because every felony larceny necessarily includes within it a misdemeanor larceny. In other words, given the charged offense, it would have been necessary for defendant to commit third-degree home invasion, by committing the misdemeanor, before completing the crime of first-degree home invasion, by committing the larceny. Accordingly, third-degree home invasion under MCL 750.110a(4)(a) is a necessarily included lesser offense of first-degree home invasion.[18]

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[17] *Cornell*, 466 Mich at 345.

[18] We note that third-degree home invasion under MCL 750.110a(4)(b) is completed when a defendant breaks and enters a dwelling or enters a dwelling without permission and, while there or while entering or exiting, violates a term or condition of probation, parole, a personal protection order, or bond or bail. Since defendant in this case was not convicted under MCL 750.110a(4)(b), the issue of whether third-degree home invasion under MCL 750.110a(4)(b) is a necessarily included lesser offense of first-degree home invasion is not before us, and we therefore refrain from deciding it.

We next consider whether defendant's due process rights were violated. Due process requires that a defendant be on notice of all the elements of a crime that he or she is charged with and is expected to defend against.[19] Because all the elements of third-degree home invasion are subsumed within the elements required for first-degree home invasion in this case, defendant was on notice of all the elements of the crime he was required to defend against. As a result, defendant was fully informed of the nature of the charges against him and the elements that the prosecution was required to prove beyond a reasonable doubt in order to obtain a conviction. Accordingly, we conclude that defendant's due process rights were not violated because he was convicted of a necessarily included lesser offense of the crime with which he was charged.

IV. CONCLUSION

We granted leave in this case to consider the limited issue of whether third-degree home invasion, MCL 750.110a(4), is a necessarily included lesser offense of first-degree home invasion, MCL 750.110a(2). We hold that third-degree home invasion under MCL 750.110a(4)(a) is a necessarily included lesser offense of first-degree home invasion because all the elements supporting defendant's conviction of third-degree home invasion are subsumed within the elements that would have been necessary to convict defendant of first-degree home invasion. Further, defendant's due process rights were not violated because he was on notice of all the elements of the crime he was required to defend against. Accordingly, we reverse the Court of Appeals' judgment and reinstate defendant's convictions and sentences.

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[19] See *Schmuck v United States*, 489 US 705, 717-718; 109 S Ct 1443; 103 L Ed 2d 734 (1989).

WEAVER, CORRIGAN, YOUNG, and MARKMAN, JJ., concurred with HATHAWAY, J.

CORRIGAN, J. (*concurring*). I join the majority opinion because I agree that third-degree home invasion under MCL 750.110a(4)(a) is a necessarily included lesser offense of the charged offense of first-degree home invasion. As the majority opinion explains, all the elements required for defendant's conviction of third-degree home invasion are subsumed in the elements of first-degree home invasion.

I write separately only to express continued adherence to my dissenting opinion in *People v Nyx*, 479 Mich 112, 154-179; 734 NW2d 548 (2007). That is, when the Legislature itself has formally divided an offense into degrees, MCL 768.32(1) permits a fact-finder to convict a defendant of a legislatively denominated inferior degree of the charged offense if a rational view of the evidence supports the conviction. Resort to the *Cornell*[1] rule of construction for determining whether an offense is inferior is simply unnecessary in this situation.

Nonetheless, because the majority here correctly concludes that the elements of third-degree home invasion under MCL 750.110a(4)(a) are subsumed in the charged offense of first-degree home invasion, thereby requiring reinstatement of defendant's convictions and sentences, I concur in the majority's decision.

CAVANAGH, J. (*concurring in part and dissenting in part*). I concur with the result reached by the majority opinion. I agree with the majority opinion that defen-

[1] *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002).

dant's due process rights were not violated. Because defendant was charged with committing first-degree home invasion on the basis of committing a larceny offense, defendant was on notice that he needed to defend each element of a larceny crime. I do not, however, join the majority opinion in full because I continue to believe that the majority's interpretation of the word "inferior" in MCL 768.32 is contrary to the established definition and historical use of the term. See *People v Mendoza*, 468 Mich 527, 548-555; 664 NW2d 685 (2003) (CAVANAGH, J., concurring), and *People v Nyx*, 479 Mich 112, 142-143; 734 NW2d 548 (2007) (CAVANAGH, J., concurring in result only).

KELLY, C.J., concurred with CAVANAGH, J.

PEOPLE v PLUNKETT

Docket No. 138123. Decided March 30, 2010.

The 15th District Court, Terrence P. Bronson, J., bound Ronald J. Plunkett over to the Washtenaw Circuit Court for trial on charges that included delivering a controlled substance (heroin) causing death and delivering less than 50 grams of heroin. Evidence at the preliminary examination indicated that defendant had driven Tracy Corson to meet Harold Spencer, a drug dealer, and given her money to purchase heroin and that Corson subsequently shared the heroin with Tiffany Gregory shortly before Gregory died of a drug overdose. In the circuit court, defendant moved to quash the bindover, and the court, Melinda Morris, J., granted the motion with respect to the two counts related to delivery of heroin. The prosecution sought delayed leave to appeal. The Court of Appeals, FITZGERALD, P.J., and BANDSTRA, J. (SCHUETTE, J., dissenting), affirmed, concluding that the evidence did not support the prosecution's theory that defendant aided and abetted Spencer's delivery of the heroin to Corson or that he constructively delivered the heroin to Corson himself. 281 Mich App 721 (2008). The Supreme Court ordered and heard oral argument on whether to grant the prosecution's application for leave to appeal or take other peremptory action. 483 Mich 964 (2009).

In an opinion by Justice YOUNG, joined by Justices WEAVER, CORRIGAN, and MARKMAN, the Supreme Court *held*:

A defendant who transported another person to an illegal narcotics transaction, provided the money for the transaction, and intended that the money be used to purchase narcotics may be bound over for trial on charges of aiding and abetting violations of laws prohibiting the delivery of narcotics. A bindover is required when probable cause exists to support each element of a crime.

1. The allegations against defendant were premised solely on Spencer's delivery of heroin to Corson, a delivery that violated both MCL 333.7401(2)(a) and MCL 750.317a.

2. A person who procures, counsels, aids, or abets the commission of a crime may be prosecuted and punished as if he or she had directly committed the offense. The three elements necessary for a conviction under an aiding and abetting theory are (1) the defendant or some other person committed the crime charged, (2) the

defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or knew that the principal intended its commission when the defendant gave aid and encouragement.

3. A defendant who assists either party to a criminal delivery of narcotics—the deliverer or the recipient—necessarily aids and abets the deliverer's commission of the crime because such assistance aids and abets the delivery. The evidence of defendant's specific conduct in furtherance of Spencer's delivery of heroin to Corson established probable cause that defendant performed acts or gave encouragement that assisted the delivery of heroin from Spencer to Corson and intended or knew that Spencer would deliver heroin to Corson. Without defendant's conduct, this drug transaction would not have occurred. The district court did not abuse its discretion by binding defendant over for trial on the heroin charges.

Reversed; bindover reinstated and case remanded for trial.

Chief Justice KELLY, joined by Justices CAVANAGH and HATHAWAY, dissenting, concluded that aiding and abetting requires that there be some assistance given to the perpetrator of the crime by words or deeds that are intended to encourage, support, or incite the commission of that crime. Spencer was the actual perpetrator of the delivery offense. The deeds in which defendant engaged to encourage the commission of a crime were directed solely at Corson's possession crime. Defendant participated in and encouraged her possession of the heroin, but did nothing to encourage or assist Spencer's delivery of the heroin to Corson, the crime that he was charged with aiding and abetting. Probable cause was thus lacking for a critical element necessary to support defendant's conviction under an aiding and abetting theory. Moreover, the majority's decision renders obsolete the charge of possessing a controlled substance under an aiding and abetting theory because the prosecution may always charge the person who aids and abets possession with delivery. The judgment of the Court of Appeals should be affirmed.

1. CRIMINAL LAW — AIDING AND ABETTING.

The three elements necessary for a conviction under a theory of aiding and abetting a crime are (1) the defendant or some other person committed the crime charged, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or knew that the principal intended its commission when the defendant gave aid and encouragement (MCL 767.39).

2. CONTROLLED SUBSTANCES — DELIVERY OF CONTROLLED SUBSTANCES — AIDING AND ABETTING.

A defendant who assists either party to a criminal delivery of controlled substances—the deliverer or the recipient—is guilty of aiding and abetting the delivery.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Brian L. Mackie*, Prosecuting Attorney, and *David A. King*, Assistant Prosecuting Attorney, for the people.

Gentry Law Offices, P.C. (by *Kevin S. Gentry*), and *John A. Shea* for defendant.

YOUNG, J. This case requires this Court to determine whether a defendant who transported another person to make a drug purchase, supplied the money for this purchase, and intended that the drug purchase occur may be bound over for trial for violating laws prohibiting the delivery of heroin and the delivery of heroin causing death. We hold that evidence of such conduct provides probable cause to believe that defendant aided and abetted the violation of these laws and, therefore, that he may be bound over for trial on those counts. Under MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, reinstate the district court's bindover for trial on these counts, and remand this case to the Washtenaw Circuit Court for trial.

I. FACTS AND PROCEDURAL HISTORY

The following facts were established through testimony at defendant's preliminary examination. In February 2006, defendant Ronald James Plunkett, then an attorney living in Ann Arbor, met Tracy Ann Corson, a Livonia prostitute, after defendant allegedly told a Detroit drug dealer that he "wanted [the] company of a girl [who]

would be provided drugs to go and to get high at his house." By May 2006, Corson had moved into defendant's apartment. They would "[get] high a lot" from crack cocaine and heroin that they purchased for $200 "[j]ust about every day" from a Detroit drug dealer named Harold Spencer. Because Corson did not have the financial resources to purchase drugs, defendant bankrolled their drug habits. A typical day for defendant and Corson included driving from Ann Arbor to a parking lot in northwest Detroit to purchase drugs from Spencer.

June 25, 2006, was no exception. After defendant arrived home from work, he and Corson drove to Detroit. As usual, defendant provided Corson with the drug money and drove her to meet their drug dealer, where Corson completed the drug transaction. The drug purchase routine was structured "so that when [she and defendant] met [their drug dealer] in the parking lot [Corson] could just jump out and hop in [the dealer's] car, get the drugs and come back." While driving back to Ann Arbor after the drug transaction, defendant smoked crack cocaine with Corson, and Corson injected herself with heroin. Both of them partied into the night with defendant's ex-girlfriend at defendant's apartment. The three smoked crack cocaine together, and Corson gave defendant's ex-girlfriend heroin.

Around 3:00 a.m. on June 26, Corson received a phone call from a childhood friend, Tiffany Gregory, who was seeking drugs. Corson invited Gregory to defendant's apartment. Gregory arrived at defendant's apartment appearing visibly intoxicated but able to walk and talk. After the four smoked crack cocaine in the living room, Corson and Gregory went into a bedroom and injected themselves with heroin. Subsequently, Corson left the bedroom to use the bathroom. Upon her return, Corson observed that Gregory had passed out and was unresponsive and blue. Emergency medical services were summoned. While waiting for emergency personnel to arrive,

Corson and defendant hid the remaining drugs. Attempts by paramedics to resuscitate Gregory failed, and she was pronounced dead at 5:14 a.m.

A forensic pathologist performed an autopsy on Gregory and determined her cause of death to be an accidental drug overdose. The toxicology report indicated that Gregory had ingested a lethal amount of heroin. Gregory also had cocaine metabolites in her system, as well as a blood alcohol level of 0.115 percent. The forensic pathologist testified that the combination of alcohol and drugs in Gregory's system had a synergistic effect on her body, but that heroin was the ultimate cause of death.

Defendant was arrested on four related drug charges: (I) delivery of a controlled substance causing death,[1] (II) delivery of less than 50 grams of a controlled substance (heroin),[2] (III) delivery of less than 50 grams of a controlled substance (cocaine),[3] and (IV) maintaining a drug house.[4] The district court bound defendant over for trial on all four counts.

Defendant moved in the circuit court to quash the bindover. Relevant to this appeal, defendant claimed with regard to counts I and II that Corson purchased the heroin for her personal use and, moreover, that he did not even know that Corson had purchased the heroin. Accordingly, defendant claimed that he could not be bound over for trial on these counts.

The prosecutor argued that defendant's conduct met the elements of counts I and II under two independent theories that the prosecutor claimed did not require defendant's physical transfer of the heroin to Corson. First, the prosecutor asserted that defendant aided and

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[1] MCL 750.317a.

[2] MCL 333.7401(2)(a)(*iv*).

[3] *Id*.

[4] MCL 333.7405(1)(d).

abetted the delivery of the heroin from Spencer to Corson. Alternatively, the prosecutor argued that the defendant effected a "constructive delivery" of the heroin from himself to Corson. The circuit court agreed with defendant, ruling that the district court had abused its discretion by binding defendant over on counts I and II because defendant's actions did not constitute delivery of heroin to Corson. The court affirmed the district court's bindover on counts III and IV, and these charges are not at issue in this appeal.

The Court of Appeals granted the prosecution's delayed application for leave to appeal and affirmed the circuit court's decision to quash counts I and II.[5] The majority concluded that neither of the prosecution's theories supported a bindover on the two counts related to the delivery of heroin. The majority held that "no evidence was presented to support a finding that defendant aided and abetted the drug dealer in delivering the drugs to Corson" and that at most "the evidence in this case could support a finding that defendant aided and abetted Corson in *receiving* the heroin . . . ."[6] It further held that "a defendant constructively delivers a controlled substance when the defendant directs another person to convey the controlled substance under the defendant's direct or indirect control to a third person or entity."[7] It thereby concluded that "the heroin purchased by Corson was not under defendant's control,

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[5] *People v Plunkett*, 281 Mich App 721; 760 NW2d 850 (2008).

[6] *Id.* at 730.

[7] *Id.* at 728, citing *Commonwealth v Murphy*, 577 Pa 275, 285; 844 A2d 1228 (2004) ("[A] defendant constructively transfers drugs when he directs another person to convey drugs under his control to a third person or entity."), and *Dawson v State*, 812 SW2d 635, 637 (Tex App, 1991) (stating that constructive delivery is defined as "the transfer of a controlled substance either belonging to an individual or under his direct or indirect control by some other person at the instance or direction of the individual accused of such constructive transfer").

nor did defendant direct the drug dealer to transfer the drugs to Corson."[8]

Judge SCHUETTE dissented, concluding that probable cause supported the prosecution's theory that defendant aided and abetted Spencer's delivery of the heroin to Corson. He reasoned that "there is evidence that defendant 'performed acts . . . that assisted the commission of the crime,' i.e., he provided the buyer and the money" and "knew that Spencer intended the crime at the time defendant gave aid."[9]

This Court scheduled argument on whether to grant the prosecution's application for leave to appeal or take other peremptory action and directed the parties to address "whether MCL 750.317a encompasses the defendant's actions in this case."[10]

II. PRELIMINARY EXAMINATIONS

Neither the United States Constitution nor the Michigan Constitution requires a preliminary examination.[11] Rather, the Legislature has mandated preliminary examinations for felony charges:

> Except as provided in [MCL 712A.4],[12] the magistrate before whom any person is arraigned on a charge of having

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[8] *Id.* at 729.

[9] *Id.* at 732 (SCHUETTE, J., dissenting), quoting *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006).

[10] 483 Mich 964 (2009).

[11] *People v Yost*, 468 Mich 122, 125; 659 NW2d 604 (2003).

[12] Whenever a juvenile 14 years of age or older is accused of an act that if committed by an adult would be a felony, a judge of the family division of circuit court may waive jurisdiction under MCL 712A.4. At that time, "the court shall determine on the record if there is probable cause to believe that an offense has been committed that if committed by an adult would be a felony and if there is probable cause to believe that the juvenile committed the offense." MCL 712A.4(3).

> committed a felony shall set a day for a preliminary examination . . . . At the preliminary examination, a magistrate shall examine the complainant and the witnesses in support of the prosecution, on oath . . . .[13]

The purpose of the preliminary examination is to determine whether "a felony has been committed and [whether] there is probable cause for charging the defendant therewith . . . ."[14] If there is probable cause, the magistrate must "bind the defendant to appear before the circuit court . . . , or other court having jurisdiction of the cause, for trial."[15]

As this Court explained in *People v Yost*, "[p]robable cause requires a quantum of evidence 'sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief' of the accused's guilt."[16] This standard is less rigorous than the requirement to find guilt beyond a reasonable doubt to convict a criminal defendant, and "the gap between probable cause and guilt beyond a reasonable doubt is broad . . . ."[17]

III. STANDARD OF REVIEW

Absent an abuse of discretion, reviewing courts should not disturb a magistrate's decision to bind a criminal defendant over for trial.[18] In the instant case, defendant argues that the district court's decision to bind him over on the two counts relating to the distribution of heroin was an abuse of discretion because his

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[13] MCL 766.4.

[14] MCL 766.13.

[15] *Id.*

[16] *Yost*, 468 Mich at 126, quoting *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997).

[17] *Yost*, 468 Mich at 126.

[18] *People v Stone*, 463 Mich 558, 561; 621 NW2d 702 (2001).

alleged conduct does not fit within the scope of the appropriate criminal statutes. Determining the scope of a statute is a matter of statutory interpretation and as such is reviewed de novo.[19]

When interpreting a statute, courts must " 'ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute.' "[20] This requires courts to consider "the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' "[21]

IV. ANALYSIS

Defendant was charged with violating MCL 333.7401(2)(a) (delivery of a schedule 1 or 2 narcotic controlled substance) and MCL 750.317a (delivery of a schedule 1 or 2 controlled substance causing death). As an initial matter, the facts adduced at the preliminary examination suggested that two separate deliveries of a schedule 1 controlled substance (heroin) occurred during the evening of June 25 to 26, 2006: when Spencer sold the heroin to Corson and when Corson gave the heroin to Gregory. The prosecution's allegations against defendant are premised solely on the delivery of heroin from Spencer to Corson. Accordingly, this Court's analysis only examines defendant's involvement in the delivery of heroin from Spencer to Corson. As a necessary premise of the prosecution's aiding and abetting theory, we first conclude that Spencer's delivery of heroin to Corson violated both statutes. We also conclude that defendant's conduct provided probable cause

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[19] *Id.*

[20] *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007), quoting *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

[21] *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999), quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995).

that he aided and abetted this delivery, thus supporting a bindover on both charges.

A. SPENCER'S DELIVERY OF HEROIN TO CORSON

At oral argument before this Court, defense counsel admitted that Spencer's delivery of heroin to Corson violated both MCL 333.7401 and MCL 750.317a. It is thus unchallenged that, on the basis of the evidence presented at defendant's preliminary examination, there is probable cause to conclude that Spencer delivered heroin in violation of MCL 333.7401 and delivered heroin causing death in violation of MCL 750.317a when he sold the heroin to Corson that subsequently killed Gregory.

MCL 333.7401 provides, in relevant part:

> (1) Except as authorized by [MCL 333.7101 *et seq*.], a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance . . . .
>
> (2) A person who violates this section as to:
>
> (a) A controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in [MCL 333.7214(a)(*iv*)] and:
>
> * * *
>
> (*iv*) Which is in an amount less than 50 grams, of any mixture containing that substance is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $25,000.00, or both.

The Legislature has determined that heroin, a narcotic, is a schedule 1 controlled substance within the meaning of the controlled substances act.[22] In directly selling heroin to Corson, Spencer violated MCL 333.7401.

[22] MCL 333.7212(b).

It is also clear that Spencer violated MCL 750.317a (delivery of heroin causing death). The Legislature recently added MCL 750.317a to the Michigan Penal Code.[23] It provides, in relevant part:

> A person who delivers a schedule 1 or 2 controlled substance . . . to another person in violation of . . . MCL 333.7401 . . . that is consumed by that person or any other person and that causes the death of that person or other person is guilty of a felony punishable by imprisonment for life or any term of years.

It is clear from the plain language of the statute that MCL 750.317a provides an additional punishment for persons who "deliver[]" a controlled substance in violation of MCL 333.7401 when that substance is subsequently consumed by "any . . . person" and it causes that person's death. It punishes an individual's role in placing the controlled substance in the stream of commerce, even when that individual is not directly linked to the resultant death.

Consequently, MCL 750.317a is a general intent crime, and as such does not require the intent that death occur from the controlled substance first delivered in violation of MCL 333.7401. Rather, the general intent required to violate MCL 750.317a is identical to the general intent required to violate MCL 333.7401(2)(a): the *delivery* of a schedule 1 or 2 controlled substance. Accordingly, Spencer violated MCL 750.317a when he sold heroin to Corson because that heroin subsequently caused Gregory's death.

B. DEFENDANT'S ROLE IN THE DELIVERY OF HEROIN TO CORSON

Given that Spencer's delivery of heroin violated both statutes at issue here, the question posed in this appeal is whether *defendant's* actions make him as culpable as

[23] 2005 PA 167.

Spencer under the law. The prosecution does not argue that defendant physically delivered the heroin to Corson; rather, the prosecution argues that he aided and abetted Spencer's delivery of heroin to Corson.[24] Under our aiding and abetting statute,

> [e]very person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.[25]

This Court recently described the three elements necessary for a conviction under an aiding and abetting theory:

> " '(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement.' "[26]

A bindover is required when probable cause exists to support each of the elements of a crime.[27]

As stated, it is not contested that the first element was established. There was ample evidence to support

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[24] The prosecution also alleges that defendant constructively transferred the heroin to Corson within the meaning of MCL 333.7105(1). Because a bindover is supported by the prosecution's aiding and abetting theory, this Court need not decide whether the Court of Appeals correctly ruled on the alternative theory in order to reinstate the district court's bindover.

[25] MCL 767.39.

[26] *Robinson*, 475 Mich at 6, quoting *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999).

[27] See *Yost*, 468 Mich at 126.

probable cause that Spencer committed both crimes at issue when he sold heroin to Corson. Thus, to sustain the prosecution's aiding and abetting theory, the evidence must support defendant's act of encouragement and assistance of Spencer's crime (element 2) as well as defendant's knowledge of Spencer's criminal delivery to Corson or defendant's intent that this delivery crime be committed (element 3). We believe that the evidence presented at the preliminary examination more than satisfies all three aiding and abetting elements.

Defendant claims that at most he assisted Corson in *obtaining possession* of heroin from Spencer, but did not assist Spencer in *delivering* heroin to Corson. Defendant's analysis, which has been accepted by the circuit court, the Court of Appeals majority, and this Court's dissent, conflates two crimes—possession and delivery—such that defendant's focus on the possessory crime obscures the delivery crime. What the lower courts and the dissenting justices have failed to appreciate is that a criminal "delivery" of narcotics necessarily requires *both* a deliverer and a recipient. Accordingly, a defendant who assists *either* party to a criminal delivery necessarily aids and abets the deliverer's commission of the crime because such assistance aids and abets the *delivery*.[28]

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[28] Whether defendant is *also* liable for aiding and abetting the separate criminal offense of possession of narcotics is irrelevant to this Court's inquiry into whether he aided and abetted the delivery. The dissent errs by claiming that "defendant gave no assistance to Spencer, the actual perpetrator of the delivery offense." *Post* at 67. To the contrary, defendant drove Corson to Spencer and provided the money that effected the delivery of illicit narcotics. Without defendant's conduct, Spencer would not have sold the narcotics to Corson on June 25, 2006.

Furthermore, the dissent erroneously claims that this decision "renders . . . obsolete" the charge of possession of narcotics under an aiding and abetting theory. *Post* at 67. Such a charge remains distinct from aiding and abetting the delivery of narcotics. Someone who provides no encouragement or assistance for the initial delivery of narcotics to a possessor can nevertheless aid and abet the *continued* possession of narcotics.

Corson testified that defendant drove her from Ann Arbor to Detroit on the day in question for the specific purpose of engaging in a drug transaction with Spencer. Moreover, defendant paid for the heroin that Corson used on the drive back to Ann Arbor, provided to defendant's ex-girlfriend in defendant's apartment, and subsequently shared with Gregory in defendant's apartment. Furthermore, the evidence adduced at the preliminary examination suggests a consistent pattern of heroin activity—from acquisition to consumption—in defendant's presence. As the district court held, this evidence was sufficient to establish probable cause that defendant "performed acts or gave encouragement that assisted" the delivery of heroin from Spencer to Corson on the day in question and, furthermore, that he "intended . . . or had knowledge" that Spencer would deliver heroin to Corson.[29]

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[29] *Robinson*, 475 Mich at 6. Although defendant alleges that he neither intended nor knew that Corson would deliver the heroin to Gregory on the night of Gregory's death, such knowledge or intention is irrelevant to whether he violated MCL 333.7401 and MCL 750.317a by aiding and abetting *Spencer's* delivery to *Corson*.

Moreover, defendant's unsupported claim to the circuit court that he neither intended nor knew that Spencer would deliver heroin to Corson is not sufficient to quash the bindover. This argument seems to have been abandoned in this Court, as defense counsel admitted in this Court that defendant "[a]ssisted Corson in possessing the drugs" without distinguishing between the heroin and the crack cocaine.

More important, a bindover decision must be based on *evidence*, not arguments of counsel. At the preliminary examination, as recounted earlier, the testimony of Corson established probable cause that defendant intended Spencer to deliver heroin to Corson on the day in question and that Spencer had routinely done so previously. As stated, probable cause merely requires "a quantum of evidence 'sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief' of the accused's guilt." *Yost*, 468 Mich at 126 (citation omitted). The evidence presented at the preliminary examination indicated that defendant's and Corson's actions on the day in question were part of their ordinary pattern of drug activity, which provides a reasonable inference that defendant knew and intended that Spencer would deliver heroin to Corson on the day in question.

The Court of Appeals majority attempted to distinguish the instant case from three earlier Court of Appeals cases applying Michigan's aiding and abetting doctrine to the delivery of narcotics. In *People v Izarraras-Placante*,[30] the defendant drove a drug dealer to a transaction with an undercover police officer, was overheard discussing the price with the drug dealer, and was identified by the drug dealer as his partner. In *People v Lyons*,[31] the defendant answered a hotel room door, asked an undercover officer what he desired, and led the officer into the room to obtain heroin from another person inside the room. In *People v Berry*,[32] the defendant met an undercover officer who was going to purchase cocaine from a drug dealer, convinced the officer to obtain the cocaine from another drug dealer, and coordinated the transaction. When the undercover officer suggested that the defendant pool his money with the officer's money to get a better price on narcotics, defendant did so. They therefore purchased the narcotics together.

By including these three cases as comparative examples of aiding and abetting the delivery of narcotics, the Court of Appeals majority implied that the evidence in this case was insufficient to establish probable cause for a bindover. However, none of these cited cases supports the requirement the Court of Appeals majority imposed that a defendant charged with aiding and abetting the delivery of narcotics must have aided and abetted only the person who *delivered* the narcotics.[33]

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[30] *People v Izarraras-Placante*, 246 Mich App 490; 633 NW2d 18 (2001).

[31] *People v Lyons*, 70 Mich App 615; 247 NW2d 314 (1976).

[32] *People v Berry*, 101 Mich App 399; 300 NW2d 575 (1980).

[33] To the contrary, the facts in *Berry* also suggested that the defendant there was in a similar position to defendant in the instant case: the defendant and the undercover officer collaborated to purchase narcotics from a drug dealer and did purchase narcotics from a drug dealer, which they then split. As in *Berry*, the evidence presented at the instant

Thus, the Court of Appeals majority erred by confining its inquiry to whether "defendant aided and abetted *the drug dealer* in delivering the drugs to Corson."[34] Instead, the crux of the appropriate inquiry is whether defendant aided and abetted *the delivery itself* by assisting any party to that transaction. Such assistance to any party to an illegal transaction necessarily "encourage[s], support[s], or incite[s] the commission of that crime."[35] Because defendant drove Corson to purchase heroin and supplied the money for the heroin, there is probable cause to bind defendant over for violating MCL 333.7401 and MCL 750.317a. The district court, therefore, did not abuse its discretion by binding defendant over on these charges.

V. CONCLUSION

A defendant who transported another person to an illegal narcotics transaction, provided the money for this transaction, and intended that the money be used to purchase narcotics may be bound over for trial under MCL 750.317a and MCL 333.7401(2)(a) for aiding and

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defendant's preliminary examination suggested that he "was more than a mere bystander," that he "encouraged the transaction 'knowingly with the intent to aid the possessor [to] obtain or retain possession,' " and that he "took an active role in arranging the delivery" of the narcotics. *Id.* at 402, quoting *People v Doemer*, 35 Mich App 149, 152; 192 NW2d 330 (1971). The similarities between the instant case and *Berry* further belie the dissent's claim that "defendant gave no assistance to Spencer, the actual perpetrator of the delivery offense." *Post* at 67. Without defendant's actions, this drug transaction would not have occurred.

[34] *Plunkett*, 281 Mich App at 730 (emphasis added).

[35] *Moore*, 470 Mich at 63. The dissent fails to reconcile its position that "aiding and abetting requires that there be some 'assistance given to the perpetrator of a crime,' " *post* at 67, quoting *Moore*, 470 Mich at 63 (emphasis omitted), with the fact that any assistance given to the *recipient* of an illegal delivery to aid in her possession of narcotics necessarily assists the *deliverer* in delivering those narcotics.

abetting the delivery of narcotics. The Court of Appeals erred by concluding that probable cause did not exist to support a bindover on these charges. Accordingly, the judgment of the Court of Appeals is reversed, the district court's bindover is reinstated, and this case is remanded to the Washtenaw Circuit Court for trial. We do not retain jurisdiction.

WEAVER, CORRIGAN, and MARKMAN, JJ., concurred with YOUNG, J.

KELLY, C.J. (*dissenting*). I respectfully dissent. In my view, defendant performed no act and gave no encouragement that assisted the delivery of heroin by Harold Spencer to Tracy Corson. Therefore, probable cause was lacking for a critical element necessary to support a conviction under an aiding and abetting theory. I would affirm the judgment of the Court of Appeals.

I agree with the majority opinion's recitation of the facts and the applicable legal standard that must be satisfied to support a conviction for aiding and abetting. That standard requires that probable cause exist to support the following elements of a crime before a defendant may be bound over on a charge of aiding and abetting the crime:

> "(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement."[1]

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[1] *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999).

The majority is also correct that a "delivery" of narcotics requires both a deliverer and a recipient. I do not agree, however, that this fact commands the conclusion that "a defendant who assists *either* party to a criminal delivery necessarily aids and abets the deliverer's commission of the crime because such assistance aids and abets the *delivery*."[2] Rather, aiding and abetting requires that there be some "assistance *given to the perpetrator of a crime* by words or deeds that are intended to encourage, support, or incite the commission of *that crime*."[3] I therefore disagree with the majority that "the crux of the appropriate inquiry is whether defendant aided and abetted the delivery itself by assisting any party to that transaction."[4] Indeed, the language quoted from *People v Moore* belies such a conclusion.

Under the standard elucidated in *Moore*, two key pieces of evidence are lacking here. First, defendant gave no assistance to Spencer, the actual perpetrator of the delivery offense. Second, the "deeds" in which defendant engaged to encourage the commission of a crime were directed solely to Corson's crime of possession, not Spencer's delivery offense.

Under the majority's analysis, any third party who assists in a drug transaction may be charged with delivery of those drugs under an aiding and abetting theory. This conclusion is overly broad. What conduct is left to support a charge of *possession* of a controlled substance under an aiding and abetting theory? In my view, today's decision renders such a charge obsolete, as the prosecution may always charge someone who aids and abets possession

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[2] *Ante* at 62.

[3] *Moore*, 470 Mich at 63, citing *People v Palmer*, 392 Mich 370, 378; 220 NW2d 393 (1974) (emphasis added). *Palmer* similarly held that the term " 'aiding and abetting' is used to describe all forms of assistance *rendered to the perpetrator of a crime*." *Palmer*, 392 Mich at 378 (emphasis added).

[4] *Ante* at 65 (emphasis omitted).

with aiding and abetting the delivery of the controlled substance. Thus, it is the majority rather than the dissent that conflates the crimes of delivery and possession.

Illustrating this point is the fact that "possession" of a controlled substance and "delivery" of that substance are distinct offenses. The prescribed punishment for each offense is outlined in great detail in the applicable statutes.[5] Therefore, it is contrary to those statutes to allow all aiders and abettors of the offense of possession of drugs to be charged as aiders and abettors of the delivery.

Defendant indisputably participated in and encouraged the commission of a crime: namely, Corson's possession of the heroin. But he did nothing to encourage or assist the commission of the crime that he was charged with aiding and abetting: Spencer's delivery of the heroin to Corson.

People v Doemer[6] is also informative on this point. In *Doemer*, the defendant was charged with possession of marijuana under an aiding and abetting theory. The Court of Appeals concluded that, to uphold the conviction, "[t]he act or encouragement must be done knowingly with the intent to aid the possessor [to] obtain or retain possession."[7] Defendant's acts in this case fall squarely within this language and fully support a charge of possession of heroin under an aiding and abetting theory.

Therefore, I believe the Court of Appeals correctly affirmed the circuit court's order quashing the bindover. Accordingly, I would affirm the judgment of the Court of Appeals.

CAVANAGH and HATHAWAY, JJ., concurred with KELLY, C.J.

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[5] See, e.g., MCL 333.7401 and MCL 333.7403.

[6] *People v Doemer*, 35 Mich App 149; 192 NW2d 330 (1971).

[7] *Id.* at 152.

BRIGGS TAX SERVICE, LLC v DETROIT PUBLIC SCHOOLS

Docket Nos. 138168, 138179, and 138182. Argued November 4, 2009 (Calendar No. 7). Decided March 30, 2010.

Briggs Tax Service, L.L.C., petitioned the Tax Tribunal for a refund of property taxes that it alleged the Detroit Public Schools (DPS) had levied and collected without authorization and to enjoin future collections without proper authorization. Briggs also named the Detroit Board of Education, the city of Detroit, and the Wayne County Treasurer as respondents. At issue was a school-operating millage levied in three tax years even though the school district electors had not approved it. The tribunal initially dismissed the refund claim on jurisdictional grounds because it was not filed within 30 days after the issuance of the applicable tax bills, as required by the version of MCL 205.735(2) in effect at the time, but allowed Briggs to amend its petition. The amended petition alleged that a mutual mistake of fact under MCL 211.53a had occurred, allowing Briggs to bring its claim within the three-year limitations period of that statute. DPS and the county treasurer moved for summary disposition, arguing that the three-year limitations period did not apply and that the tribunal lacked jurisdiction. The tribunal agreed and dismissed the petition. The Court of Appeals, JANSEN, P.J., and O'CONNELL and OWENS, JJ., reversed and remanded, holding that the mistake regarding the validity of imposing the tax was a mutual mistake of fact between Briggs and the assessor and that MCL 211.53a consequently applied. 282 Mich App 29 (2008). DPS and the board of education, the city, and the county treasurer filed separate applications for leave to appeal, which the Supreme Court granted. 484 Mich 1024 (2009).

In a unanimous opinion by Chief Justice KELLY, the Supreme Court *held*:

The levying and collecting of an unauthorized property tax does not constitute a mutual mistake of fact made by the taxpayer and the assessor.

1. At the time of the dispute, MCL 205.735(2) required the filing of a petition with the tribunal within 30 days of a final decision. When another statute provides a different limitations period, however, that statute controls and MCL 205.735 does not apply to that petition.

2. MCL 211.53a allows three years to bring a claim in property tax cases in which there is a clerical error or the assessing officer and the taxpayer made a mutual mistake of fact. A mutual mistake of fact is an erroneous belief shared and relied on by the parties about a material fact that affects the substance of the transaction.

3. A mistake occurred here: DPS levied a tax without the required voter approval. No mutuality existed, however. The mistake was attributable to DPS alone because it certified the tax. The assessor did not make a mistake in performing his statutory duties. Assessors are not empowered to review or alter certified tax rates.

4. The Court of Appeals erred by concluding that DPS's mistake could be imputed to the assessor under an agency theory because assessors are not agents of taxing authorities. Fundamental to the existence of an agency relationship is the principal's right to control the agent's conduct. DPS was not a principal with respect to the assessor and therefore had no authority to exert control over him. Nor was the assessor an employee of DPS; assessors are employed by tax-assessing jurisdictions. There was no contractual relationship between DPS and the assessor, whose duties exist by virtue of statute.

5. Moreover, no mistake of fact occurred. Collection of an unauthorized tax levy constitutes a mistake of law. The three-year limitations period of MCL 211.53a did not apply to Briggs's claim.

Reversed and Tax Tribunal decision reinstated.

1. TAXATION — PROPERTY TAX — MUTUAL MISTAKE OF FACT.

MCL 211.53a allows a taxpayer three years to bring a claim for recovery of property taxes paid in excess of the correct amount if the assessing officer and the taxpayer made a mutual mistake of fact; a mutual mistake of fact is an erroneous belief shared and relied on by both parties about a material fact that affects the substance of the transaction.

2. TAXATION — UNAUTHORIZED TAX LEVY — MISTAKE OF LAW.

Levy and collection of an unauthorized tax constitutes a mistake of law, not a mistake of fact.

The Mazzara Law Firm, PLLC (by *Jack J. Mazzara*), and *Giamarco, Mullins & Horton, PC* (by *Larry W. Bennett*), for Briggs Tax Service, L.L.C.

Dickinson Wright PLLC (by *Robert F. Rhoades* and *Adam D. Grant*), *Thrun Law Firm, P.C.* (by *David Olmstead* and *Roy H. Henley*), and *Miller, Canfield, Paddock & Stone PLC* (by *Jerome R. Watson* and *Larry J. Saylor*) for the Detroit Public Schools and the Detroit Board of Education.

Joanne D. Stafford for the city of Detroit.

William M. Wolfson, Interim Corporation Counsel, and *Richard G. Stanley*, Assistant Corporation Counsel, for the Wayne County Treasurer.

Amicus Curiae:

Honigman Miller Schwartz and Cohn LLP (by *John D. Pirich*, *Michael B. Shapiro*, and *Jason Conti*) for the Building Office Managers Association of Metropolitan Detroit.

KELLY, C.J. The dispute in this case concerns whether respondent's wrongful collection of property taxes from petitioner constitutes a mutual mistake of fact within the meaning of MCL 211.53a. If the assessing officer and petitioner made a mutual mistake of fact, the three-year limitations period of MCL 211.53a applies, and petitioner may pursue its refund claim. If not, petitioner is not entitled to a refund because it did not file its petition within the general limitations period. We conclude that the assessing officer and petitioner did not make a mutual mistake of fact and that MCL 211.53a does not apply to petitioner's claim. Accordingly, we reverse the judgment of the Court of Appeals and reinstate the decision of the Tax Tribunal.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In September 1993, voters in the Detroit Public School district approved a 32.25-mill school operating property tax. The millage authorized respondent Detroit Public Schools (DPS) to levy property taxes until the millage expired on June 30, 2002. In March 1994, Michigan voters approved Proposal A, a school finance reform proposal. Under Proposal A, local school districts are precluded from levying more than 18 mills in property taxes. However, Proposal A provided that unexpired millages authorized before January 1, 1994, are valid, even if greater than 18 mills.

Despite the fact that voter approval for the DPS operating millage expired on June 30, 2002, DPS continued to levy an unauthorized 18-mill tax for tax years 2002, 2003, and 2004. Dr. Kenneth Burnley, the Chief Executive Officer of the Detroit Public School District, approved annual resolutions certifying the tax levies. DPS apparently believed that, when voters approved Proposal A, local school district electors no longer needed to approve a tax rate of 18 mills. In August 2005, DPS published a notice acknowledging that the taxes levied for 2002, 2003, and 2004 were levied without authorization and that the revenue from those taxes might have to be refunded.

Petitioner, Briggs Tax Service, L.L.C., filed a claim with the Tax Tribunal against respondents DPS, the Detroit Board of Education, the city of Detroit, and the Wayne County Treasurer. It sought a refund of the unauthorized taxes levied and collected by DPS.[1] Petitioner also sought to enjoin future collections without

[1] Pursuant to the Tax Tribunal Act, MCL 205.701 *et seq.*, the Tax Tribunal has exclusive and original jurisdiction over this case. Specifically, MCL 205.731 provided at the relevant time:

> The tribunal's exclusive and original jurisdiction shall be:

proper authority as well as an award for the damage that the unlawful property tax levies allegedly caused. Additionally, petitioner asserted that respondents violated the Michigan Constitution by unlawfully taking its property and by depriving it and other property owners of due process of law.[2]

The Tax Tribunal dismissed petitioner's refund claim on jurisdictional grounds because it had not been filed within 30 days of the issuance of the applicable tax bills as required by MCL 205.735(2).[3] On reconsideration, the Tax Tribunal gave petitioner the opportunity to file an amended petition.

In its amended petition, petitioner alleged that a mutual mistake of fact under MCL 211.53a had occurred. Applying MCL 211.53a, petitioner claimed that it had three years in which to file suit to recover the unauthorized taxes. DPS and the county treasurer moved for summary disposition, alleging that the Tax Tribunal lacked jurisdiction because the three-year period provided by MCL 211.53a did not apply. The Tax Tribunal agreed, ruling that

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> (a) A proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under property tax laws.
>
> (b) A proceeding for refund or redetermination of a tax under the property tax laws.

[2] In addition to the action filed with the Tax Tribunal, petitioner and other property owners filed an action in the Wayne Circuit Court seeking class certification and refunds of the property tax that DPS imposed. The circuit court granted summary disposition to respondents on the ground that the Tax Tribunal had exclusive jurisdiction over the claims. The Court of Appeals affirmed that decision. *Briggs Tax Service, LLC v Detroit Pub Schools*, unpublished opinion per curiam of the Court of Appeals, issued March 13, 2007 (Docket No. 271631).

[3] Effective May 30, 2006, the time limits in MCL 205.735(2) were moved to MCL 205.735(3) and the general limitations period changed from 30 to 35 days. See 2006 PA 174.

> MCL 211.53a governs a ". . . mutual mistake of fact made by the **assessing officer** and the taxpayer . . . ." (Emphasis added.) Pursuant to MCL 211.10d(1), the assessing officer is an assessor who has been certified by the state assessor's board and who makes an annual assessment of property. An assessor is not tasked with determining, approving, certifying, or verifying a millage, nor is that person qualified to do so. Moreover, an assessor is not involved in the collection of the tax. Assessors are employed by assessing jurisdictions. While assessing jurisdictions also levy property taxes, not all jurisdictions that levy property taxes are assessing jurisdictions. In the instant case, the assessor was employed by the City of Detroit, not DPS. For these reasons, the Tribunal finds that the assessing officer made **no** mistake as to the expiration date of DPS' millage.[4]

Accordingly, the Tax Tribunal dismissed petitioner's refund claim because it was not filed within 30 days as required by MCL 205.735(2).

The Court of Appeals reversed the judgment of the Tax Tribunal, holding that petitioner was entitled to pursue a claim for a refund under MCL 211.53a.[5] It reasoned that the mistake regarding the validity of imposing the tax was a mutual mistake of fact between the taxpayer and the assessor, rejecting the Tax Tribunal's conclusion to the contrary:

> This litigation arises not from a dispute over a question of law, but from a mutual mistake of fact—both parties erroneously believed that [petitioner] was required to pay the disputed taxes in 2002, 2003, and 2004, although [petitioner] had no such obligation. . . . [T]he question whether the procedures necessary to renew the property tax assessments in order to levy taxes on nonhomestead-property owners for tax years 2002, 2003, and 2004 were

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[4] *Briggs Tax Service, LLC v Detroit Pub Schools*, 16 MTTR 145, 165 (Docket No. 319592, May 31, 2007).

[5] *Briggs Tax Service, LLC v Detroit Pub Schools*, 282 Mich App 29; 761 NW2d 816 (2008).

> followed is one of fact—either the school electors authorized the taxes for those years or they didn't. Similarly, whether [petitioner], a nonhomestead-property owner, was required to pay these taxes (and, hence, whether [petitioner] is entitled to a refund of these taxes) is a factual question. Therefore, the belief apparently held by both [petitioner] and respondents—that respondents were authorized to issue, and [petitioner] was obligated to pay, the disputed taxes in 2002, 2003, and 2004—constitutes a mutual mistake of fact.[6]

We granted respondents' applications for leave to appeal to determine whether a mutual mistake of fact occurred such that the three-year limitations period of MCL 211.53a applies.[7]

STANDARD OF REVIEW

The standard of review of Tax Tribunal cases is multifaceted.[8] If fraud is not claimed, this Court reviews the Tax Tribunal's decision for misapplication of the law or adoption of a wrong principle.[9] We deem the Tax Tribunal's factual findings conclusive if they are supported by "competent, material, and substantial evidence on the whole record."[10] But when statutory interpretation is involved, this Court reviews the Tax Tribunal's decision de novo.[11] We also review de novo the grant or denial of a motion for summary disposition.[12]

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[6] *Id*. at 38-39.

[7] *Briggs Tax Service, LLC v Detroit Pub Schools*, 484 Mich 1024 (2009).

[8] *Wexford Med Group v City of Cadillac*, 474 Mich 192, 201; 713 NW2d 734 (2006).

[9] *Michigan Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 476; 518 NW2d 808 (1994).

[10] *Id*., citing Const 1963, art 6, § 28, and *Continental Cablevision of Michigan, Inc v City of Roseville*, 430 Mich 727, 735; 425 NW2d 53 (1988).

[11] *Lincoln v Gen Motors Corp*, 461 Mich 483, 489-490; 607 NW2d 73 (2000).

[12] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

ANALYSIS

This case involves an issue of statutory interpretation. The primary goal of statutory interpretation is to give effect to the intent of the Legislature.[13] The first step is to review the language of the statute.[14] If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute.[15]

LEGAL BACKGROUND

When this case arose, MCL 205.735(2) set forth the requirements for invoking the Tax Tribunal's jurisdiction. Generally, former MCL 205.735(2) required filing a petition with the Tax Tribunal within 30 days of a final decision. However, when another statute provides a different limitations period for filing a petition with the Tax Tribunal, that statute controls and MCL 205.735 does not apply.[16] Germane to this appeal is MCL 211.53a, which provides:

> Any taxpayer who is assessed and pays taxes in excess of the correct and lawful amount due because of a *clerical error* or *mutual mistake of fact made by the assessing officer and the taxpayer* may recover the excess so paid, without interest, if suit is commenced within 3 years from the date of payment, notwithstanding that the payment was not made under protest. [Emphasis added.]

Thus, the Legislature has provided taxpayers with two situations in which a three-year limitations period

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[13] *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999).

[14] *Id*.

[15] *Id*.

[16] *Wikman v City of Novi*, 413 Mich 617, 652-653; 322 NW2d 103 (1982).

applies: (1) cases in which there is a "clerical error" and (2) cases in which the assessing officer and the taxpayer made a mutual mistake of fact. In this case, no party contends that there was a clerical error. We thus focus our discussion on the meaning and application of the phrase "mutual mistake of fact made by the assessing officer and the taxpayer." Instructive in this regard is MCL 8.3a, which provides:

> All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

Here, the phrase "mutual mistake of fact" is a technical term that has acquired a particular meaning under the law.

In *Ford Motor Co v City of Woodhaven*,[17] we considered the common-law meaning of "mutual mistake of fact." We referred to the Black's Law Dictionary definitions of "mistake," "mutual mistake," and "mistake of fact," as well as the seminal case of *Sherwood v Walker*.[18] We held that a "mutual mistake of fact" is "an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction."[19]

APPLICATION

There is no doubt that a mistake occurred in this case: DPS levied a tax without the requisite voter

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[17] *Ford Motor Co v City of Woodhaven*, 475 Mich 425; 716 NW2d 247 (2006).

[18] *Sherwood v Walker*, 66 Mich 568; 33 NW 919 (1887).

[19] *Ford*, 475 Mich at 442.

approval. It erroneously believed that it could levy an 18-mill tax for tax years 2002, 2003, and 2004 when, in fact, authorization for the previously approved tax had expired. This resulted in wrongful assessments that petitioner and other taxpayers paid in full. However, we conclude that this mistake does not constitute a "mutual mistake of fact" within the meaning of MCL 211.53a.

NO "MUTUAL" MISTAKE

In order for the three-year limitations period of MCL 211.53a to apply, the "mistake of fact" must be "mutual." That is, it must be shared and relied on by the assessing officer and the taxpayer. No such mutuality exists here. The mistake in this case is attributable to DPS alone, whose CEO certified the tax levied against petitioner pursuant to DPS's statutory duties.[20] In its amended petition before the Tax Tribunal, petitioner acknowledged that DPS, not the assessor, certified the tax.[21]

Nor did the assessor make a mistake in performing his duties in spreading and assessing the tax. In fact, the assessor performed his statutory duties as required,

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[20] DPS certified the tax it levied pursuant to the Revised School Code. See MCL 380.432(2), which provides:

> The [first class school district] board shall adopt a budget in the same manner and form as required for its estimates and determine the amount of tax levy necessary for that budget and *shall certify* on or before the date required by law the amount to the city. [Emphasis added.]

[21] Petitioner's amended petition stated:

> 48. Upon information and belief, the City [of Detroit] issued tax bills imposing the Illegal Levy based on the *certifications or resolutions by the Board* [*of Education of the city of Detroit*] *and/or DPS*.
>
> 49. The certifications, resolutions and/or tax bills were relied upon by Petitioner and Respondents under the mistaken belief that the Illegal Levy was authorized. [Emphasis added.]

and petitioner has made no allegation to the contrary.[22] Thus, there was no mutual mistake between the assessor and taxpayer, as required for application of MCL 211.53a.

This analysis is supported by the General Property Tax Act (GPTA).[23] The GPTA provides that tax assessors have numerous duties, including the (1) creation of an annual tax assessment roll, (2) determination of property values for tax assessment purposes, (3) determination of taxable values, and (4) placement on the assessment roll of assessed and taxable values.[24] Furthermore, the Revised School Code provides that school boards "shall adopt a budget . . . and determine the amount of tax levy necessary for that budget . . . ."[25]

Once that determination is made, assessors are required to "spread the taxes on the tax roll on the taxable value for each item of property."[26] After the assessment roll is complete and approved by a taxing unit's board of review, assessors receive certified tax rates from taxing units and multiply those rates by the taxable values.[27] Assessors then deliver a final tax roll to the taxing unit's treasurer for collection.[28]

There is no authority supporting petitioner's argument that assessors are empowered to review or alter

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[22] The assessor is not a party to this lawsuit.

[23] MCL 211.1 *et seq*.

[24] See MCL 211.10; MCL 211.27a.

[25] MCL 380.432(2).

[26] MCL 211.24b(2); see also Detroit Charter, § 8-402(2), which provides:

> The assessors shall prepare the tax roll by spreading property taxes ratably on the assessment roll on or before the date provided by ordinance and shall deliver the tax roll to the treasurer in the manner provided by law.

[27] See MCL 211.24(b), MCL 211.29, and MCL 211.42.

[28] MCL 211.42.

certified tax rates. Indeed, an assessor who refuses to spread a certified tax is subject to a mandamus action.[29] Thus, because DPS, rather than the assessor, erroneously certified the tax rate levied on petitioner, there was no mutual mistake between DPS and the assessor within the meaning of MCL 211.53a.

We also disagree with the Court of Appeals conclusion that DPS's mistake can be imputed to the assessor on an agency theory.[30] The Court of Appeals concluded that "[r]espondents . . . are all governmental entities, and a governmental entity can only act through its agents. Further, the 'general rule is that knowledge of an agent on a material matter, acquired within the scope of the agency, is imputed to the principal.' "[31] Yet the Court of Appeals summarily declared without supporting analysis that an agency relationship existed between the assessor and DPS.

In fact, assessors are not agents of taxing authorities. Fundamental to the existence of an agency relationship is the right of the principal to control the conduct of the agent.[32] Here, DPS is not a principal with respect to the assessor and therefore has no authority to exert control over the assessor. Nor is the assessor an employee of DPS. Instead, assessors are employed by tax-assessing jurisdictions. Nor is there a contractual relationship

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[29] *Board of State Tax Comm'rs v Quinn*, 125 Mich 128, 131; 84 NW 1 (1900) ("[I]t is not the duty of an [assessing] officer to omit a statutory duty because of an opinion that the action of his superiors has not conformed to law. He has merely to do his duty as prescribed by law, leaving the regularity of the action of others to be determined by the courts"), citing *Union School-Rogers Twp Dist v Parris*, 97 Mich 593; 56 NW 924 (1893).

[30] *Briggs*, 282 Mich App at 35 n 7 (citations omitted).

[31] *Id*.

[32] *St Clair Intermediate School Dist v IEA/MEA*, 458 Mich 540, 557-558; 581 NW2d 707 (1998), citing *Capitol City Lodge No 141, FOP v Meridian Twp*, 90 Mich App 533, 541; 282 NW2d 383 (1979).

between the assessor and DPS. As noted earlier, the assessor's duties arise independently of DPS and exist by virtue of statute.[33] Accordingly, there is no basis for the Court of Appeals holding that DPS's mistake can be imputed to the assessor because an agency relationship exists between those parties.

NO MISTAKE "OF FACT"

Also necessary for application of MCL 211.53a is a mistake "of fact." Lest confusion exist in differentiating mistakes of fact and mistakes of law, Michigan courts have held on several occasions that an unauthorized tax levy constitutes a mistake of law.

In *Upper Peninsula Generating Co v City of Marquette*,[34] the defendant taxing authority imposed a property tax exceeding the 15-mill constitutional limitation without obtaining the necessary voter approval. The plaintiff taxpayer appealed from an order dismissing its refund suit, arguing that the excess tax was illegal because the electorate had not approved it. The plaintiff further argued that a mutual mistake of fact had occurred such that the three-year limitations period of MCL 211.53a applied to its claim. The Court of Appeals disagreed, holding that "[t]he failure to obtain the voters' approval for the millage in excess of the constitutional limitation cannot be characterized as a mistake of fact, and therefore plaintiff is not entitled to relief under this statute."[35]

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[33] Further demonstrating DPS's lack of control over the assessor is the fact that taxing authorities, such as DPS, are empowered to appeal as of right from decisions made by an assessing officer. See, e.g., *Wayne Co v State Tax Comm*, 261 Mich App 174, 246; 682 NW2d 100 (2004).

[34] *Upper Peninsula Generating Co v City of Marquette*, 18 Mich App 516; 171 NW2d 572 (1969).

[35] *Id.* at 517.

Similarly, in *Carpenter v City of Ann Arbor*,[36] before 1965, the city had imposed a special purpose tax pursuant to specific statutory authority. That enabling statute was repealed effective July 1, 1965. The city nonetheless continued to levy the tax for tax years 1966, 1967, and 1968. The plaintiff taxpayer brought a refund action, alleging that payment was made under a mutual mistake of fact. Relying on *Upper Peninsula*, the Court of Appeals held that the case did not involve a mutual mistake of fact within the meaning of MCL 211.53a.[37]

And in *Hertzog v Detroit*,[38] the plaintiff taxpayer brought suit against the city of Detroit, its board of education, and others seeking a declaratory judgment that the taxes it paid were unlawfully imposed. The plaintiff also sought a refund. This Court held that the plaintiff was not entitled to a refund because it did not bring suit within the 30-day limitations period of former MCL 211.53.

In his concurring opinion, Justice SOURIS opined:

> The instant case should be distinguished from one in which recovery is sought for taxes paid under a mistake of fact. In the latter circumstance it is the law in Michigan that a taxpayer may recover even if the taxes were not paid under protest. *Spoon-Shacket Company, Inc.* v. *County of Oakland* (1959), 356 Mich 151 [97 NW2d 25], in which the Court overruled *Consumers Power Company* v. *Township of Muskegon* (1956), 346 Mich 243 [78 NW2d 223], and adopted the reasoning of Mr. Justice TALBOT SMITH's dissenting opinion in that case. Unlike the mistakes of fact involved in *Spoon-Shacket* and *Consumers Power*, and in *Farr* v. [*Nordman*] (1956), 346 Mich 266 [78 NW2d 186], the instant case involves what Justice TALBOT SMITH in

[36] *Carpenter v City of Ann Arbor*, 35 Mich App 608; 192 NW2d 523 (1971).

[37] *Id*. at 612.

[38] *Hertzog v Detroit*, 378 Mich 1; 142 NW2d 672 (1966).

> *Consumers Power* (p 262) by reference to the Restatement of Restitution, § 75, denominated payment of " 'void taxes and assessments' ". . . .
>
> Thus, while in Michigan recovery may be had for taxes paid under a mistake of fact, there is no authority for a like recovery of void taxes and assessments, see *National Bank of Detroit* v. *City of Detroit* (1935), 272 Mich 610, 614, 615 [262 NW 422] . . . .[39]

These cases stand for the proposition that a mistake about the validity of a tax constitutes a mistake of law. We agree with their reasoning and reaffirm that collection of an unauthorized tax constitutes a mistake of law, not a mistake of fact.

In holding that the mistake about the validity of the property tax in this case constituted a mistake of fact, the Court of Appeals relied on *Ford*. This reliance was misplaced. In *Ford*, the petitioner Ford Motor Company (Ford) sought recovery of taxes that it claimed were paid as a result of a mutual mistake of fact within the meaning of MCL 211.53a. Ford had filed personal property statements with the relevant taxing units, but each report contained misinformation about the amount of taxable property. The assessor in each taxing unit accepted and relied on those statements as accurate when calculating Ford's tax liability. Ford paid the tax bills as issued. After discovering its errors, Ford petitioned the Tax Tribunal for a refund under MCL 211.53a, alleging a mutual mistake of fact.

We held that Ford had stated valid claims of mutual mistake of fact under MCL 211.53a. Ford and the assessors shared and relied on an erroneous belief about a material fact that affected the substance of the transactions.[40] Specifically, Ford's property statements overstated the amount of its taxable property, including

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[39] *Id*. at 22-23.

[40] *Ford*, 475 Mich at 443.

reporting the same property twice.[41] As this mistake concerned a numeric value, it was inherently a factual mistake.

The mutual mistake of fact in *Ford* was markedly different from DPS's unilateral mistake of law in this case. Critical to our decision in *Ford* was the fact that the assessor and Ford shared a mistaken belief that resulted in an erroneous assessment, i.e., the amount of Ford's property subject to tax. Ford and the assessor mistakenly believed that X amount of Ford's property was taxable, when in reality, Y amount was properly taxable. In contrast, the mistake in this case was the imposition of an unlawful tax. Therefore, *Ford* does not support petitioner's contention that a mistake of fact occurred here. Indeed, in reaching our decision in *Ford*, we did not consider or discuss the distinction between a mutual mistake of fact and a mistake of law.

The Court of Appeals also mistakenly relied on *Eltel Assoc, LLC v City of Pontiac*[42] for its conclusion that a mistake of fact occurred. *Eltel* involved a purely factual issue concerning the date on which title to property passed from a tax-exempt owner to a nonexempt owner. The assessor relied on the date of the deed and concluded that the property was subject to the tax for the year in question. In reality, the deed had been placed in escrow pending completion of certain conditions precedent to sale, and the property was not transferred to the nonexempt owner until after tax day. Thus, the Court of Appeals held that there was a mutual mistake of fact regarding the date on which title passed.[43] However, *Eltel* did not involve the validity of the underlying tax,

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[41] *Id*.

[42] *Eltel Assoc, LLC v City of Pontiac*, 278 Mich App 588; 752 NW2d 492 (2008).

[43] *Id*.

which is a legal issue. Therefore, it is of no consequence to the disposition of this case.

For these reasons, we conclude that no mistake "of fact" occurred in this case within the meaning of MCL 211.53a. Accordingly, petitioner is not entitled to the three-year limitations period provided by that provision.

CONCLUSION

We hold that DPS's mistake of levying an unauthorized 18-mill property tax for tax years 2002, 2003, and 2004 does not constitute a "mutual mistake of fact made by the assessing officer and the taxpayer" within the meaning of MCL 211.53a. Accordingly, the Tax Tribunal correctly ruled that petitioner's claim is subject to the 30-day limitations period of former MCL 205.735(2) and that the three-year limitations period of MCL 211.53a does not apply. Therefore, we reverse the judgment of the Court of Appeals and reinstate the decision of the Tax Tribunal.

CAVANAGH, WEAVER, CORRIGAN, YOUNG, MARKMAN, and HATHAWAY, JJ., concurred with KELLY, C.J.

Actions on Applications

ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

Order Entered August 20, 2009:

MCCORMICK v CARRIER, No. 136738. On order of the Court, upon reviewing the stipulation of the parties, the caption of this case is changed as indicated, and General Motors Corporation is dismissed as a party in interest. Court of Appeals No. 275888.

Leave to Appeal Denied August 20, 2009:

GANSON v WELLS FARGO BANK OF MINNESOTA, No. 139263; Court of Appeals No. 284720.

In re CW (GENIX v PARKER), No. 139291; Court of Appeals No. 289127.

In re ROBBINS (DEPARTMENT OF HUMAN SERVICES v SANDERS), No. 139304; Court of Appeals No. 284790.

In re JONES (DEPARTMENT OF HUMAN SERVICES v SAUNDERS), No. 139373; Court of Appeals No. 288537.

Reconsideration Granted August 20, 2009:

MCCORMICK v CARRIER, No. 136738. On order of the Court, the motions for leave to file briefs amicus curiae are granted. The motion for reconsideration of this Court's October 22, 2008, order is considered, and it is granted. We vacate our order dated October 22, 2008. On reconsideration, the application for leave to appeal the March 25, 2008 judgment of the Court of Appeals is considered, and it is granted. Court of Appeals No. 275888.

WEAVER, J. (*concurring*). I concur fully in the order granting reconsideration and leave to appeal in this case. I write separately to respond to the dissent's statements regarding the decision to grant reconsideration in this case.

The dissent erroneously asserts that the justices voting to grant reconsideration do so improperly. The dissent cites *Peoples v Evening News Ass'n*, 51 Mich 11, 21 (1883), for the proposition that this Court is precluded from granting rehearing or reconsideration when the composition of the Court has changed, absent any new arguments from the parties in the case. However, contrary to the dissent's assertions, this Court merely stated in *Peoples* that a change in the composition of this Court cannot be the *basis* for granting rehearing or reconsideration.

As such, if the composition of the Court changes, and the composition becomes such that a majority of the Court sees a reason to grant reconsideration, the majority is not precluded from granting reconsideration. If, for

instance, four justices on the newly composed Court conclude that the challenged decision was erroneous, those justices can vote to grant reconsideration. The same holds true whether the deciding vote is a new justice who joined the Court after the challenged decision was released or the deciding vote comes from a justice who voted for the challenged decision and changed his or her mind after further consideration.

This practice is consistent with MCR 2.119(F)(3), which creates a "palpable error" standard for rehearing and reconsidering cases. It is up to the moving party to show palpable error that would lead to a different disposition in the case. If a majority of the Court is convinced by the moving party, the Court has the discretion to grant rehearing or reconsideration. Furthermore, while MCR 2.119(F)(3) states that a motion for reconsideration generally will not be granted if the motion only presents the same issues ruled on in the original decision in the case, MCR 2.119(F)(3) explicitly refrains from "restricting the discretion of the court" to grant reconsideration.

Accordingly, I concur in the order to grant reconsideration and leave to appeal.

CORRIGAN, J. (*dissenting*). Seeking reconsideration, plaintiff calls on this Court to overturn our decision in *Kreiner v Fischer*, 471 Mich 109 (2004), which discusses the no-fault tort threshold, MCL 500.3135, of the Michigan automobile no-fault act, MCL 500.3101 *et seq*. On October 22, 2008, in a four to three decision, a majority of this Court denied plaintiff's application for leave to appeal the Court of Appeals decision,[1] which, consistently with the principles of *Kreiner*, had resolved the case in defendants' favor.[2] Now, although neither the law nor the facts of his case have changed, plaintiff seeks reconsideration of our order. He and his amici seek to take advantage of the intervening change in this Court's membership to reopen an otherwise final case. They have succeeded. This Court now grants reconsideration in a new four to three vote where former Chief Justice CLIFFORD TAYLOR's vote to deny leave, consistent with *Kreiner*, is now supplanted by newly elected Justice HATHAWAY's vote to grant reconsideration and grant leave to appeal.

As my colleagues have observed in other recent cases,[3] I wish only to reemphasize that the practice of reconsidering final orders due merely to a change in the Court's composition runs afoul of the historical principles and precedent of this Court.[4] As is particularly applicable here, in *Peoples v Evening News Ass'n*, 51 Mich 11, 21 (1883), this Court explicitly and

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[1] *McCormick v Carrier*, 482 Mich 1018 (2008).

[2] *McCormick v Carrier*, unpublished opinion per curiam of the Court of Appeals, issued March 25, 2008 (Docket No. 275888).

[3] I note in particular Justice YOUNG's recent dissent to the order granting reconsideration in *Univ of Michigan Regents v Titan Ins Co*, 484 Mich 852 (2009).

[4] E.g., *Nichols, Shepard & Co v Marsh*, 62 Mich 439, 440 (1886) ("We discover no point which was not presented and considered on the original argument, and nothing, therefore, to call for a rehearing which would not

unanimously concluded that "a rehearing will not be ordered on the ground merely that a change of members of the bench has either taken place, or is about to occur."

For these reasons I reiterate the call for caution in the wake of our recently reconstituted Court. I would not grant reconsideration of this otherwise final case or overrule the Court's 2004 *Kreiner* decision, which sought to bring clarity and finality to a very complex area of law.[5]

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal September 1, 2009:

BREWER v A D TRANSPORT EXPRESS, INC, No. 139068. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). At oral argument, the parties shall address whether the legislative change to MCL 418.845, 2008 PA 499, should be applied to this case. The parties may file supplemental briefs within 28 days of the date of this order, but they should not submit mere restatements of their application papers. We further direct the clerk to schedule the oral argument in this case for the same future session of this Court when it will hear oral argument on whether to grant the application in *Bezeau v Palace Sports & Entertainment, Inc* (Docket No. 137500).

The Workers' Compensation Section of the State Bar of Michigan is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 289941.

Leave to Appeal Granted September 1, 2009:

TKACHIK v MANDEVILLE, No. 138460. The parties shall include among the issues to be briefed whether, when a husband has abandoned his wife for the year and a half preceding her death, and the wife alone has made mortgage, tax, and insurance payments on property held as tenants by the entirety, the wife (or her estate) may receive contribution for the husband's share of these payments. Reported below: 282 Mich App 364.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal September 2, 2009:

LENAWEE COUNTY BOARD OF ROAD COMMISSIONERS v STATE AUTO PROPERTY & CASUALTY INSURANCE COMPANY, Nos. 137667 and 137668. We direct the

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authorize a similar application in any case where the opinion disappoints one or the other of the parties, as it must do inevitably."); cf. *Thompson v Jarvis*, 40 Mich 526 (1879).

[5] The *Kreiner* opinion helpfully recounts in detail the unstable nature of the statutory and common law governing the no-fault tort threshold from 1973 to 2004. *Kreiner*, 471 Mich at 114-121.

clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). At oral argument, the parties shall be prepared to address whether *Miller v Chapman Contracting*, 477 Mich 102 (2007), was correctly decided. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers. Court of Appeals Nos. 285626 and 286158.

CAVANAGH, J. (*concurring*). I concur in the order granting oral argument on whether to grant the application for leave to appeal. I write to respond to Justice YOUNG's dissent, in which he questions both my principles and my fidelity to judicial restraint.

Justice YOUNG presumes much. He challenges my commitment to stare decisis when this Court has merely raised the question whether *Miller v Chapman Contracting*, 477 Mich 102 (2007), was correctly decided. It is my practice, however, to review the parties' briefs, hear their arguments, and reflect on the law and merits of a case before making a decision. I have not made up my mind on the vitality of *Miller* or any other issue in this case. Consequently, my commitment to stare decisis is not currently at issue.

More importantly, however, Justice YOUNG misunderstands the import of my statement in *Cooper v Wade*, 461 Mich 1201 (1999). I did not take the time to write a dissenting statement in *Cooper* merely because I disagreed with the Court's reconsidering precedent in that single case. I have never suggested that it is always inappropriate to overrule precedent; I have merely advocated for using a necessary measure of judicial restraint before doing so.[1] My concern in *Cooper* was that it appeared that some members of the Court were not only exhibiting careless disregard for the doctrine of stare decisis, but actually deliberately and methodically setting out to overturn longstanding, well-established precedent.[2] During that term alone, the majority of the *Cooper* Court had already overturned or vacated 10 previous cases, in six different decisions. See *Cooper*, 461 Mich at 1203 n 3. Unlike the order in *Cooper*, the current order is not part of a long string of cases that, when viewed

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[1] As I have stated, I think that "[t]he 'majority of the Court can overrule a precedent for a good reason, a bad reason, or no reason at all.' . . . But precedent should not be lightly discarded. This Court should 'give respect to precedent and not overrule or modify it unless some substantial reason is given for doing so.' " *People v VanderVliet*, 444 Mich 52, 105 (1993) (CAVANAGH, J., dissenting, quoting *People v Cetlinski*, 435 Mich 742, 768 [1990], and *Wood v Detroit Edison Co*, 409 Mich 279, 297 [1980]).

[2] Unfortunately, my concerns in *Cooper* turned out to be justified. According to Justice MARKMAN's calculations, just in the period between 2000 and July 2007, counting only decisions from which Chief Justice KELLY dissented, this Court overruled around 60 cases in 40 different decisions. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 228-247 (2007).

collectively, suggests a pattern of exercising the power to overturn numerous longstanding precedents in a manner that lacks judicial restraint.

I expect that this discussion will continue if, in the future, any majority of this Court votes to reconsider or overrule precedent. If I do vote to overrule a case, at that point I invite Justice YOUNG to, in lieu of presuming that I lack principle, take that opportunity to evaluate the merits of the principles I use to guide my approach to stare decisis and determine whether my vote is consistent with those principles.[3] I hope that Justice YOUNG might consider that my views do not lack principle simply because they differ from his own. Until the opportunity to have a meaningful discussion on these issues arises, however, I can only note that I detect a distinct hollowness in the whining, mewling sound that now emanates from those who, until recently, cared little about the composition of majorities and the value of longstanding precedent.

CORRIGAN, J. (*dissenting*). I respectfully dissent from the order granting oral argument on whether to grant the application for leave to appeal. As Justice YOUNG correctly notes, the appellants have not asked this Court to reconsider *Miller v Chapman Contracting*, 477 Mich 102 (2007). Moreover, the parties have not addressed the issue whether *Miller* was correctly decided. Accordingly, I object to the decision to inject *Miller* into this appeal.

YOUNG, J. (*dissenting*). I dissent and would deny leave to appeal, because *Miller v Chapman Contracting*, 477 Mich 102 (2007), is applicable, correct, and was decided only 28 months ago. The majority, however, believes it appropriate to alert the parties to "be prepared to address" whether *Miller* was correctly decided, even though the appellants did not ask this Court to reconsider *Miller*. While the majority is within its rights to reconsider *Miller*, doing so is incompatible with the

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[3] Thirteen years ago I agreed with Justice LEVIN's recognition that "[t]here is a limit to the amount of error that can plausibly be imputed to prior courts" and that "[i]f that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term." *People v Mezy*, 453 Mich 269, 303 (1996) (LEVIN, J. dissenting, quoting *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833, 865-866 [1992]). See also *People v Childers*, 459 Mich 216, 225 (1998) (CAVANAGH, J. dissenting). In light of my deep respect for the doctrine of stare decisis, I have yet to determine what my response will be if I am confronted with precedent that represents a pattern of disregarding that doctrine in a manner that goes beyond what can be considered a "justifiable reexamination of principle." Perhaps there are some cases where, as stated by the United States Supreme Court "[r]emaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it." *Adarand Constructors, Inc v Pena*, 515 US 200, 231 (1995).

respect for judicial restraint and stare decisis that members of the majority professed for over a decade.

The appellants have not asked this Court to reconsider *Miller*, nor have the parties briefed the issue whether *Miller* was correctly decided. Nevertheless, the majority has injected this issue into the case because it disagrees with how this Court decided *Miller* approximately 28 months ago. Again, the majority has a right to revisit any decision it wishes, but its members have previously argued that doing so was a form of "activism." Justice CAVANAGH has decried the practice of "directing parties to address issues not initially raised or briefed by the parties in their application for leave to appeal" as a "distinct type[] of activist behavior." *Mack v Detroit*, 467 Mich 186, 224 n 9 (2002) (CAVANAGH, J., dissenting).

Ten years ago, Justice CAVANAGH, joined by then Justice KELLY, dissented from an order that asked the parties to address whether the Court should exercise its authority to reconsider previously decided cases. *Cooper v Wade*, 461 Mich 1201 (1999). He explained that "the fact that a majority would feel that the proper exercise of its duties mandates that [it] revisit every decision of this Court that [it] might question and have the power to reach . . . is a troubling thought." *Id.* at 1203 (CAVANAGH, J., dissenting). Instead, he counseled "a necessary measure of judicial restraint." *Id.*

In his concurring statement, Justice CAVANAGH attempts to distinguish the instant case from *Cooper v Wade* by claiming that "the current order is not part of a long string of cases that, when viewed as a collective, suggest a pattern of exercising the power to overturn numerous long-standing precedents in a manner that lacks judicial restraint." But this claim rings hollow when one member of this Court, our Chief Justice, has claimed that she would "undo a great deal of the damage that the Republican court has done." Brian Dickerson, *GOP Justices Gird for Gang of 3½*, Detroit Free Press, January 11, 2009, at 1B. Indeed, this statement, when viewed in light of actions the new philosophical majority has already taken in effectively overturning the established precedent of this Court,[1] suggests that there has been the very "pattern of exercising

[1] Rather than forthrightly overruling decisions, the Court's new majority has increasingly taken to the practice of simply ignoring precedents with which it disagrees. See, e.g., *Vanslembrouck v Halperin*, 483 Mich 965 (2009), where the new majority ignored *Vega v Lakeland Hospitals*, 479 Mich 243, 244 (2007); *Hardacre v Saginaw Vascular Services*, 483 Mich 918 (2009), where it failed to follow *Boodt v Borgess Med Ctr*, 481 Mich 558 (2008); *Sazima v Shepherd Bar & Restaurant*, 483 Mich 924 (2009), where it failed to follow *Chrysler v Blue Arrow Transport Lines*, 295 Mich 606 (1940), and *Camburn v Northwest School Dist*, 459 Mich 471 (1999); *Juarez v Holbrook*, 483 Mich 970 (2009), where it failed to follow *Smith v Khouri*, 481 Mich 519 (2008); *Chambers v Wayne Co Airport Authority*, 483 Mich 1081 (2009), where it failed to follow *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007); and *Scott v*

power to overturn numerous longstanding precedents in a manner that lacks judicial restraint" that Justice CAVANAGH decried in the Court's former philosophical majority.

Justice CAVANAGH also claims that the order in the instant case "has merely raised the question" whether *Miller* was correctly decided. As he well knows, the Court will not be "merely" discussing whether *Miller* was correctly decided; that discussion has a point, and that point can *only* be to reconsider *Miller*.

Because judicial restraint and principle should not depend on whether one is in the majority, I respectfully dissent.[2] However, regarding the merits, I request that the parties address the relevance of textual differences between MCR 2.118(D) and FR Civ P 15(c)(1)(C).

Leave to Appeal Denied September 2, 2009:

In re EILENDER (DEPARTMENT OF HUMAN SERVICES V EILENDER), No. 139372; Court of Appeals No. 287939.

MASON V ALLSTATE INSURANCE COMPANY, No. 139424; Court of Appeals No. 292490.

ARP V OAKWOOD HEALTHCARE, INC, No. 139430; Court of Appeals No. 292106.

In re WELLONS (DEPARTMENT OF HUMAN SERVICES V WELLONS), No. 139501; Court of Appeals No. 289607.

Leave to Appeal Dismissed September 2, 2009:

ROBINSON V ELEVEN DEQUINDRE ASSOCIATES, No. 139081. On order of the Chief Justice, a stipulation signed by counsel for the parties agreeing to the dismissal of this application for leave to appeal is considered, and the application for leave to appeal is dismissed with prejudice and without costs. Court of Appeals No. 289569.

Order Entered September 11, 2009:

PEOPLE V LEON DAVIS, No. 138270. On order of the Court, the application for leave to appeal the January 7, 2009 order of the Court of Appeals is considered. We direct the Wayne County Prosecuting Attorney to

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State Farm Automobile Ins Co, 483 Mich 1032 (2009), where it failed to enforce *Thornton v Allstate Ins Co*, 425 Mich 643 (1986), and *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626 (1997).

[2] Justice CAVANAGH incorrectly asserts that I have attacked his principles. I do not attack his principles. Having been on the receiving end of Justice CAVANAGH's principles for 10 years, I challenge only the consistency with which he applies them.

answer the application for leave to appeal within 56 days after the date of this order. The prosecutor shall pay particular attention to the defendant's contention that he is entitled to relief under the Interstate Agreement on Detainers, MCL 780.601. See *People v Swafford*, 483 Mich 1 (2009). The application for leave to appeal remains pending. Court of Appeals No. 287574.

Leave to Appeal Granted September 11, 2009:

PEOPLE v HOUTHOOFD, Nos. 138959 and 138969. On order of the Court, the motion for miscellaneous relief is granted. The applications for leave to appeal the February 3, 2009, judgment of the Court of Appeals are granted. The parties shall include among the issues to be briefed whether venue was properly laid in Saginaw County with respect to the defendant's solicitation to commit murder and witness intimidation charges, whether the defendant is entitled to retrial on the false pretenses and witness intimidation charges in the event that his conviction for solicitation to commit murder is not reinstated, and the relevance, if any, of the defendant's statement to the trial court, over his counsel's objection, that he wanted the cases tried together. The motion for bail is denied. Court of Appeals No. 269505.

Summary Disposition September 11, 2009:

PEOPLE v HOWARD SANDERS, No. 137049. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court to determine whether the defendant should be awarded jail credit and, if the court finds that he is entitled to such credit, to apply the credit to the sentence in this case. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. Court of Appeals No. 285902.

PEOPLE v GREGORY HOLDER, No. 137465. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we grant the defendant's motion to withdraw the application for leave to appeal. Court of Appeals No. 286143.

PEOPLE v LONSBY, No. 138076. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse, in part, the judgment of the Court of Appeals. It is not necessary to remand this case to the St. Clair Circuit Court for consideration of the defendant's ability to pay attorney fees, pursuant to *People v Dunbar*, 264 Mich App 240 (2004). In *People v Jackson*, 483 Mich 271 (2009), we held that the assessment of a defendant's ability to pay attorney fees is only necessary when that imposition is enforced and the defendant contests his or her ability to pay. In all other respects, leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 277000.

PEOPLE v WILLIAM CHAPMAN, No. 138406. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and vacate the defendant's convictions for third-degree criminal sexual conduct and the sentences imposed by the Wayne Circuit Court. MCL 750.520d(1)(a) provides that a person is guilty of third-degree criminal sexual conduct if the person engages in sexual penetration with a victim who "is at least 13 years of age and under 16 years of age." The evidence established that the defendant engaged in sexual penetration with the victim on several occasions between September 2005 and June 2006, but did not establish that these acts occurred prior to the victim's sixteenth birthday in February 2006. Taking the evidence in the light most favorable to the prosecutor, we find that a rational trier of fact could not find the defendant guilty of the charged offense beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 421 (2002). The defendant's convictions of accosting a child for an immoral purpose, furnishing liquor to a minor, and two counts of distributing marijuana to a minor are unaffected by this order. We remand this case to the Wayne Circuit Court for entry of an amended judgment of sentence consistent with this order. Court of Appeals No. 276689.

ONEIDA CHARTER TOWNSHIP v CITY OF GRAND LEDGE, No. 138520. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we remand this case to the Eaton Circuit Court for reinstatement of the March 15, 2007, order that dismissed the case with prejudice. MCL 123.141(2) exempts water departments that are not contractual customers of another water department and that serve less than 1% of the population of the state, such as the city of Grand Ledge, from the cost-based requirement of subsection 2. Contrary to the Court of Appeals ruling, that subsection does not indicate that the second sentence of MCL 123.141(2) somehow modifies or limits application of the exemption that appears in the subsequent sentence by defining "contractual customers" as *wholesale* contractual customers. Moreover, MCL 123.141(3) prohibits only "contractual customers as provided in subsection (2)" from charging retail rates in excess of the actual cost of providing service. Grand Ledge is not a contractual customer as provided in subsection 2, so subsection 3 is not applicable. Reported below: 282 Mich App 435.

WHITMAN v GALIEN TOWNSHIP, No. 138570. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 287991.

PEOPLE v MCINTOSH, No. 138862. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 290028.

PEOPLE v RUBAN, No. 138937. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 290839.

PEOPLE v EARLS, No. 139251. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reinstatement of the defendant's claim of appeal. On April 30, 2009, the

defendant was given 21 days in which to file his brief with the Court of Appeals. According to the Court of Appeals date stamp on the brief that was returned to the defendant, the brief was filed with that court on May 20, 2009, within the 21 day period. Consequently, the brief was timely filed and dismissal was entered in error. Court of Appeals No. 281248.

Leave to Appeal Denied September 11, 2009:

PEOPLE v MAHAN, No. 137825; Court of Appeals No. 279244.

PEOPLE v JOHN JONES, No. 137856; Court of Appeals No. 287989.

CAVANAGH, J., would grant leave to appeal.

PEOPLE v WEISSERT, Nos. 137921 and 137922; Court of Appeals Nos. 276150 and 282322.

KELLY, C.J. (*concurring*). I concur in the Court's order denying defendant's application for leave to appeal. I write separately only to note that, contrary to Justice CORRIGAN's assertion, it was not erroneous in this case for the Court of Appeals to disregard our recent decision in *People v Ream*.[1] At the time of defendant's sentencing, *People v Wilder*[2] was the controlling law. The law in effect at the time a defendant committed his or her crimes is the law to be applied with respect to sentencing for those crimes.[3] Therefore, the Court of Appeals was bound to affirm defendant's sentence because it was legal when imposed. Although *Ream* later overruled *Wilder*, *Ream* was decided long after defendant was sentenced. Thus, the Court of Appeals *should not have* relied on *Ream*.

With respect to Justice CORRIGAN's mention of *People v Smith*,[4] it is wholly irrelevant that, before the trial court resentenced defendant, our Court "questioned" *Wilder* in *Smith*. Our trial courts are not blessed with the gift of prescience. Until this Court explicitly overrules a decision, that decision binds trial courts. Thus, the trial court in this case was bound by *Wilder* when it sentenced defendant, and the Court of Appeals correctly remanded this case for correction of the judgment of sentence to reflect that the predicate offenses have been vacated.

HATHAWAY, J., joined the statement of KELLY, C.J.

CORRIGAN, J. (*concurring*). I write separately only to observe that the Court of Appeals disregarded our recent decision in *People v Ream*, 481 Mich 223 (2008), when it directed the trial court to vacate the predicate felony convictions underlying defendant's felony-murder conviction. Nonetheless, because the prosecutor has not filed a cross-appeal raising this issue, I concur in the denial of leave to appeal.

Chief Justice KELLY opines that the Court of Appeals properly ignored our recent holding in *Ream* because it was decided after defendant was

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[1] *People v Ream*, 481 Mich 223 (2008).

[2] *People v Wilder*, 411 Mich 328 (1981).

[3] *People v Doxey*, 263 Mich App 115, 116-117 (2004).

[4] *People v Smith*, 478 Mich 292 (2007).

sentenced. But *Ream* was decided *before* the Court of Appeals issued its opinion. If the Court of Appeals shared Chief Justice KELLY's view that *Ream* does not govern, then it should have at the very least acknowledged the existence of a recent decision directly addressing the very issue before the Court and explained why and how it concluded that this precedent did not apply.[1]

MARKMAN, J., joined the statement of CORRIGAN, J.

PEOPLE v TRIMBLE, No. 137934; Court of Appeals No. 288282.

PEOPLE v MOTTINGER, No. 137969; Court of Appeals No. 278566.

PEOPLE v CARDENAS-BORBON, No. 138036; Court of Appeals No. 277639.

In re ATTORNEY FEES OF UJLAKY (PEOPLE v MCCRACKEN), No. 138112; Court of Appeals No. 288247.

PEOPLE v GERALD WILSON, No. 138151. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284673.

PEOPLE v HATFIELD, No. 138177; Court of Appeals No. 280940.

PEOPLE v HALE, No. 138196; Court of Appeals No. 280680.

PEOPLE v MARQUISE GORDON, No. 138206; Court of Appeals No. 279858.

PEOPLE v DOUGLAS WILLIAMS, No. 138207; Court of Appeals No. 286733.

PEOPLE v DAWSON, No. 138211. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285814.

PEOPLE v GASPER, No. 138237. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287708.

PEOPLE v BULL, No. 138251; Court of Appeals No. 289288.

PEOPLE v MARTIN, No. 138252. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 288768.

PEOPLE v FLOYD, No. 138274. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286762.

PEOPLE v MICKEY DAVIS, No. 138278. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 288639.

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[1] Moreover, it is noteworthy that the sentences for the predicate felony convictions were imposed *after* this Court's decision in *People v Smith*, 478 Mich 292, 318 n 16 (2007), which explicitly questioned the analysis in *People v Wilder*, 411 Mich 328 (1981), presaging our holding in *Ream*.

PEOPLE v STRADLEY, No. 138281. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286052.

PEOPLE v AYRE, No. 138290. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287831.

PEOPLE v JOSEPH BENNETT, No. 138292. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 287866.

PEOPLE v SPIKES, No. 138297. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287406.

PEOPLE v JOHNNY HUDSON, No. 138307; Court of Appeals No. 282752.

PEOPLE v HNATIUK, No. 138309. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286037.

PEOPLE v LATTA, No. 138310; Court of Appeals No. 281297.

PEOPLE v ABNER, No. 138317. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288122.

ASSUMPTION GREEK ORTHODOX CHURCH v THE CINCINNATI INSURANCE COMPANY, No. 138321; Court of Appeals No. 275733.

PEOPLE v GREGORY BERRY, No. 138325. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287814.

PEOPLE v LORENZO TOWNSEND, No. 138345. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 288453.

PEOPLE v FRANKIE CRAIG, No. 138346; Court of Appeals No. 280679.

PEOPLE v TORRANCE GRAHAM, No. 138361. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288213.

PEOPLE v DONALD STEWART, No. 138365. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 287444.

PEOPLE v MCKELVIE, No. 138368. For purposes of MCR 6.502(G)(1), the Court notes that, contrary to the Court of Appeals characterization of the defendant's application as relating to a motion for relief from judgment, the defendant's application sought leave to appeal a judgment of conviction. The application was properly denied, however, due to the lack of merit in the grounds presented. Court of Appeals No. 288693.

PEOPLE v JAMES MOORE, No. 138369; Court of Appeals No. 279742.

PEOPLE v MCCORMACK, No. 138373. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288501.

PEOPLE v MONK, No. 138411; Court of Appeals No. 280291.

PEOPLE v BLAIR WILSON, No. 138432. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286372.

PEOPLE v RAYMOND, No. 138436. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 287692.

PEOPLE v BETTIS, No. 138438. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287354.

PEOPLE v WHITMAN, No. 138440; Court of Appeals No. 289344.

GABE v VLK, No. 138443; Court of Appeals No. 282843.

PEOPLE v COREY TAYLOR, No. 138451; Court of Appeals No. 280438.

PEOPLE v GREGORY FISHER, No. 138469. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287723.

PEOPLE v SYLVESTER KEYS, No. 138480; Court of Appeals No. 277649.

PEOPLE v DONALD LUCAS, No. 138493; Court of Appeals No. 280417.

PEOPLE v HORECZY, No. 138494; Court of Appeals No. 288281.

CHARTER TOWNSHIP OF YPSILANTI v WASHTENAW COUNTY, No. 138499; Court of Appeals No. 281498.

CAVANAGH, J., did not participate due to a familial relationship with counsel of record.

PEOPLE v LARRY SANDERS, No. 138509; Court of Appeals No. 289647.

PEOPLE v GOODSON, No. 138522; Court of Appeals No. 289958.

PEOPLE v STALLWORTH, No. 138531. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287124.

GOLDSMITH v DEPARTMENT OF CORRECTIONS, No. 138537; Court of Appeals No. 288533.

PEOPLE v COOPER, No. 138545; Court of Appeals No. 280024.

PEOPLE v SHUMATE, No. 138559. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286858.

PEOPLE v REID, No. 138566; Court of Appeals No. 280196.

PEOPLE v MURPHY, No. 138581; Court of Appeals No. 288512.

PEOPLE v HOPE, No. 138589; Court of Appeals No. 288563.

PEOPLE v WALK, No. 138597; Court of Appeals No. 290334.

PEOPLE v KORBY, No. 138609; Court of Appeals No. 282016.

PEOPLE v ECHAVARRIA, No. 138617. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 289614.

GRIEVANCE ADMINISTRATOR v RADULOVICH, No. 138619. The stay granted pursuant to MCR 9.122(C) shall remain in effect until 21 days after the effective date of this order. ADB: 06-50-GA.

CIPRIANO v CIPRIANO, No. 138626; Court of Appeals No. 289393.

PEOPLE v GERALD HUNT, No. 138628; Court of Appeals No. 289924.

DETROIT THERMAL, LLC v HIGHGATE HOTELS, INC, No. 138629; Court of Appeals No. 276321.

PEOPLE v WOODRING, No. 138631; Court of Appeals No. 289795.

PEOPLE v HOPKINS, No. 138655; Court of Appeals No. 283610.

PEOPLE v LAJAMILLE HORTON, No. 138656; reported below: 283 Mich App 105.

PEOPLE v MASON, No. 138661; Court of Appeals No. 282241.

PEOPLE v MICHAUX, No. 138665; Court of Appeals No. 282482.

PEOPLE v LANDERS, No. 138679; Court of Appeals No. 290454.

PEOPLE v OLIVE, No. 138680; Court of Appeals No. 290447.

PEOPLE v COREY LONG, No. 138690; Court of Appeals No. 289907.

TAURUS MOLD, INC v TRW AUTOMOTIVE US LLC, No. 138726; Court of Appeals No. 282269.

PEOPLE v DAVID ADAMS, No. 138728; Court of Appeals No. 281668.

PEOPLE v ARDENDOYLE ARMY, No. 138729; Court of Appeals No. 280815.

PEOPLE v PERNICIOUS CRAIG, No. 138731; Court of Appeals No. 281383.

PEOPLE v WIECZOREK, No. 138737; Court of Appeals No. 287157.

PEOPLE v COLE, No. 138740; Court of Appeals No. 277874.

PEOPLE v GAMBLES, No. 138742; Court of Appeals No. 289107.

PEOPLE v LESTER SINGLETON, No. 138744; Court of Appeals No. 282082.

SNOW v EKHARDT, No. 138747; Court of Appeals No. 288945.

PEOPLE v CHANDLER, No. 138756; Court of Appeals No. 281763.

DEAN v HENNING, No. 138760; Court of Appeals No. 288889.

PEOPLE v LYNN MATTISON, No. 138763; Court of Appeals No. 290132.

PEOPLE v RIDEAUX, No. 138764; Court of Appeals No. 281533.

GOODRICH v HOME DEPOT, No. 138765; Court of Appeals No. 281652.
HATHAWAY, J., would grant leave to appeal.

EGELER v WYLIE, No. 138776; Court of Appeals No. 280659.

PEOPLE v DEMETRIUS GREEN, No. 138795; Court of Appeals No. 280810.
HATHAWAY, J. (*not participating*). Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

PEOPLE v JEREMY BURRELL, No. 138797; Court of Appeals No. 281526.

PEOPLE v LEON MORROW, No. 138801; Court of Appeals No. 281864.

PEOPLE v MERLO, No. 138804; Court of Appeals No. 290099.

SMITH v AMARIA, No. 138808; Court of Appeals No. 283229.

PEOPLE v BERDINKA, No. 138819; Court of Appeals No. 279511.

PEOPLE v MCCLOUD, No. 138821; Court of Appeals No. 279551.

COLLINS v OAKLAND COUNTY COMMUNITY COLLEGE, No. 138823; Court of Appeals No. 282351.
KELLY, C.J., and CAVANAGH and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v MARTRELL HOWARD, No. 138835; Court of Appeals No. 290665.

DINKINS v MICHIGAN PAROLE BOARD, No. 138840; Court of Appeals No. 289196.

PEOPLE v KENNETH HARRISON, No. 138845; reported below: 283 Mich App 374.

PEOPLE v ANTHONY LEE, No. 138846; Court of Appeals No. 281048.

PONTE ESTATE v PONTE, No. 138847; Court of Appeals No. 290010.

PEOPLE v BRYAN HILL, No. 138848; Court of Appeals No. 289868.

TRUCKOR v ERIE TOWNSHIP, No. 138850; reported below: 283 Mich App 154.

PEOPLE v RONDALE CLARK, No. 138856; Court of Appeals No. 281994.

PEOPLE v NOWITZKE, No. 138868; Court of Appeals No. 290161.

NATURAL SYSTEMS, INC v CLAYTON GROUP SERVICES, INC, No. 138878; Court of Appeals No. 289069.

PEOPLE v THOMAS BAKER, No. 138880; Court of Appeals No. 281860.

PEOPLE v DEMETRICE JOHNSON, No. 138881; Court of Appeals No. 279130.

PEOPLE v BETTY, No. 138887; Court of Appeals No. 289369.

PEOPLE v ATKINSON, No. 138888; Court of Appeals No. 280885.

CITY OF BLOOMFIELD HILLS v FROLING, No. 138889; Court of Appeals No. 288766.

GHD OPERATING, LLC v EMERSON-PREW, INC, No. 138892; Court of Appeals No. 278857.

PEOPLE v TERRELL BAKER, No. 138900; Court of Appeals No. 290453.

PEOPLE v DEANDRE WILLIAMS, No. 138903; Court of Appeals No. 290693.

PEOPLE v CASTRO-DAVIS, No. 138910; Court of Appeals No. 281576.

PEOPLE v DENNIS BANKS, No. 138915; Court of Appeals No. 281325.

PEOPLE v ATCHER, No. 138927; Court of Appeals No. 290681.

AUTOALLIANCE INTERNATIONAL, INC v DEPARTMENT OF TREASURY, No. 138929; reported below: 282 Mich App 492.

BAGLEY ACQUISITION CORPORATION v HOMRICH WRECKING, INC, Nos. 138930 and 138931; Court of Appeals Nos. 279681 and 281037.

ENGERMAN v ENGERMAN, No. 138940; Court of Appeals No. 281292.

PEOPLE v MICHELLE WALKER, No. 138941; Court of Appeals No. 290881.

PEOPLE v HYSELL, No. 138944; Court of Appeals No. 283288.

PEOPLE v FLOYD ALLEN, No. 138950; Court of Appeals No. 287203.

ORAM v ORAM, No. 138954; Court of Appeals No. 280505.

CONNER CREEK ACADEMY EAST v SUPERINTENDENT OF PUBLIC INSTRUCTION, No. 138955; Court of Appeals No. 289239.

CONNER CREEK ACADEMY EAST v DEPARTMENT OF LABOR AND ECONOMIC GROWTH, No. 138957; Court of Appeals No. 289241.

ADAMUS v BIGGER, No. 138961; Court of Appeals No. 282651.

PEOPLE v HOUSE, No. 138967; Court of Appeals No. 290859.

PEOPLE v PEACOCK, No. 138982; Court of Appeals No. 282285.

HOLLIDAY v PIONEER STATE MUTUAL INSURANCE COMPANY, No. 138993; Court of Appeals No. 281319.

CROWELL v DEPARTMENT OF CORRECTIONS, No. 139008; Court of Appeals No. 288937.

PEOPLE v GRZELAKOWSKI, No. 139020; Court of Appeals No. 290873.

PEOPLE v POE, No. 139023; Court of Appeals No. 282451.

PEOPLE v LAROSE, No. 139027; Court of Appeals No. 282219.

PEOPLE v SCOTT LEWIS, No. 139046; Court of Appeals No. 289242.

PEOPLE v DAY, No. 139047; Court of Appeals No. 282686.

BOSSMAN INVESTMENTS, INC v CITY OF FLINT, No. 139075; Court of Appeals No. 289339.

PEOPLE v CASEY PERRY, No. 139253; Court of Appeals No. 291565.

In re CHABAN (CHABAN v 35TH DISTRICT COURT JUDGE), No. 139303; Court of Appeals No. 292827.

CHURCH KRITSELIS & WYBLE, PC v MITTLEMAN, No. 139315; Court of Appeals No. 292154.

Reconsideration Denied September 11, 2009:

RAY v PERKINS, No. 136962. Leave to appeal denied at 483 Mich 855. Court of Appeals No. 281591.

KELLY, C.J., would grant the motion for reconsideration.

PEOPLE v JERMELL JOHNSON, No. 137659. Leave to appeal denied at 1107 Mich 483. Court of Appeals No. 286627.

KELLY, C.J., did not participate because she served on the Court of Appeals panel that affirmed the defendant's conviction on direct appeal.

SAAB v FARAH, Nos. 137664 and 137665. Leave to appeal denied at 483 Mich 1006. Court of Appeals Nos. 278384 and 278772.

CORRIGAN, J., would grant the motion for reconsideration.

MARKMAN, J., would grant the motion for reconsideration and, on reconsideration, would reverse for the reasons set forth in his dissenting statement in this case, 483 Mich 1006 (2009).

ROBERTS v SAFFELL, No. 137749. Summary disposition entered at 483 Mich 1089. Reported below: 280 Mich App 397.

PEOPLE v REDDELL, No. 138119. Leave to appeal denied at 483 Mich 1111. Court of Appeals No. 288457.

MAYES v CITY OF OAK PARK, No. 138125. Leave to appeal denied at 483 Mich 980. Court of Appeals No. 287367.

PEOPLE v LEE BERRY, No. 138197. Leave to appeal denied at 483 Mich 1111. Court of Appeals No. 287972.

MICHIGAN STATE UNIVERSITY ADMINISTRATIVE PROFESSIONAL ASSOCIATION v MORALEZ, No. 138222. Leave to appeal denied at 483 Mich 1019. Court of Appeals No. 278415.

CUNMULAJ v CHANEY and CUNMULAJ v MICHIGAN STATE UNIVERSITY, Nos. 138390 and 138391. Leave to appeal denied at 483 Mich 1021. Court of Appeals Nos. 282264 and 282265.

PEOPLE v LINCOLN, No. 138751. Leave to appeal denied at 483 Mich 1115. Court of Appeals No. 288462.

GANSON v WELLS FARGO BANK OF MINNESOTA, No. 139263. Leave to appeal denied at 485 Mich 851. Court of Appeals No. 284720.

In re TAVORN (DEPARTMENT OF HUMAN RESOURCES v TAVORN), Nos. 139300, 139301, and 139302. Leave to appeal denied at 484 Mich 873. Court of Appeals Nos. 287495, 287497, and 287498.

Rehearing Granted September 11, 2009:

PEOPLE v BORGNE, No. 134967. The defendant's motion for rehearing of this Court's opinion, 483 Mich 178 (2009), is granted in part. We consider defendant's argument that he was denied his constitutional right to the effective assistance of counsel because trial counsel failed to object to the prosecutor's improper comments and questions concerning defendant's post-arrest, post-*Miranda*[1] silence. The prosecutor's comments and questions outlined in our opinion, 483 Mich at 188-192, violated *Doyle v Ohio*, 426 US 610 (1976). *Id.* at 181. Nonetheless, we concluded that the unpreserved error did not amount to plain error affecting defendant's substantial rights under *People v Carines*, 460 Mich 750 (1999), and affirmed his convictions. *Id.* at 181, 201-202. We again affirm.

Defendant argues that reversal was required on the basis of ineffective assistance of counsel pursuant to *Strickland v Washington*, 466 US 668 (1984). Under *Strickland*, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Even if defendant's trial attorney erred by failing to object, reversal is not required. Rather, in light of the "compelling, untainted evidence against defendant," see *Borgne*, *supra* at 198-201, there was no reasonable probability that, but for the error, the result of the trial would have been different. As we observed previously, the prosecutor's comments "were not pervasive"; the prosecutor "only referred to defendant's silence under the mistaken belie[f] that defendant had raised the subject in his fleeting mention of having tried to tell his exculpatory story while being escorted to the police car. The prosecutor also referred to defendant's silence in closing argument, but it, again, was only an attempt to impeach defendant's exculpatory story." *Id.* at 198. We continued: "This use of silence did not obviate the prosecutor's need to independently prove that defendant committed the crime. And the prosecutor here presented compelling, largely consistent, untainted evidence to prove this

[1] *Miranda v Arizona*, 384 US 436 (1966).

defendant's guilt." *Id.* at 199. The victim consistently identified defendant as her assailant, including when defendant was apprehended near the scene of the crime. *Id.* at 199-200. She further identified him as the man who drove past her after the crime and yelled a self-incriminating comment at her. *Id.* at 200. A second witness corroborated this event. *Id.* at 200-201. Defendant's act of yelling at the victim after the crime was "uniquely incriminating" and was "the equivalent of an open confession to the crime." *Id.* at 200. Finally, the circumstances leading to defendant's arrest were also "highly incriminating." *Id.* at 201. He was found "crouching in the corner of an abandoned building" that was located "a few blocks from the crime scene" and "in the direction that the assailant fled from the crime scene." *Id.* This was the very building to which a bystander chased the assailant, and the bystander was found waiting outside this building. *Id.*

For these reasons, just as the *Doyle* error in this case does not support a finding of prejudice under the *Carines* plain-error standard, *id.* at 196-198, defendant cannot show that he was prejudiced by counsel's errors under the *Strickland* standard. Accordingly, we again affirm defendant's convictions. Court of Appeals No. 269572.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ., would, in lieu of granting rehearing, remand to the Court of Appeals for consideration of the issue of ineffective assistance of counsel.

Rehearing Denied September 11, 2009:

PEOPLE v CARLETUS WILLIAMS, No. 135271; Court of Appeals No. 266807.

JACKSON v GREEN ESTATE, No. 136423; Court of Appeals No. 269244.

MARKMAN, J. I would deny defendant's motion for rehearing with regards to the partition issue, but grant the motion with regards to the statute of limitations issue and, on reconsideration, would reverse the judgment of the Court of Appeals on the statute of limitations issue for the reasons stated in my opinion in *Jackson v Green Estate*, 484 Mich 209, 221-227 (2009).

KELLY, C.J., and CAVANAGH, J., would grant rehearing.

SEYBURN v BAKSHI, No. 136436; reported below: 278 Mich App 486.

In re SERVAAS, No. 137633; opinion at: 484 Mich 634.

KELLY, C.J., amends her opinion in this case, dated July 31, 2009, to read as follows:

KELLY, C.J. (*concurring in part and dissenting in part*). I concur in Justice WEAVER's opinion except for part II(A) and the portions of the introduction and conclusion discussing quo warranto.

I agree with Justice MARKMAN that the existence of an action for quo warranto does not prevent the JTC from assessing respondent's misconduct, regardless of whether that conduct happens to involve the improper exercise of a title to office. Accordingly, I concur in part II of Justice MARKMAN's opinion. Given Judge Servaas's admission that he moved outside his election division, I find that he did vacate his office.

Under the unique facts of this case, I find that a public censure is the appropriate sanction for the violations of Counts I (vacating judicial office) and III (inappropriate sexual conduct).

Summary Disposition September 16, 2009:

JOHNSON v DETROIT MEDICAL CENTER, No. 139533. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We further order that the stay entered by this Court on September 1, 2009, remains in effect until completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. Court of Appeals No. 293304.

PEOPLE v ROBERT LAMONTE WALKER, No. 139565. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the Genesee Circuit Court's July 22, 2009, order granting the defendant's motion for resentencing. An error in scoring the judicial guidelines does not provide a basis for appellate relief. *People v Raby*, 456 Mich 487, 496 (1998). As such, the defendant's former appellate counsel was not ineffective and the defendant is not entitled to be resentenced. The motion for stay is denied. Court of Appeals No. 293208.

Leave to Appeal Granted September 16, 2009:

SMITH v ANONYMOUS JOINT ENTERPRISE, Nos. 138456, 138457, and 138458. The parties shall include among the issues to be briefed whether the Court of Appeals erred in determining that the plaintiff presented insufficient evidence to support a finding of actual malice for purposes of her defamation claim. Court of Appeals No. 275297, 275316, and 275463.

PEOPLE v MARDLIN, No. 139146. The parties shall address whether evidence provided under the "doctrine of chances" may be used to establish that a fire did not have a natural or accidental cause, and whether more than the mere occurrence of other fires involving the defendant's property is necessary for admission of such evidence.

The motion for bond pending appeal or expedited review and the motion to appoint an expert are denied.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 279699.

Leave to Appeal Denied September 16, 2009:

BUTT v DETROIT EDISON COMPANY, No. 138324; Court of Appeals No. 287781.

IRVING v AUTO CLUB INSURANCE ASSOCIATION, No. 138405; Court of Appeals No. 288316.

SHEIKO v UNDERGROUND RAILROAD, No. 138467; Court of Appeals No. 277766.

PEOPLE v JOENELL HAWTHORNE, No. 138489; Court of Appeals No. 280289.

PEOPLE v HENDERSON, Nos. 138542 and 138778; reported below 282 Mich App 307.

KELLY, C.J., and CAVANAGH and MARKMAN, JJ., would grant leave to appeal.

PEOPLE v MERCIER, No. 138549; reported below 282 Mich App 307.

KELLY, C.J., and CAVANAGH and MARKMAN, JJ., would grant leave to appeal.

PEOPLE v NEAL, No. 138562; Court of Appeals No. 281666.

PEOPLE v JACOBS, No. 138576; Court of Appeals No. 289659.

PEOPLE v RUFUS THOMAS, No. 138610; Court of Appeals No. 279574.

KELLY, C.J., and CAVANAGH, J., would grant leave to appeal.

PEOPLE v ROBERT LEE WALKER, No. 138670; Court of Appeals No. 290543.

PEOPLE v JEDYNAK, No. 138681; Court of Appeals No. 282938.

PEOPLE v PATRICK JONES, No. 138718; Court of Appeals No. 288949.

PEOPLE v SONJIA JOHNSON, No. 138777; Court of Appeals No. 282231.

PEOPLE v MAXON, No. 138849; Court of Appeals No. 282688.

PEOPLE v HOLMES, No. 138965; Court of Appeals No. 291350.

LABRECK v OAKLAND CIRCUIT JUDGE, No. 139478; Court of Appeals No. 292558.

KELLY, C.J., would grant leave to appeal.

Order Entered September 18, 2009:

SAULT STE MARIE TRIBE OF CHIPPEWA INDIANS v BOUSCHOR, No. 137990. On order of the Court, the application for leave to appeal the November 18, 2008 judgment of the Court of Appeals is considered. We direct the parties to submit supplemental briefs, within 35 days of the date of this order, addressing the issue whether Michigan's governmental tort liability act, MCL 691.1401 *et seq*., applies to defendant Bernard Bouschor, the former tribal chairperson of plaintiff Sault Ste. Marie Tribe of Chippewa Indians, in light of the Tribe's status as a sovereign and the definitions contained in MCL 691.1401. The application for leave to appeal remains pending. Court of Appeals No. 276712.

Summary Disposition September 18, 2009:

LIPNEVICIUS v LIPNEVICIUS, No. 138349. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The court should consider: (a) whether the trial court legally erred in allowing the biological father to intervene in the divorce proceedings; (b) whether the defendant father was the child's legal father prior to the trial court's determination that the defendant father was not a biological parent; (c) whether the trial court's determination that the defendant father was not the child's biological parent amounted to termination of his parental rights; (d) if the trial court's determination did amount to a termination of the defendant father's parental rights, whether any constitutional implications exist; cf. *Santosky v Kramer*, 455 US 745 (1982); (e) whether the defendant father was entitled to invoke the equitable parent doctrine after the court determined that another man was the biological father; (f) whether the defendant father's entitlement to invoke the equitable parent doctrine is in any way affected by the fact that the biological father is apparently willing to undertake all parental responsibilities with regard to the child; and (g) whether, if the defendant father is entitled to invoke the equitable parent doctrine, he has satisfied the standards of an equitable parent. Court of Appeals No. 289073.

KELLY, C.J. (*dissenting*). I believe that the order remanding this case to the Court of Appeals for consideration as on leave granted correctly flags the relevant legal issues. However, I favor granting leave to appeal rather than remanding. This case presents unique questions of law in that it differs from previous cases that have raised the equitable parent doctrine. Consequently, its correct resolution is unclear. In granting leave to appeal, I would order oral argument on the issues specified in the remand order to assist the Court.[1]

FACTS AND PROCEDURAL HISTORY

The plaintiff filed for divorce from her husband in 2006. During the proceedings, plaintiff sought a determination of the parentage of their son, NL. A person asserting that he was the biological father was permitted to intervene. A DNA test confirmed that the intervenor was NL's biological father, and the trial court thereafter determined that plaintiff had successfully rebutted the presumption of legitimacy. It issued an order holding that the child had been born out of wedlock, was not the issue of the marriage, and that the intervenor was NL's father.

Defendant then moved that the court declare him NL's equitable—hence, natural and legal—father. The court denied the motion, holding that plaintiff had rebutted the presumption of NL's legitimacy by clear and convincing evidence and that the intervenor was the "natural"

[1] I also note that the parties raise numerous procedural arguments that further complicate this appeal. Thus, the burden of the Court of Appeals on remand is heightened and further delay is likely.

father. As there can be only one father, the court ruled that defendant could not be declared an equitable parent. The Court of Appeals denied defendant's application for leave to appeal. NL's biological parents subsequently married and currently live together with NL.

HISTORY OF THE EQUITABLE PARENT DOCTRINE IN MICHIGAN

The "equitable parent" doctrine originated in the Court of Appeals decision in *Atkinson v Atkinson*.[2] In that divorce case, the child's mother contended that her husband was not the child's father. A blood test subsequently confirmed her contention. Nevertheless, the husband argued that the court should treat him as the child's equitable parent because of the close father-son relationship the two shared. Notably, the court observed that "[p]laintiff is the only father [the child] has ever known . . . ."[3]

The Court then adopted the doctrine of "equitable parent." In doing so, it established this test for its application:

> [W]e adopt the doctrine of equitable parent and find that a husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support.[4]

The Court of Appeals later addressed the correct application of the doctrine in three interrelated cases: *York v Morofsky* (*York I*),[5] *York v Coble* (*York II*),[6] and *Coble v Green*.[7] In *York I*, the plaintiff wife (York) disclaimed the defendant husband's (Morofsky's) parentage of their son during their divorce proceedings. The trial court found that the plaintiff had established that the child was not a product of the marriage and denied Morofsky's attempt to establish himself as the child's equitable parent. The Court of Appeals reversed, holding that "equitable parenthood is a permanent status once it attaches."[8] Therefore, the Court concluded that the trial court had erred because it had "entirely ignored defendant's role

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[2] *Atkinson v Atkinson*, 160 Mich App 601 (1987).

[3] *Id.* at 610.

[4] *Id.* at 608-609.

[5] *York v Morofsky*, 225 Mich App 333 (1997) (*York I*).

[6] *York v Coble*, unpublished order of the Court of Appeals, entered March 27, 2001 (Docket No. 228309) (*York II*).

[7] *Coble v Green*, 271 Mich App 382 (2006).

[8] *York I*, *supra* at 337.

in supporting the child for the first four years of his life . . . ."[9] As in *Atkinson*, the biological father (Coble) at no time attempted to assert his parental rights to the child at issue in the proceedings.

Subsequently, Morofsky was jailed for failure to pay child support. York sought to reinstate a paternity action against Coble, the child's biological father. The trial court granted the motion and allowed the paternity action to go forward. The court relied heavily on public policy concerns and the best interests of the child in determining that Coble was the child's biological parent and ordering him to pay child support. The Court of Appeals dismissed Coble's appeal because of a filing defect.

Coble then sued his attorney (Green) for legal malpractice for failing to inform him of the Court of Appeals dismissal of his appeal. The trial court denied Green's motion for summary disposition, ruling that neither Coble nor the child's mother had standing to bring a paternity action. Because Morofsky had been deemed the child's equitable parent in *York I*, no determination could be made that the child was not the issue of the marriage. The Court of Appeals affirmed, agreeing that, because the child had a legal father under its decision in *York I*, York lacked standing to pursue a paternity action against anyone else. This Court denied leave to appeal.[10]

This Court affirmed the viability of the equitable parent doctrine in *Van v Zahorik*.[11] The parties in *Van* cohabited for a number of years, during which time the defendant mother had two children. The parties never married. After the relationship ended, the defendant refused to allow the plaintiff to see the children and denied that he was the children's father. The plaintiff filed a petition to establish paternity.

After blood tests showed that the plaintiff was not the natural father of either child, the plaintiff argued that he should be considered the children's equitable parent. He claimed that he had cared for and financially supported the children both during and after his relationship with the defendant. The trial court granted summary disposition to the defendant. It reasoned that the parties had never married and that the doctrine of equitable parenthood was applicable only where the parties were married. The Court of Appeals affirmed that the equitable parent doctrine applies only when the parties are married.[12] This Court agreed.[13]

SHOULD THE EQUITABLE PARENT DOCTRINE APPLY HERE?

The facts in this case are different from those in *Atkinson*, *Van*, and other cases applying the equitable parent doctrine. Here, the husband

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[9] *Id.* at 336.

[10] *Coble v Green*, 477 Mich 1054 (2007). I, as well as Justices CAVANAGH and WEAVER, voted to grant leave to appeal in *Coble*.

[11] *Van v Zahorik*, 460 Mich 320 (1999).

[12] *Van v Zahorik,* 227 Mich App 90 (1997).

[13] *Van v Zahorik,* 460 Mich 320 (1999). I dissented from the majority's decision in *Van*, as did Justice BRICKLEY, joined by Justice CAVANAGH.

wishes to continue as the child's legal father despite the fact that he has been shown not to be the biological father. Yet the biological father also seeks legal right to the child. The proper application of the equitable parent doctrine to this set of facts is a matter of first impression.[14]

The trial court determined that its order finding the intervenor to be NL's biological father was controlling and precluded application of the equitable parent doctrine in defendant's favor. In effect, the order terminated defendant's parental rights. A majority of this Court has recognized the gravity of the holding by flagging it for the Court of Appeals to consider on remand.

CONCLUSION

Given the jurisprudentially significant issues present here and the lack of relevant authority to guide the Court of Appeals on remand, I would not remand this case. Rather, I would grant defendant's application for leave to appeal.

PEOPLE v DALE WIGGINS, No. 138687. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether 25 points were properly assessed for offense variable 12 (MCL 777.42). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

MARKMAN, J. (*concurring*). Justice WEAVER dissents because she is "not persuaded that the decision of the Court of Appeals was clearly erroneous or that defendant has suffered any material injustice . . . ." It is difficult to understand how Justice WEAVER can assert that this decision was not "clearly erroneous" where the trial court scored offense variable (OV) 12 at 25 points for three or more "crimes against a person" where only one of the crimes is categorized as a "crime against the person," and two are designated as "crimes against public order." MCL 777.11 through 777.18; MCL 722.675. OV 12 should have been scored at only 10 points. Moreover, it is difficult to understand how Justice WEAVER can assert that defendant has not suffered any "material injustice" where the trial court imposed a minimum sentence of 85 months when it thought the correct range was 51 to 85 months while the correct guidelines range is 45 to 75

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[14] Indeed, this case appears to be a mirror image of *Coble*. There, the Court of Appeals determined that, because the court had previously held that the child had an equitable father, that holding could not be challenged by a biological parent.

The trial court in this case relied on *Coble* as controlling its decision that its order finding the intervenor to be the child's "natural" parent was dispositive of defendant's claim of equitable parenthood. Because this Court simply denied leave to appeal in *Coble*, and because I nevertheless do not view *Coble* as dispositive of defendant's claim, I believe this conclusion supports granting further review.

months. Given that defendant's sentence is outside the Legislature's guidelines range, resentencing is required. Thus, the lower courts unmistakably applied the law in an "erroneous" manner, and equally unmistakably caused a "material injustice" to a person who, but for the instant order, might have been imprisoned for a term beyond that intended by the Legislature and the trial court. Court of Appeals No. 290017.

WEAVER, J. (*dissenting*). I dissent. I would not remand this case and I would deny leave to appeal because I am not persuaded that the decision of the Court of Appeals was clearly erroneous or that defendant has suffered any material injustice in this case.

PEOPLE V ELANANI, No.138802. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Lenawee Circuit Court, and we remand this case to the trial court for resentencing. The trial court erred in scoring offense variable 7 at 50 points, because the victim was not subjected to extreme or prolonged pain or humiliation. MCL 777.37(3). The defendant's sentencing guidelines range based on properly scored offense variables is 7 to 23 months. As a result, the trial court's conclusion that the offense variables did not take into account the defendant's high offense variable score is not accurate. The other stated reasons for the departure, that the crime is a "very egregious offense" and that the defendant is "more recidivous," are not objective and verifiable reasons for the departure. On remand, the trial court shall sentence the defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Babcock*, 469 Mich 247 (2003), and *People v Smith,* 482 Mich 292 (2008). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 290561.

WEAVER, J. (*dissenting*). I dissent. I would not vacate and remand this case for resentencing and I would deny leave to appeal because I am not persuaded that the decision of the Court of Appeals was clearly erroneous or that defendant has suffered any material injustice in this case.

Leave to Appeal Denied September 18, 2009:

LAFNER V CITY OF FLINT, No. 138459; Court of Appeals No. 282669.

MARKMAN, J. (*concurring*). I concur in this Court's order denying plaintiffs' application for leave to appeal. I write separately only to observe that plaintiffs expressly waived the only argument on which a basis might have been established for granting this application.

Plaintiffs were involved in an automobile accident on a county highway under the jurisdiction of defendant, city of Flint. Plaintiffs claim that the driver lost control of his vehicle when he hit a large pothole, causing the passenger side tires to go onto the shoulder of the road. Because the shoulder had an "edge drop-off" anywhere from two to six inches in height, the driver apparently oversteered to return to the pavement. In the process, he crossed over the centerline and collided with

an oncoming vehicle. Plaintiffs, who were in the oncoming vehicle, filed this action, alleging that the city is liable under the highway exception to governmental immunity. The trial court denied defendant's motion for summary disposition, and the Court of Appeals reversed.

In *Grimes v Dep't of Transportation*, 475 Mich 72, 73 (2006), a case involving MCL 691.1402, this Court held that the "shoulder is not within the [highway] exception because it is not 'designed for vehicular travel.' " However, the liability of a municipal highway authority may conceivably be *expanded* by MCL 691.1402a(1), which states in pertinent part:

> Except as otherwise provided by this section, a municipal corporation has no duty to repair or maintain, and is not liable for injuries arising from, a portion of a county highway outside of the improved portion of the highway designed for vehicular travel, including a sidewalk, trailway, crosswalk, or other installation. This subsection does not prevent or limit a municipal corporation's liability if both of the following are true:
>
> (a) At least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of a defect in a sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel . . . .

Thus, on the one hand, § 1402 grants governmental immunity to highway authorities for injuries occurring on "sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel." On the other hand, § 1402a(1) may *additionally* impose liability upon a municipal authority for injuries occurring on "a sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel," if the municipal authority knew or should have known of the defect at least 30 days before the accident and the defect is the proximate cause of the injury. Although a shoulder is not "designed for vehicular travel" pursuant to § 1402, it may, at least conceivably, constitute an "other installation outside of the improved portion of the highway designed for vehicular travel" pursuant to § 1402a(1).

Although plaintiffs raised the argument that § 1402a(1) imposed additional liability upon defendant in the lower courts, this argument was expressly waived in the instant application.

KELLY, C.J., and HATHAWAY, J., would grant leave to appeal.

PEOPLE v BINSCHUS, No. 138749; Court of Appeals No. 283799.

KELLY, C.J., would remand this case for resentencing.

Reconsideration Denied September 18, 2009:

In re MCBRIDE (DEPARTMENT OF HUMAN SERVICES v MCBRIDE), No. 136988; Court of Appeals No. 282062.

CORRIGAN, J. (*dissenting*). I would grant the respondent father's motion for rehearing and grant leave to appeal for the reasons I expressed in my dissent to the order denying his original application for leave to appeal. *In re McBride,* 483 Mich 1095 (2009). Respondent and the Attorney General argued that respondent's parental rights were wrongly terminated because the trial court deprived him of his rights to counsel and to participate in this case from the outset while he was in prison. Further, these errors arguably were not harmless because, had counsel been appointed, counsel may have established a guardianship with respondent's sister, who requested custody from the court; such a guardianship could have averted the termination of respondent's parental rights and permitted him to continue his relationships with his three adolescent sons. Most significantly, in the words of respondent's *pro per* motion for rehearing, the conclusion of the Court of Appeals that the complete denial of his right to counsel was harmless gives trial courts a "green light to violate parents[']rights whenever they feel the need" because judges "will know that the courts will deny relief for those who appeal in the future." A parent's right to counsel during termination proceedings has thus been reduced to a right to counsel when an appellate court, in hindsight and without the benefit of any developed record in favor of the unrepresented parent, thinks that counsel might have made a difference.

KELLY, C.J. I join the statement of Justice CORRIGAN.

Summary Disposition September 23, 2009:

PEOPLE v REGINALD LEWIS, No. 136622. By order of April 22, 2009, the application for leave to appeal the April 15, 2008, judgment of the Court of Appeals was held in abeyance pending the decision in *Melendez-Diaz v Massachusetts*, cert gtd 552 US 1256 (2008). On order of the Court, the case having been decided on June 25, 2009, 557 US __; 129 S Ct 2527; 174 L Ed 2d 314 (2009), the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate in part the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration of the defendant's Confrontation Clause, sufficiency of the evidence, and ineffective assistance issues in light of *Melendez-Diaz*. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 274508.

PEOPLE v MARQUEZ GOINS, No. 138745. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Wayne Circuit Court, and we remand this case to the trial court for resentencing. For the reasons stated in the Court of Appeals opinion, the trial court's scoring of offense variable (OV) 13 was improper. The Court of Appeals' alternate basis for scoring OV 13 was improper because it impermissibly included conduct that was already scored under OV 12. MCL 777.43(2)(c). In all other respects, leave to appeal is denied, because we

are not persuaded that the remaining question presented should be reviewed by this Court. Court of Appeals No. 283210.

MARKMAN, J. (*concurring*). Justice WEAVER dissents because she is "not persuaded that the decision of the Court of Appeals was clearly erroneous or that defendant has suffered any material injustice . . . ." It is difficult to understand how Justice WEAVER can assert that this decision was not "clearly erroneous" when the Court of Appeals cited conduct scored under offense variable (OV) 12 to justify the scoring of OV 13 contrary to the express command of MCL 777.43(2)(c). It is equally difficult to understand how Justice WEAVER can assert that defendant has not suffered any "material injustice" where the trial court imposed a minimum sentence of 132 months when it thought the correct guidelines range was 126 to 210 months while the correct guidelines range is 108 to 180 months. Thus, the lower courts unmistakably applied the law in an "erroneous" manner, and equally unmistakably caused a "material injustice" to a person who, but for the instant order, might have been imprisoned for a term beyond that intended by the Legislature and the trial court.

WEAVER, J., (*dissenting*). I dissent. I would not vacate the sentence and remand this case and I would deny leave to appeal because I am not persuaded that the decision of the Court of Appeals was clearly erroneous or that defendant has suffered any material injustice in this case.

PEOPLE v MURAWA, No. 138842. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse that part of the March 4, 2009, Court of Appeals order imposing sanctions against defense counsel. In this case, the defendant was not advised at sentencing of his right to appointed appellate counsel, and he was later provided appointed counsel pursuant to *Halbert v Michigan*, 545 US 605 (2005). Defense counsel complied with the deadlines that this Court had previously established for counsel appointed under similar circumstances, see, e.g., *People v Corn*, 477 Mich 903 (2006). Specifically, counsel filed a postjudgment motion within six months, consistent with MCR 6.429(B)(3). Four months after that motion was denied and within a year of his appointment, defense counsel then filed an application for leave to appeal in the Court of Appeals, consistent with his obligations under MCR 7.205. Under these circumstances, we conclude that defense counsel should not be sanctioned, and we direct the Court of Appeals to issue a refund to counsel. The cases cited in the Court of Appeals March 4, 2009, order are inapposite because there was no *Halbert* issue presented in those cases. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 290402.

BUITENDORP v SWISS VALLEY, INC, No. 138985. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the decision of the Workers' Compensation Appellate Commission (WCAC) and remand this case to the Workers' Compensation Board of Magistrates for reconsideration under the proper legal standard. The magistrate and the WCAC employed an improper legal framework in analyzing the facts of this case by assessing whether the major purpose of the plaintiff's *overall*

activities were work-related. Under MCL 418.301(3) and *Eversman v Concrete Cutting & Breaking*, 463 Mich 86 (2000), the major purpose of the plaintiff's activity *at the time of injury* determines whether the social or recreational bar applies. We do not retain jurisdiction. Court of Appeals No. 289999.

Leave to Appeal Denied September 23, 2009:

PEOPLE v RUDOLPH HORTON, No. 135021. By order of December 20, 2007, we granted leave to appeal the August 28, 2007, judgment of the Court of Appeals, and by order of March 26, 2008, the application for leave to appeal was held in abeyance pending the decision in *Melendez-Diaz v Massachusetts*, cert gtd 552 US 1256 (2008). On order of the Court, the case having been decided on June 25, 2009, 557 US ___; 129 S Ct 2527; 174 L Ed 2d 314 (2009), we vacate our December 20, 2007, order granting leave to appeal, 480 Mich 987 (2007). The application is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 268264.

DAVIS v WILLIAMS, No. 138080; Court of Appeals No. 278713.

PEOPLE v HENDRICK, No. 138601; Court of Appeals No. 289524.

PEOPLE v DAVID STUCKEY, No. 138603; Court of Appeals No. 281764.

CAVANAGH, J., would grant leave to appeal.

MASON v CITY OF MENOMINEE, No. 138625; reported below: 282 Mich App 525.

PEOPLE v ANTHONY HARRIS, No. 138727; Court of Appeals No. 282281.

PEOPLE v MARCHESE, No. 138874; Court of Appeals No. 290310.

PEOPLE v WOZNIAK, No. 138928; Court of Appeals No. 291114.

MARILYN FROLING REVOCABLE LIVING TRUST v BLOOMFIELD HILLS COUNTRY CLUB, No. 138932; reported below: 283 Mich App 264.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ., would grant leave to appeal.

TYREE v MASTERS HOME IMPROVEMENT, No. 138942. On order of the Court, the application for leave to appeal prior to decision by the Court of Appeals is considered, and it is denied as moot. The Court of Appeals denied leave to appeal by order dated July 29, 2009. That order is the subject of a new application for leave to appeal to this Court, Docket No. 139590, which remains pending. Court of Appeals No. 291654.

SCHMID v FARM BUREAU LIFE INSURANCE COMPANY OF MICHIGAN, No. 138953; Court of Appeals No. 282030.

KELLY, C.J., and HATHAWAY, J., would grant leave to appeal.

PEOPLE v DAVID LEWIS, No. 138958; Court of Appeals No. 282965.

GRAHAM v OAKWOOD HEALTHCARE, INC, No. 139567; Court of Appeals No. 292621.

Summary Disposition September 25, 2009:

PEOPLE v LLOYD, No. 137852. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration of: (1) whether the error in admitting the 911 call set forth in exhibit 20 was constitutional in nature; (2) if so, whether the Court of Appeals therefore erred in failing to apply the "harmless beyond a reasonable doubt" standard that is applied to preserved constitutional error, *Chapman v California*, 386 US 18 (1967); and (3) if the incorrect standard was applied, whether the prosecutor has established that the error was harmless beyond a reasonable doubt. *People v Blackmon,* 477 Mich 1125 (2007). We do not retain jurisdiction. Court of Appeals No. 277172.

In re MCCORMICK ESTATE (BRAVERMAN v MCCORMICK), No. 138462. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals. We reverse the order of the Wayne County Probate Court approving petitioner's 12th, 13th, 14th and final accountings and granting his petition for complete estate settlement, and we remand this case for further proceedings. We direct the probate court to require the petitioner to provide an itemized accounting that establishes his and the receiver's entitlement to the specific amounts they received from the estate as compensation. See MCR 5.310(C)(2)(c). In particular, the probate court shall require the petitioner to provide an itemization of the $41,485 payment to himself from the estate, and the $105,156 payment to the receiver from the proceeds of the sale of the real property. We do not retain jurisdiction. Court of Appeals No. 277558.

CAVANAGH, J., would deny leave to appeal.

Leave to Appeal Granted September 25, 2009:

HOOVER v MICHIGAN MUTUAL INSURANCE COMPANY, No. 138018. The parties shall include among the issues to be briefed whether, or to what extent, the defendant is obligated to pay the plaintiffs personal protection insurance benefits under the no-fault act, MCL 500.3101 *et seq*., for housing and living expenses, as well as services, associated with the care of the plaintiffs' adult son, Michael Hoover, and whether *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521 (2005), was correctly decided. Reported below: 281 Mich App 617.

KELLY, C.J. (*concurring*). Justice YOUNG's dissenting statement is short on the civility that, in my opinion, justices of this Court owe one another out of respect for others' sincerely held beliefs and honorable motivations.

It is also inaccurate in several respects. For example, my vote here represents no change in my fidelity to judicial restraint and stare decisis. In the case of *Peterson v Magna Corp*, 484 Mich 300 (2009), issued a mere 60 days ago, I provided a lengthy statement detailing that fidelity. Like

my vote in this case, my position in *Peterson* is wholly consistent with my past "clamorings." I urge all who are interested to read *Peterson*.

YOUNG, J. (*dissenting*). I would deny leave to appeal. I therefore dissent from the order granting leave to appeal in this case and inviting the parties to reconsider whether *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521 (2005), was correctly decided. This case represents the latest installment on Chief Justice KELLY's promise to undo "the damage that the Republican Court has done" during the last decade. Brian Dickerson, *GOP Justices Gird for Gang of 3½*, Detroit Free Press, January 11, 2009, at 1B.

It is no secret that members of the new majority share a judicial philosophy very different from that of the prior majority of the TAYLOR Court. Theirs is a philosophy that allows empathy (or "equity") to trump the words of a statute. While the majority is within its rights to reconsider *Griffith*, doing so is incompatible with the respect for judicial restraint and stare decisis that members of the new majority stoutly professed for over a decade. Indeed, the new majority's actions smack of the very "pattern of exercising power to overturn numerous longstanding precedents in a manner that lacks judicial restraint" that Justice CAVANAGH once decried in attacking the TAYLOR Court in *Cooper v Wade*, 461 Mich 1201, 1203 (1999).[1] Moreover, not only is today's order a hypocritical change in the new majority's purported fidelity to stare decisis, today's order is indicative of the zeal with which the majority is attempting to obliterate this Court's last decade of work. Chief Justice KELLY was once concerned that "if each successive Court, believing its reading is correct and past readings wrong, rejects precedent, then the law will fluctuate from year to year, rendering our jurisprudence dangerously unstable." *Pohutski v City of Allen Park*, 465 Mich 675, 712 (2002) (KELLY, J., dissenting).[2] The majority's decision to reconsider a decision handed down just four years ago proves that her fears for preserving precedent pertained only to precedent with which she personally agreed. I suspect we will hear no more about stare decisis from the new majority.

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[1] *Lenawee Co Bd of Rd Comm'rs v State Auto Prop & Cas Ins Co*, 485 Mich 853, 854-855 (2009) (CAVANAGH, J., concurring). Ten years ago, Justice CAVANAGH, joined by then Justice KELLY, dissented in *Cooper* from an order that asked the parties to address whether the Court should exercise its authority to reconsider certain previously decided cases. He explained that "the fact that a majority would feel that the proper exercise of its duties mandates that [it] revisit every decision of this Court that [it] might question and have the power to reach . . . is a troubling thought." *Cooper*, 461 Mich at 1203. Instead, he counseled "a necessary measure of judicial restraint." *Id.*

[2] The actions of this new majority demonstrate that its previous clamorings about stare decisis were no more than political posturing.

Leave to Appeal Denied September 25, 2009:

PEOPLE v NICHOLAS THOMPSON, No. 138203; Court of Appeals No. 278243.

KELLY, C.J. (*dissenting*). I would grant leave to appeal to consider the constitutionality of MCL 768.27b. The statute threatens to gut our Michigan Rules of Evidence. The case raises a serious separation of powers issue. I believe that the Court is remiss in not considering this jurisprudentially significant question.[1]

CAVANAGH, J., would grant leave to appeal.

PEOPLE v MICHAEL STOKES, No. 138326. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). We write further only to comment on the unusual posture of this case.

Defendant was convicted of assault with intent to commit great bodily harm, MCL 750.84, after representing himself at trial. He was given a prison sentence of 10 to 20 years as a fourth-offense habitual offender, MCL 769.12. Defendant raised five issues in his appeal by right to the Court of Appeals, which court affirmed his conviction. Defendant then raised six issues in his appeal to this Court. For the new issue, defendant stated: "I feel that I was denied assistance of counsel for my defense at trial." Defendant elaborated upon this, contending that he had been compelled to represent himself because the judge made it clear that he either had to do this or else retain his current counsel. He argued that his request to represent himself was not unequivocal as required by *People v Anderson*, 398 Mich 361 (1976). This Court denied defendant's application.

Defendant then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. Defendant raised several issues in this petition, but did not raise the "waiver of counsel" issue. Nevertheless, the district court raised the issue sua sponte. *Stokes v Wolfenbarger*, 2008 US Dist LEXIS 12300 (2008), asserting that defendant "has never presented any claim to the state courts which challenges the validity of the waiver of his right to counsel or that his decision to represent himself may have been forced upon him." The district court then decided to hold defendant's petition in abeyance so that defendant could return to state court and exhaust the "waiver of counsel" claim. The district court also ordered that defendant could refile an amended petition raising any newly exhausted claims within 60 days of the conclusion of the state postconviction proceedings.

Defendant then filed a motion in the state circuit court for relief from judgment that raised the "waiver of counsel" issue. The circuit court denied relief stating:

> There are three main requirements with which a court must comply in this context. First, the defendant's requests must be

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[1] For a thorough discussion of this issue, refer to Justice CAVANAGH's dissenting statement in *People v Watkins,* 482 Mich 1114 (2008), which I joined.

> unequivocal. Second, the defendant must assert his right to self-representation knowingly, intelligently, and voluntarily. In assuring a knowing and voluntary waiver, the trial court must make defendant aware of the dangers and disadvantages of self-representation so that the record will establish that he knows what he is doing and that his choice is made with eyes open. [*People v Ahumada*, 222 Mich App 612 (1997).] Third, the court must establish that the defendant will not unduly disrupt the court while acting as his own counsel. *Id*. In addition, MCR 6.005 requires the trial court to offer the assistance of an attorney and to advise the defendant about the possible punishment for the charged offense. *Id*.
>
> Here, the record indicates that defendant's request was unequivocal; the court asked defendant if he wished to represent himself and he answered in the affirmative. The defendant further indicated that he had prior work experience as a paralegal and as a result of that experience was capable of preparing his own trial strategy. Further the court advised defendant of his continued right to counsel and that the counsel assigned to his case was one of the "best in the building." The court also advised defendant of the maximum penalty of the crime for which he was charged. A review of the record indicates that the court properly determined that defendant's desire to represent himself was fully knowing and intelligent. As such, there is no violation of defendant's Sixth amendment right to counsel, and his claim in this regard is without merit.

Defendant then filed an appeal in the Court of Appeals raising the "waiver of counsel" issue, which court denied defendant's application on the grounds that defendant had "failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)." Defendant now seeks leave to appeal in this Court raising the "waiver of counsel" issue and we deny leave to appeal for the same reason.

As set forth above, the district court was apparently under the mistaken belief that defendant had not raised his "waiver of counsel" issue in the state courts. In any event, having reviewed the written "waiver of counsel" form signed by defendant on October 12, 2004, and the 24 pages of transcript that consisted of two separate extended discussions with defendant over the course of two days, we agree with the trial court that defendant's waiver was unequivocal. Even if this issue was being considered by this Court in the first instance, we would still deny relief from judgment because defendant has not established actual prejudice. MCR 6.508(D)(3)(b). In this latter regard, we note that even though defendant represented himself at trial, his former counsel conducted voir dire and otherwise assisted him as standby counsel throughout the trial. Court of Appeals No. 286305.

KELLY, C.J., and CAVANAGH, J., would simply deny leave to appeal.

PEOPLE v ACEVAL, No. 138577; reported below: 282 Mich App 379.

KELLY, C.J. (*dissenting*). I would grant leave to appeal to address whether defendant was denied the right to counsel of his choice under

United States v Gonzalez-Lopez.[1] The trial court removed one of defendant's attorneys of choice on the ground that a conflict existed between the attorneys, and the removed attorney had filed a limited appearance. I would also address whether defendant was deprived of due process such that retrial should be barred. The prosecution acquiesced in the presentation of perjured testimony in order to conceal the identity of a confidential informant.

MARKMAN, J. (*dissenting*). False testimony was provided in this drug-related criminal prosecution, and the police, the assistant prosecutor, and trial court were apparently aware of this. Defendant's first trial, at which the false testimony was offered, ended in a mistrial. Subsequently, the trial court allowed the prosecutor to initiate a second criminal prosecution, which resulted in a guilty plea. After remand from this Court, the Court of Appeals affirmed, and defendant now appeals to this Court. Because this is a remarkable case, I would grant leave to appeal for the exclusive purpose of determining whether, pursuant to the double jeopardy clauses of the United States Constitution, US Const, Am V, and the Michigan Constitution, Const 1963, art 1, § 15, a second trial should have been barred.

CAVANAGH, J. I join the statement of Justice MARKMAN.

CORRIGAN, J. I am not participating because I may be a witness in a related case.

GRIEVANCE ADMINISTRATOR v WIGGINS, No. 139602; ADB: 07-63-GA.

Summary Disposition September 28, 2009:

PEOPLE v DEWULF, No. 137574. By order of March 23, 2009, the application for leave to appeal the September 8, 2008, order of the Court of Appeals was held in abeyance pending the decision in *People v Jackson* (Docket No. 135888). On order of the Court, the case having been decided on July 10, 2009, 483 Mich 271 (2009), the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the Livingston Circuit Court's order to remit prisoner funds for fines, costs, and assessments, entered on November 18, 2005, which assessed the defendant $475 in unspecified fees or costs. The circuit court failed to cite any authority, and we are not aware of any, that permitted it to order an assessment of unidentified costs and/or fees 12 years after the defendant was sentenced and without providing notice and an opportunity to be heard. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. The motion to remand is denied. Court of Appeals No. 286152.

PEOPLE v HUSTON, No. 138287. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted of the challenge to the scoring of offense variable 10, MCL 777.40, in light of *People v Cannon*, 481 Mich

[1] *United States v Gonzalez-Lopez,* 548 US 140 (2006).

152 (2008). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 288843.

PEOPLE v LESLIE GORDON, No. 138382. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court with directions to correct the judgment of sentence to specify that defendant's convictions and sentences for three of the four counts of first-degree murder are supported by two theories: premeditated murder and felony murder. MCR 7.302(G)(1). *People v Bigelow*, 229 Mich App 218, 222 (1998). In all other respects, leave to appeal is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286517.

Leave to Appeal Denied September 28, 2009:

PEOPLE v KERSEY, No. 131956; Court of Appeals No. 270676.

PEOPLE v WOJDA, No. 134394; Court of Appeals No. 277048.

PEOPLE v RHOADS, No. 136171; Court of Appeals No. 283072.

PEOPLE v SCOTT GRAY, No. 136341; Court of Appeals No. 283758.

PEOPLE v PADILLA, No. 136500; Court of Appeals No. 284455.

PEOPLE v JEREMY STUCKEY, No. 136595; Court of Appeals No. 274235.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v SYLVESTER WASHINGTON, No. 136612; Court of Appeals No. 284409.

PEOPLE v ERVIN SANDERS, No. 136892; Court of Appeals No. 285079.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 MICH 549 (2009).

PEOPLE v EVERETTE, No. 137019; Court of Appeals No. 285740.

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v GEOFFREY THOMAS, No. 137044; Court of Appeals No. 272731.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v HASTINGS, No. 137153; Court of Appeals No. 286038.

PEOPLE v STENNETT, No. 137206; Court of Appeals No. 285518.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v DACKIW, No. 137337; Court of Appeals No. 285997.

PEOPLE v TONCHEN, No. 137432; Court of Appeals No. 286564.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v DARRYL JONES, No. 137459; Court of Appeals No. 286487.

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v KIRSCH, No. 137464; Court of Appeals No. 277156.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v BINGHAM, No. 137516; Court of Appeals No. 286930.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v FREEMAN, No. 137573; Court of Appeals No. 287159.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v JAIME BELL, No. 137589; Court of Appeals No. 286740.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v STANSBERRY, No. 137590; Court of Appeals No. 286816.

PEOPLE v CHURCHILL, No. 137655; Court of Appeals No. 278171.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v SOTO, No. 137660; Court of Appeals No. 287345.

PEOPLE v SUTTON, No. 137675; Court of Appeals No. 287413.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J.,would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v ROEBUCK, No. 137712; Court of Appeals No. 286446.

PEOPLE v AKILI ARMSTRONG, No. 137716; Court of Appeals No. 276599.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v KEVIN FISHER, No. 137765; Court of Appeals No. 278446.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v HAGGARD, No. 137821; Court of Appeals No. 287930.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v CHRISTOPHER VAUGHN, No. 137823; Court of Appeals No. 287556.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v DIGGS, No. 137875; Court of Appeals No. 287338.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v LAWSON, No. 137885; Court of Appeals No. 288207.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v CHRISTOPHER LUCAS, No. 137889; Court of Appeals No. 276819.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v CHILDRESS, No. 137916; Court of Appeals No. 287879.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v CHARLES PATTERSON, No. 137984; Court of Appeals No. 288117.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

In re WHITE ESTATE (DAHL v BAUMGARTNER), No. 137994; Court of Appeals No. 281420.

In re WHITE ESTATE (DAHL v LAWRENCE), No. 137995; Court of Appeals No. 279866.

PEOPLE v LOKKEN, No. 138024; Court of Appeals No. 288275.

PEOPLE v CARL BENNETT, No. 138171; Court of Appeals No. 288721.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v CLAYTON, No. 138183. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284815.

PEOPLE v WALLER, No. 138244; Court of Appeals No. 288736.

PEOPLE v ABDULLAH JOHNSON, No. 138262; Court of Appeals No. 277715.

HATHAWAY, J. (*not participating*). Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

PEOPLE v MCMURTRY, No. 138265; Court of Appeals No. 289031.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v MICHAEL SMITH, No. 138273; Court of Appeals No. 279499.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v DAVID WELCH, No. 138280; Court of Appeals No. 289020.

PEOPLE v SHEEHAN, No. 138294; Court of Appeals No. 289347.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v GUNN, No. 138302; Court of Appeals No. 281528.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v STILLE, No. 138308; Court of Appeals No. 282223.

PEOPLE v MARCUS NELSON, No. 138334; Court of Appeals No. 288750.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v HURT, No. 138337. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 289496.

PEOPLE v EDWARD JONES, No. 138338. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285972.

PEOPLE v FOUNTAIN, No. 138370; Court of Appeals No. 283367.

PEOPLE v MARVIN ALLEN, No. 138378; Court of Appeals No. 280523.

PEOPLE v JOSEPH, No. 138383; Court of Appeals No. 288431.

PEOPLE v JIVONNIE JONES, No. 138385; Court of Appeals No. 288137.

PEOPLE v SPARCK, No. 138404; Court of Appeals No. 289638.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v LAWRENCE JONES, No. 138425; Court of Appeals No. 288490.

PEOPLE v POTTS, No. 138429; Court of Appeals No. 289716.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v MARY WILLIAMS, No. 138431. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288154.

PEOPLE v SILDACK, No. 138439; Court of Appeals No. 289505.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v JAMES BELL, No. 138441. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287039.

PEOPLE v MICHAEL VAUGHN, No. 138452. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 288344.

PEOPLE v GLENN GREEN, No. 138463; Court of Appeals No. 289105.

PEOPLE v MORITZ, No. 138471. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286628.

PEOPLE v VANREYENDAM, No. 138472. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286302.

PEOPLE v LAMEER BAKER, No. 138481. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286053.

PEOPLE v MICHAEL WARD, No. 138497; Court of Appeals No. 289028.

PEOPLE v MORENO, No. 138501; Court of Appeals No. 288412.

PEOPLE v REYNOLDS, No. 138504; Court of Appeals No. 288883.

PEOPLE v REYNOLDS, No. 138505. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288900.

PEOPLE v BARATH, No. 138513; Court of Appeals No. 290087.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v RICKEY LONG, No. 138517; Court of Appeals, No. 288982.

PEOPLE v SYRECO MORRIS, No. 138523; Court of Appeals No. 289446.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v CYB, No. 138526; Court of Appeals No. 289628.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v DEONTAE GORDON, No. 138532. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 289246.

PEOPLE v WOOTEN, No. 138534. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 289010.

PEOPLE v DITAINIA ADAMS, No. 138535. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287540.

PEOPLE v PARHAM, No. 138544. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 289236.

PEOPLE v HAMMONS, No. 138547. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287618.

PEOPLE v CARIGON, No. 138548. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 288841.

MICHIGAN CITIZENS FOR WATER CONSERVATION v NESTLÉ WATERS NORTH AMERICA INC, No. 138551; Court of Appeals No. 288392.

PEOPLE v BARTON, No. 138558. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288352.

PEOPLE v ANTHONY SIMMONS, No. 138560. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287619.

PEOPLE v PRESLER, No. 138563; Court of Appeals No. 289891.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v OCKERMAN, No. 138573; Court of Appeals No. 289959.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v CARL JOHNSON, No. 138575. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287964.

PEOPLE v ERTMAN, No. 138584. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288939.

PEOPLE v BACHYNSKI, No. 138585; Court of Appeals No. 281550.

PEOPLE v WILLIS PATTON, No. 138586. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286367.

PEOPLE v DOBBINS, No. 138587. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 286853.

PEOPLE v RYAN HALL, No. 138599. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287780.

PEOPLE v MICHAEL WILSON, No. 138605; Court of Appeals No. 289775.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v ADAMSON, No. 138614. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286819.

PEOPLE v JUSTLY JOHNSON, No. 138618. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 287529.

PEOPLE v ORTIZ, No. 138621. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 289158.

PEOPLE v AJENE JORDAN, No. 138622; Court of Appeals No. 281940.

PEOPLE v YATES, No. 138627; Court of Appeals No. 289873.

PEOPLE v WILLIAM JONES, No. 138632. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286543.

PEOPLE v EARLEY, No. 138637. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288156.

PEOPLE v FAWAZ, No. 138638. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 290065.

PEOPLE v CHASTON, No. 138639; Court of Appeals No. 277987.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v TIRAN, No. 138649. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288356.

PEOPLE v BASIL PERRY, No. 138658; Court of Appeals No. 282751.

PEOPLE v SALERNO, No. 138664. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286889.

PEOPLE v HENRY JACKSON, No. 138666. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 289630.

PEOPLE v MURRY, No. 138667. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288041.

PEOPLE v ALPHONSO STEWART, No. 138676. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 289584.

PEOPLE v TREMAYNE THOMPSON, No. 138677. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287959.

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v DONALD JONES, JR, No. 138678. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288402.

PEOPLE v GARREN, No. 138684; Court of Appeals No. 289829.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v SPOONER, No. 138685. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 289675.

PEOPLE v TYRONE WILLIAMS, No. 138688. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 289279.

PEOPLE v PETTIFORD, No. 138697; Court of Appeals No. 273369.

PEOPLE v WILLETT, No. 138699. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285381.

PEOPLE v PAUL REED, No. 138710; Court of Appeals No. 290837.

PEOPLE v LIDDELL, No. 138717; Court of Appeals No. 281339.

BURISE v CITY OF PONTIAC, No. 138722; reported below: 282 Mich App 646.

PEOPLE v TWILLEY, No. 138730. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288535.

PEOPLE v GOURLAY, No. 138746; Court of Appeals No. 278214.

PEOPLE v DAVID CASTANEDA, No. 138750. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 288651.

PEOPLE v SAMUEL POWELL, No. 138769; Court of Appeals No. 288773.

SHANNON v FOSTER SWIFT COLLINS & SMITH, PC, No. 138782; Court of Appeals No. 275991.

PEOPLE v DAVID ALAN WALTERS, No. 138788. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 289444.

PEOPLE v STIEBER, No. 138789; Court of Appeals No. 290155.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v FUGATE, No. 138809; Court of Appeals No. 290263.

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v PHILLIP DUNLAP, No. 138832; Court of Appeals No. 281856.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v WALTON, No. 138839. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 288842.

PEOPLE v CHRISTOPHER HOLDER, No. 138851; Court of Appeals No. 282698.

PEOPLE v ANTHONY MOORE, No. 138853; Court of Appeals No. 290809.

PEOPLE v SERVANT, No. 138857; Court of Appeals No. 282609.

PEOPLE v LUIS MARTINEZ, No. 138859; Court of Appeals No. 280284.

DROOMERS v PARNELL, No. 138867; Court of Appeals No. 278162.

PEOPLE v STANLEY PRICE, No. 138870; Court of Appeals No. 280835.

PEOPLE v PEREZ, No. 138884. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 289110.

PEOPLE v CALDWELL, No. 138885; Court of Appeals No. 281875.

PEOPLE v JACQUAVIUS WINSTON, No. 138886; Court of Appeals No. 290420.

PEOPLE v VICTOR WHITE, No. 138894; Court of Appeals No. 291270.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v WILLIE BENNETT, Nos. 138895 and 138897; Court of Appeals Nos. 290841 and 290842.

PEOPLE v HEARD, No. 138899; Court of Appeals No. 290452.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

NEILL v MEEMIC INSURANCE COMPANY, No. 138902; Court of Appeals No. 281293.

PEOPLE v BEAUDOIN, No. 138904; Court of Appeals No. 282833.

PEOPLE v BILLER, No. 138906; Court of Appeals No. 282835.

PEOPLE v MCPHERSON, No. 138913. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288596.

PEOPLE v STONER, No. 138916; Court of Appeals No. 290911.

PEOPLE v JAMOL POWELL, No. 138956; Court of Appeals No. 290552.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v ENGLISH, No. 138960. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 290642.

PEOPLE v SORLIEN, No. 138964. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286767.

LAWSON v SPECTRUM HEALTH, No. 138978; Court of Appeals No. 284144.

CAVANAGH, J., would grant leave to appeal.

PEOPLE v WILLIE FRAZIER, No. 138979; Court of Appeals No. 291149.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v HAYES, No. 138995; Court of Appeals No. 281049.

ADAMS v EATON CORPORATION, No. 139001; Court of Appeals No. 289518.

COOPER v JENKINS, No. 139004; reported below: 282 Mich App 486.

MARCUS v GFG EMPLOYMENT SERVICES, INC, No. 139010; Court of Appeals No. 284042.

PEOPLE v HEWLETT, No. 139014; Court of Appeals No. 290994.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

SIEGEL v LEVY, No. 139018; Court of Appeals No. 289770.

SEATON v DEPARTMENT OF CORRECTIONS, No. 139019; Court of Appeals No. 289166.

PEOPLE v RICKY DAVIS, JR, No. 139022; Court of Appeals No. 290917.

YONO v CARLSON, No. 139025; reported below: 283 Mich App 567.

PEOPLE v DOSSIE, No. 139032. This denial is without prejudice to the defendant filing a petition in the Wayne Circuit Court, consistent with the procedure outlined in *People v Jackson*, 483 Mich 271 (2009), for a review of the assessments of court-appointed attorney fees, as well as the defendant's financial circumstances and ability to pay the assessments. Such a petition may be filed once collection efforts begin on the amended judgments of sentence entered on May 28, 2009. Court of Appeals No. 290991.

PEOPLE v BUNTING, No. 139035; Court of Appeals No. 290831.

PEOPLE v BRIDGES, No. 139037; Court of Appeals No. 279518.

PEOPLE v FORBES, No. 139042; Court of Appeals No. 282629.

FRENCH v COUNTRYWIDE HOME LOANS, INC, No. 139044; Court of Appeals No. 282718.

PEOPLE v DEANTE HAWKINS, No. 139045; Court of Appeals No. 282483.

PEOPLE v POTTER, No. 139049; Court of Appeals No. 291378.

PEOPLE v PHIPPS, No. 139050; Court of Appeals No. 291703.

PEOPLE v CRAIG SMITH, No. 139052; Court of Appeals No. 291122.

PEOPLE v VAN JENKINS, No. 139055; Court of Appeals No. 291738.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v BURCHARD, No. 139059; Court of Appeals No. 283052.

PEOPLE v SHAWN JAMISON, No. 139061; Court of Appeals No. 290539.

PEOPLE v MARVIN SNYDER, No. 139062; Court of Appeals No. 290427.

PEOPLE v DONALD SCOTT, No. 139071; Court of Appeals No. 291252.

PEOPLE v MCCLAIN, No. 139074; Court of Appeals No. 282437.

PEOPLE v JAMES OWENS, No. 139077; Court of Appeals No. 282548.

PEOPLE v LOCKHART, No. 139079; Court of Appeals No. 282486.

PEOPLE v KEITH BROOKS, No. 139082; Court of Appeals No. 289008.

PEOPLE v RODRICK JONES, No. 139091; Court of Appeals No. 290222.

PEOPLE v DECKER, No. 139092; Court of Appeals No. 291496.

PEOPLE v LAKARI BERRY, No. 139094; Court of Appeals No. 282605.

PEOPLE v JAMES HOWARD, No. 139095; Court of Appeals No. 284056.

PEOPLE v WEDGEWORTH, No. 139098; Court of Appeals No. 283619.

PEOPLE v VANDIVER HOWARD, III, No. 139103; Court of Appeals No. 291346.

HULVEY v DEPARTMENT OF CORRECTIONS, No. 139107; Court of Appeals No. 290494.

BROWN v ALTERRA HEALTHCARE CORPORATION, No. 139108; Court of Appeals No. 281352.

KMART MICHIGAN PROPERTY SERVICES, LLC v DEPARTMENT OF TREASURY, No. 139110; reported below: 283 Mich App 647.

PEOPLE v GORTON, No. 139111; Court of Appeals No. 291319.

PEOPLE v KARR, No. 139115; Court of Appeals No. 289634.

PEOPLE v WEBSTER, No. 139127; Court of Appeals No. 291632.

K KADADU, LLC v DEPARTMENT OF COMMUNITY HEALTH, No. 139128; Court of Appeals No. 290457.

PEOPLE v GINGRICH, No. 139129; Court of Appeals No. 289491.

PEOPLE v CHRISTOPHER CUMMINGS, No. 139132; Court of Appeals No. 291364.

PEOPLE v TERRENCE HUNT, No. 139134; Court of Appeals No. 284648.

PEOPLE v TUTTLE, No. 139135; Court of Appeals No. 291797.

In re ZYLA ESTATE (GRAPP v HILL-PTASHNIK), Nos. 139136 and 139137; Court of Appeals Nos. 281355 and 281356.

PEOPLE v NAYVON HILL, No. 139138; Court of Appeals No. 284188.

PEOPLE v ADRIAN GIBSON, No. 139141; Court of Appeals No. 283508.

PEOPLE v YOUNG, No. 139145; Court of Appeals No. 282939.

PEOPLE v MARKOWICZ, No. 139147; Court of Appeals No. 291551.

PEOPLE v HATCHETT, No. 139148; Court of Appeals No. 284646.

PEOPLE v STEVENS, No. 139150; Court of Appeals No. 291151.

PEOPLE v ENDERS, No. 139151; Court of Appeals No. 292285.

PEOPLE v KICI, No. 139155; Court of Appeals No. 283058.

MONTGOMERY v EAST DETROIT PUBLIC SCHOOLS, No. 139158; Court of Appeals No. 283398.

DIXON v CHRYSLER LLC, No. 139161; Court of Appeals No. 289774.

PEOPLE v MELLING, No. 139166; Court of Appeals No. 283460.

PEOPLE v HORNE, No. 139168; Court of Appeals No. 284070.

PEOPLE v DAVENPORT, No. 139170; Court of Appeals No. 279040.

PENNINGTON v DEPARTMENT OF CORRECTIONS, No. 139178; Court of Appeals No. 288342.

PEOPLE v LAFAYETTE, No. 139187; Court of Appeals No. 291063.

In re BALENGER (BALENGER v BALENGER), No. 139188; Court of Appeals No. 284438.

DORMAN v ZOOK, No. 139191; Court of Appeals No. 284665.

PEOPLE v DAVID WATTS, No. 139196; Court of Appeals No. 291167.

PEOPLE v SENSELY, No. 139208; Court of Appeals No. 283054.

PEOPLE v LEONDRE WALKER, No. 139213; Court of Appeals No. 283164.

PEOPLE v ANTHONY STEPHENS, No. 139214; Court of Appeals No. 284251.

PEOPLE v SLOUGH, No. 139237; Court of Appeals No. 291587.

PEOPLE v ESTRADA, No. 139252; Court of Appeals No. 291417.

PEOPLE v ITANI, No. 139254; Court of Appeals No. 291932.

PEOPLE v FULBRIGHT, No. 139256; Court of Appeals No. 285176.

PEOPLE v WELLS, No. 139259; Court of Appeals No. 279714.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

WARSON v WARSON, No. 139265; Court of Appeals No. 283401.

PEOPLE v AUSTIN, No. 139270; Court of Appeals No. 282608.

PEOPLE v JEROME MOORE, No. 139280; Court of Appeals No. 291699.

AUSTIN v BEKUM AMERICA CORPORATION, Nos. 139292 and 139293; Court of Appeals Nos. 287801 and 288675.

PEOPLE v JAMES COLLINS, No. 139296; Court of Appeals No. 285304.

PEOPLE v DECOSEY, No. 139392; Court of Appeals No. 283051.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v HURLBURT, No. 139401; Court of Appeals No. 291610.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v ROBERT CHAPMAN, No. 139409; Court of Appeals No. 284306.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v MUNSON, No. 139422; Court of Appeals No. 292353.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

CAVANAGH, J., would grant leave to appeal to reconsider *People v Idziak*, 484 Mich 549 (2009).

FISHER v BEHR, No. 139437; Court of Appeals No. 292476.

PEOPLE v MICHAEL WARD, No. 139449. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 292079.

PEOPLE v KADRIOSKI, No. 139605; Court of Appeals No. 283571.

Reconsideration Denied September 28, 2009:

HOWE v BOUCREE, No. 136926. Leave to appeal denied at 483 Mich 901. Court of Appeals No. 273949.

PEOPLE v BRANDON MOORE, No. 136986. Leave to appeal denied at 483 Mich 976. Court of Appeals No. 283907.

PEOPLE v CECIL HAWKINS, No. 137456. Leave to appeal denied at 483 Mich 1107. Court of Appeals No. 285167.

ATLANTIC XXXI, LLC v ART MIDWEST LP, No. 138154. Leave to appeal denied at 483 Mich 980. Reported below: 281 Mich App 733.

PEOPLE v GREER, No. 138227. Leave to appeal denied at 483 Mich 1019. Court of Appeals No. 280083.

PEOPLE v LENERO THOMAS, No. 138259. Leave to appeal denied at 483 Mich 1020. Court of Appeals No. 280728.

E&N PROPERTIES v HIPPENSTEEL, No. 138557. Leave to appeal denied at 483 Mich 1114. Court of Appeals No. 287727.

REID v FLINT CIVIL SERVICE COMMISSION, No. 138568. Leave to appeal denied at 483 Mich 1114. Court of Appeals No. 281935.

Leave to Appeal Dismissed September 29, 2009:

COHN v WILLIAM BEAUMONT HOSPITAL, No. 138918. On order of the Chief Justice, a stipulation signed by counsel for the parties agreeing to the dismissal of this application for leave to appeal is considered, and the application for leave to appeal is dismissed with prejudice and without costs. Court of Appeals No. 289272.

Leave to Appeal Granted September 30, 2009:

O'NEAL v ST JOHN HOSPITAL & MEDICAL CENTER, Nos. 138180 and 138181. The parties shall include among the issues to be briefed: (1) whether the requirements set forth in the second sentence of MCL 600.2912a(2) apply in this case; (2) if not, whether the plaintiff presented sufficient evidence to create a genuine issue of fact with regard to whether the defendants' conduct proximately caused his injury; or (3) if so, whether *Fulton v William Beaumont Hosp*, 253 Mich App 70 (2002), was correctly decided, or whether a different approach is required to correctly implement the second sentence of § 2912a(2).

The Clerk of the Court is directed to place this case on the January 2010 session calendar for argument and submission. Appellant's brief and appendix must be filed no later than November 13, 2009, and appellees' brief and appendix, if appellees choose to submit an appendix, must be filed no later than December 4, 2009.

The Michigan State Medical Society, the Michigan Health and Hospital Association, the Michigan Association for Justice, and Michigan Defense Trial Counsel, Inc., are invited to file briefs amicus curiae, to be filed no later than December 16, 2009. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae, to be filed no later than December 16, 2009. Court of Appeals Nos. 277317 and 277318.

EDRY v ADELMAN, No. 138187. The parties shall include among the issues to be briefed: (1) whether *Wickens v Oakwood Healthcare Sys*, 465 Mich 53 (2001), was correctly decided; and (2) whether the lower courts erred in finding that Dr. Singer's testimony was inadmissible under MRE 702.

The Clerk of the Court is directed to place this case on the January 2010 session calendar for argument and submission. Appellant's brief and appendix must be filed no later than November 13, 2009, and appellees' brief and appendix, if appellees choose to submit an appendix, must be filed no later than December 4, 2009.

The Michigan State Medical Society, the Michigan Health and Hospital Association, the Michigan Association for Justice, and Michigan Defense Trial Counsel, Inc., are invited to file briefs amicus curiae, to be filed no later than December 16, 2009. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae, to be filed no later than December 16, 2009. Court of Appeals No. 279676.

BRIGHTWELL v FIFTH THIRD BANK OF MICHIGAN and CHAMPION v FIFTH THIRD BANK OF MICHIGAN, Nos. 138920 and 138921. The parties shall include among the issues to be briefed: (1) whether the Court of Appeals correctly decided in *Barnes v IBM*, 212 Mich App 223 (1995), (a) that an alleged violation of the Civil Rights Act "occurred" only when and where the corporate decision affecting the plaintiff's employment was made, MCL 37.2801(2); and (b) that this Court's analysis of MCL 600.1629 from *Gross v Gen Motors Corp*, 448 Mich 147 (1995), should be applied to discrimination cases brought under MCL 37.2801(2); and (2) whether the Court of Appeals correctly determined that the alleged violation "occurred" only in Oakland County, where the decision to terminate the plaintiffs was made, rather than in Wayne County, where the plaintiffs worked and where that decision was communicated to the plaintiffs.

The Clerk of the Court is directed to place this case on the January 2010 session calendar for argument and submission. Appellants' brief and appendix must be filed no later than November 13, 2009, and appellee's brief and appendix, if appellee chooses to submit an appendix, must be filed no later than December 4, 2009.

The Michigan Association for Justice and Michigan Defense Trial Counsel, Inc., are invited to file briefs amicus curiae, to be filed no later than December 16, 2009. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae, to be filed no later than December 16, 2009. Court of Appeals Nos. 280820 and 281005.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal October 2, 2009:

PEOPLE v BARBARICH, No. 139060. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). At oral argument, the parties shall address whether the state police trooper who effectuated the traffic stop had sufficient, reliable information based on an anonymous citizen tip to form a particularized suspicion that the defendant had been or was about to be engaged in criminal wrongdoing, *People v Shabaz*, 424 Mich 42, 59 (1985); or whether the citizen's tip constituted "a complaint by someone who witnessed [a] person violating [the Vehicle Code] or a local ordinance substantially corresponding to [the Vehicle Code], which violation is a civil infraction" for purposes of MCL 257.742(3) and, if so, whether the trooper thus had the authority to stop the defendant's car. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers. Court of Appeals No. 290772.

Leave to Appeal Denied October 2, 2009:

In re GARCIA (DEPARTMENT OF HUMAN SERVICES v GARCIA), No. 139668; Court of Appeals No. 290999.

Reconsideration Denied October 2, 2009:

In re ROBBINS (DEPARTMENT OF HUMAN SERVICES v SANDERS), No. 139304. Leave to appeal denied at 485 Mich 851. Court of Appeals No. 284790.

Summary Disposition October 7, 2009:

PEOPLE v DENDEL, No. 137467. By order of February 24, 2009, the application for leave to appeal the September 11, 2008 judgment of the Court of Appeals was held in abeyance pending the decision in *Melendez-Diaz v Massachusetts*, cert gtd 552 US 1256 (2008). On order of the Court, the case having been decided on June 25, 2009, 557 US __; 129 S Ct 2527; 174 L Ed 2d 314 (2009), the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate in part the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration of the defendant's Confrontation Clause and hearsay issues in light of *Melendez-Diaz*. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We direct the Court of Appeals' attention to the fact that we have also remanded *People v Lewis* (Docket No. 136622) to the Court of Appeals for reconsideration in light of *Melendez-Diaz*. We do not retain jurisdiction. Court of Appeals No. 247391.

PEOPLE v CURRY, No. 138818. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Saginaw Circuit Court for the court to make factual findings on the defendant's motion to suppress his statement to police. Although it denied defendant's motion by order of April 11, 2007, the circuit court failed to make factual findings or set forth its reasons for denying the motion. As a consequence, the Court of Appeals lacked a factual basis for considering whether the circuit court properly admitted the defendant's statement. We do not retain jurisdiction. Court of Appeals No. 279254.

Leave to Appeal Denied October 7, 2009:

PEOPLE v GRUMBLEY, No. 138239; Court of Appeals No. 288580.

PEOPLE v GOURLAY, No. 138538; Court of Appeals No. 281376. KELLY, C.J., would grant leave to appeal.

PEOPLE v CHAMBERLAIN, No. 139105; Court of Appeals No. 288446.

Summary Disposition October 9, 2009:

ANDRES v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 138070. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of Court of Appeals. Although the defendant

mentioned fraud in its affirmative defenses, and the trial court addressed the fraud issue, the Court of Appeals held that defendant had failed to state "the circumstances constituting fraud" "with particularity" as required by MCR 2.112(B)(1). Given the trial court's express consideration of defendant's fraud defense, the Court of Appeals erred in failing to review defendant's fraud argument. Accordingly, we remand this case to the Court of Appeals for consideration of defendant's argument that the trial court erred in granting summary disposition for plaintiff and enforcing the parties' attendant care services agreement. We retain jurisdiction. Court of Appeals No. 279608.

KELLY, C.J. (*dissenting*). I dissent from the Court's order peremptorily reversing the Court of Appeals judgment and remanding this case for consideration of defendant's fraud argument. Defendant did not properly raise fraud in the trial court. In ruling to the contrary, this Court gives short shrift to several important court rules and to established caselaw.

The underlying facts of this case stem from an automobile accident in which Raymond Andres suffered a traumatic brain injury. He has since required 24-hour care, which is provided by his family. Defendant, State Farm Mutual Automobile Insurance Company, is Raymond's automobile insurance carrier. Lori Andres, Raymond's former wife and guardian, entered into an "Attendant Care Services Agreement" with defendant for payment of attendant care benefits. Defendant later declared the agreement null and void, claiming it was procured by fraud. According to defendant, a State Farm claims representative and the attorney representing Raymond and Lori Andres committed the fraud.

Lori, as Raymond's guardian and conservator, filed suit to enforce the agreement.[1] When plaintiff brought a motion for summary disposition, the trial court granted it, ruling that plaintiff was entitled to recover attendant care benefits at the rates specified in the agreement. Defendant appealed, arguing that the agreement was unenforceable because it had been procured by fraud.

The Court of Appeals did not address the issue because it held that defendant had waived fraud as an affirmative defense as a result of deficiencies in its pleadings. The court relied on MCR 2.111(F), which requires a party to timely raise an affirmative defense.[2] MCR 2.111(F)(3)(a) mandates that fraud be stated in a party's responsive pleading, either as originally filed or as amended. Furthermore, MCR 2.112(B) requires a party asserting fraud to state the circumstances constituting fraud with particularity. A party that fails to assert fraud as an affirmative defense in conformity with our court rule waives it as a defense to a claim.[3]

Here, defendant merely mentioned fraud in its responsive pleading in reference to its request for attorney fees:

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[1] Lori Andres was later replaced as Raymond's guardian by Raymond's brother, Mark Phillips (hereinafter plaintiff).

[2] MCR 2.111(F)(2); *Harris v Vernier*, 242 Mich App 306, 312 (2000).

[3] *Glenhurst Constr Co, Inc v Daniel*, 25 Mich App 115, 116 (1970).

> 7. [State Farm] is entitled to attorney fees since Plaintiff's claim is in some respect fraudulent or so excessive as to have no reasonable foundation. See Section 3148 of the Michigan No-Fault statute.

I agree with the Court of Appeals that defendant did not specifically allege that its agreement with Andres was unenforceable because it was procured by fraud. In fact, given its citation of the no-fault act, this paragraph appears to have been included solely for the purpose of recovering attorney fees.[4] Moreover, even if the paragraph *were* intended to plead fraud as an affirmative defense, the pleading unquestionably fails to state with particularity the circumstances of the fraud. Thus, defendant's affirmative defense of fraud, if any, is hopelessly deficient under MCR 2.112(B).

On appeal in this Court, defendant does not contend that it asserted fraud with particularity. Rather, it asserts that defendant is entitled to raise the issue on appeal because plaintiff failed to raise it in plaintiff's motion for summary disposition.

A review of the record reveals that plaintiff explicitly stated in his brief supporting his motion for summary disposition that defendant "has not pled with particularity any facts to support [its] fraud affirmative defense which should be struck." Thus, plaintiff did raise the issue in the trial court, and the Court of Appeals properly concluded that defendant failed to allege fraud with the requisite particularity.

Now this Court peremptorily reverses that ruling notwithstanding the fact that the Court of Appeals faithfully applied the relevant court rules and the caselaw interpreting them. This Court should do the same and deny defendant's application for leave to appeal.

AUTO-OWNERS INSURANCE COMPANY v FERWERDA ENTERPRISES, INC, Nos. 138917 and 138919. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we remand this case to the Court of Appeals for consideration of whether the trial court properly assessed attorney fees and penalty interest against plaintiff, Auto-Owners Insurance Company. The circuit court correctly granted summary disposition in favor of the defendants because the subject policy unambiguously provided coverage for the defendants' claim. Accordingly, we reinstate the circuit court's judgment and we remand this case to the Court of Appeals for further proceedings not inconsistent with this order. We do not retain jurisdiction. Court of Appeals No. 277574.

Leave to Appeal Denied October 9, 2009:

RILEY v STATE FARM FIRE AND CASUALTY COMPANY, No. 137968; Court of Appeals No. 276195.

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[4] See MCL 500.3148(2).

KELLY, C.J. (*concurring*). I concur in the Court's order denying defendant's application for leave to appeal. I write separately in response to Justice CORRIGAN's dissenting statement.

Defendant, State Farm Fire and Casualty Company, provided a homeowner's insurance policy to plaintiff. The policy included coverage for damage caused by mold. In January 2001, plaintiff's home was damaged by an ice dam, and in April 2002, the home sustained damage from a leaking toilet. Defendant paid more than $100,000 for mold remediation, structural repairs, content replacement or cleaning, and additional living expenses for plaintiff and her family when they could not live in the house. Defendant then advised plaintiff that it had repaired the home as required by the policy. However, when plaintiff continued to be ill after returning to the home, she sued on the basis of numerous theories. The jury returned a verdict in favor of plaintiff in the amount of $164,450, comprised of several awards. Specifically, the jury awarded $106,000 for property repair and replacement costs, $43,000 for cleaning or replacing contents, and $15,450 for additional living expenses. The trial court entered a final judgment of $33,523.49 after determining that defendant was entitled to a setoff of $140,111.02 for amounts it had previously paid plaintiff.

Plaintiff appealed as of right. The Court of Appeals held that the jury intended to award damages only for the time after defendant had stopped paying benefits under the policy and therefore reversed the trial court's setoff determination. The Court of Appeals remanded for the entry of judgment for plaintiff in the amount of $124,450, plus case evaluation sanctions. Defendant now seeks leave to appeal in this Court.

Defendant contends that the Court of Appeals erroneously vacated the trial court's setoff determination. I disagree. Plaintiff's complaint specifically sought damages for breach of contract and alleged that defendant was responsible for all losses caused by mold. The trial court instructed the jury that plaintiff could receive damages "naturally arising from the breach." The instruction further informed the jury that, if it found a breach, it had to determine damages for losses relating to the property, its contents, and for additional living expenses. Then it told the jury to determine its award regardless of any setoff for amounts already paid by defendant. Yet the instruction then stated that the jury could "evaluate the amounts allegedly paid and the timing of those payments."

These instructions undoubtedly lack clarity. But plaintiff's theory from the start, unequivocally expressed to the jury, was that defendant owed more money for the losses incurred than it had already paid under her policy. In defense, defendant argued that it owed plaintiff nothing more. Therefore, the fact that the jury awarded damages for breach of contract suggests that it accepted plaintiff's theory of the case. Such an award would not allow the trial court to impose a setoff. The damages awarded under plaintiff's breach of contract theory would cover losses in addition to the losses for which defendant already paid.

Furthermore, the Court of Appeals was correct to reverse the trial court's setoff award because the damages plaintiff sought were those arising from defendant's breach of contract. That breach of contract did not occur until defendant stopped paying benefits under plaintiff's policy.

Thus, any award in plaintiff's favor, given that plaintiff sought damages for breach of contract, was specifically earmarked as damages resulting from defendant's failure to continue payments. They were not damages for which defendant could claim a setoff for amounts paid before the contract's breach.

Finally, the purchase price and market value of plaintiff's home are not pertinent to the legal issues presented in this case. Defendant paid approximately $100,000 for losses related to plaintiff's home before this action was brought. The fact that defendant paid this amount did not relieve it from potential liability in the instant matter. Indeed, the jury determined that plaintiff was entitled to damages based on defendant's breach of contract. Thus, whether defendant's liability extended beyond the initial purchase price or market value of plaintiff's home is wholly irrelevant here.

In sum, I concur in the order denying defendant's application for leave to appeal. The Court of Appeals properly held that defendant was not entitled to a setoff for amounts previously paid under plaintiff's policy.

CORRIGAN, J. (*dissenting*). I respectfully dissent from the order denying defendant's application for leave to appeal. Because the Court of Appeals blatantly undermined common-law setoff rules when it reversed the trial court's order to reduce the jury verdict by prior settlement amounts, I would grant leave to appeal or peremptorily reinstate the trial court's order.

Plaintiff, Gwiniov Riley, purchased a house for $70,000. She insured it with a homeowner's policy issued by defendant State Farm Fire and Casualty Co (State Farm). In January 2001, plaintiff filed a claim for loss resulting from ice damming, which State Farm paid. In April 2002, plaintiff filed a second claim for loss resulting from a leaky toilet. State Farm's agent determined that plaintiff and her family should vacate the house because the leak had caused visible mold growth. From April 2002 to December 2002, State Farm paid various contractors to assess the air quality of the house, remove the mold, refurbish parts of the house, and replace its damaged contents. State Farm also paid the additional living expenses of plaintiff's family so they could reside elsewhere during the remediation. In total, State Farm paid approximately $95,000 on plaintiff's claim during this period. The house was worth between $100,000 and $110,000. On December 2, 2002, State Farm advised plaintiff that defendant had fully honored its policy obligations. State Farm further asserted that because the house had passed clearance testing, it would not make additional payments on the leaky toilet claim.

Plaintiff filed suit, arguing that the mold remediation was unsuccessful and that she continued to suffer losses resulting from the leak. After an eight day trial, the jury awarded plaintiff a verdict in the amount of $164,450. State Farm sought a financial setoff in the amount that it had already paid on plaintiff's ice damming and leaky toilet claims, or $110,111.02. Additionally, State Farm sought a setoff of $100,000, which included the total settlement between plaintiff and two additional defendants as a result of an earlier case evaluation. The two additional defendants had worked as contractors on plaintiff's house. The trial court agreed with State Farm in part and ordered $140,111.02 in financial

setoffs. The final judgment awarded to plaintiff was $33,523.49 with costs. Plaintiff appealed as of right. A divided Court of Appeals panel vacated the financial setoffs and remanded for entry of judgment in the amount of $125,450 plus case evaluation sanctions.[1] State Farm now seeks leave to appeal in this Court.

The Court of Appeals ruling barring the trial court's setoffs obliterates well-established legal principles regarding setoffs. The common-law setoff rule "is based on the principle that a plaintiff is only entitled to one full recovery for the same injury." *Kaiser v Allen*, 480 Mich 31, 39 (2008); see also *Great Northern Packaging, Inc v General Tire and Rubber Co*, 154 Mich App 777, 781 (1986) ("As a general rule, only one recovery for a single injury is allowed under Michigan law."). In *Kaiser*, the Court held that the common-law setoff rule remains the law for vehicle-owner vicarious-liability cases to the extent that joint and several liability principles have not been abrogated by statute. *Kaiser, supra* at 33. Admittedly, this case does not implicate vehicle-owner vicarious-liability issues. Nonetheless, the *Kaiser* rationale is instructive here because neither party asserts that the tort-reform statutes have somehow abrogated the common-law setoff rule. Consequently, "the common-law setoff rule should be applied to ensure that a plaintiff only recovers those damages to which . . . she is entitled as compensation for the whole injury." *Id*. at 40.

In this case, the setoffs imposed by the trial court prevented plaintiff from realizing an oversized windfall. Before the trial began, plaintiff settled with two additional defendants in the amount of $100,000. Neither side apprised the jury of this settlement. Additionally, State Farm had already paid plaintiff $110,111.02 to resolve her claims. The trial court instructed the jury about the assessment of damages, stating in relevant part:

> Whether or not State Farm is entitled to a credit or offset for amounts already paid is a question of law for the Court to determine. In making your assessment, therefore, I am asking you to award such sums to the plaintiff as you find she has proved regardless of any offset for amounts paid. If I find that State Farm is entitled to such a credit or offset, I will make that decision as a matter of law after the trial. You may, however, evaluate the amounts allegedly paid and the timing of those payments in making all other decisions you need to make.

After the jury issued its verdict, the trial court determined that State Farm was entitled to a setoff in the amount of $30,000 because of the overlapping breach of contract theory on which plaintiff sued both State Farm and one of the other defendants. The trial court's ruling regarding the amounts previously paid by other defendants aligns with this Court's requirement of not informing the jury about the existence of a settlement

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[1] *Riley v State Farm Fire and Casualty Co*, unpublished opinion per curiam of the Court of Appeals, issued September 25, 2008 (Docket No. 276195).

between plaintiff and another defendant. See *Brewer v Payless Stations, Inc*, 412 Mich 673, 679 (1982). Moreover, by implementing a financial setoff in the amount already paid by defendant State Farm, the trial court ensured that "a plaintiff is not *overcompensated* for . . . her actual loss as determined by the trier of fact." *Velez v Tuma*, 283 Mich App 396, 413 (2009) (emphasis in original).

By its decision today, this Court allows plaintiff to recover nearly three times the amount it would cost to demolish and rebuild her home. Because allowing plaintiff to recover such a sizable windfall obliterates the common-law setoff rule, I would grant leave to appeal or issue a peremptory order reinstating the financial setoffs imposed by the trial court.

YOUNG and MARKMAN, JJ., joined the statement of CORRIGAN, J.

MARKMAN, J. (*dissenting*). I join Justice CORRIGAN's dissenting statement and write separately to emphasize a single point. As a result of the majority's denial of defendant's application for leave to appeal, and its refusal to reinstate the trial court's setoff ruling, plaintiff will have received a total recovery of $335,561 under a homeowner's policy for damage done to a house that was valued no higher than $110,000. This is an unjust and indefensible result.

YOUNG, J., joined the statement of MARKMAN, J.

AMERISURE INSURANCE COMPANY v PLUMB, No. 138785; Court of Appeals No. 276384.

WEAVER, J. (*concurring*). While the Court of Appeals reached the correct result, it did so for the wrong reasons. The correct reason why defendant is not entitled to no-fault personal protection insurance (PIP) benefits is that the words "take" and "use" in the applicable statute, MCL 500.3113(a), must be read together—"take and use"—and not analyzed as two separate and distinct components. Defendant concedes that she knew that she was intoxicated and that she had a suspended license at the time of the incident. Thus, defendant cannot claim that she reasonably believed she was entitled to "take and use" the vehicle for purposes of MCL 500.3113(a). Therefore, defendant is not entitled to PIP benefits as provided by the statute. There is no need to read additional words into the statute in order to reach this result.

KELLY, C.J. (*dissenting*). I dissent from the Court's order denying defendant's application for leave to appeal. I believe leave should be granted to explore whether the Court of Appeals decision improperly imported into MCL 500.3113(a) a requirement that it does not contain.

An unidentified man gave defendant the keys to an automobile, presumably his own, and asked her to drive it. Defendant obliged, despite the fact that her driver's license was suspended and she was intoxicated. She sustained severe injuries in an ensuing accident. Plaintiff, the assigned claims carrier, argued that defendant was disqualified from receiving no-fault personal protection insurance (PIP) benefits. It asserted that she took the vehicle unlawfully and could not have reasonably believed that she was entitled to use it, given her intoxication and lack of a valid driver's license. The trial court agreed and granted summary

disposition to plaintiff. The Court of Appeals affirmed in a published opinion, although Judge O'CONNELL dissented in part.

Defendant argues that the Court of Appeals decision wrongfully imports into MCL 500.3113(a) the requirement that the claimant must have a reasonable belief that she was entitled to take and *legally* use the vehicle. MCL 500.3113 provides, in pertinent part:

> A person is not entitled to be paid [PIP] benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, *unless the person reasonably believed that he or she was entitled to take and use the vehicle*. [Emphasis added.]

The Court of Appeals reasoned that defendant could not have believed that she was entitled to use the vehicle because she was legally prohibited from doing so. However, it may have been counterintuitive for the Court of Appeals to have discussed factors such as intoxication and the lack of a driver's license in this context. Here, MCL 500.3113(a) serves as an exception to the general rule precluding coverage for one who has unlawfully *taken* a vehicle. As defendant persuasively notes, it seems as if the exception is designed to provide a safe harbor for a claimant who had a reasonable belief that she was not taking the car unlawfully.

Furthermore, defendant claims that the Court of Appeals failed to focus on the operative word of the statute, "entitled." "Entitle" means "to give a right or claim to something."[1] In the context of MCL 500.3113(a), the owner of a vehicle has the capacity to "give a right or claim to something" to another person. Indeed, the Legislature enacted a statute that speaks merely of a person's reasonable belief that he or she is entitled to take and use a vehicle. MCL 500.3113(a) makes no mention of the legality of the taking. Citizens are presumed to know the law, and it would be no defense that one reasonably believed that one's unlawful actions were lawful. Thus, because MCL 500.3113(a) does not contain the word "legally" before "use," it is difficult to imagine that the Legislature intended the statutory construction employed by the Court of Appeals majority.

Finally, defendant contends that the Court of Appeals opinion is irreconcilable with *Bronson Methodist Hosp v Forshee*.[2] *Bronson* noted that the purpose of MCL 500.3113(a) is to preclude PIP benefits for someone who has unlawfully taken a motor vehicle. The *Bronson* Court explicitly held, "[I]t is the unlawful nature of the taking, *not the unlawful nature of the use* that forms the basis for exclusion under the statute."[3] The Court further stated:

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[1] *Random House Webster's College Dictionary* (2001).

[2] *Bronson Methodist Hosp v Forshee*, 198 Mich App at 617 (1993).

[3] *Id*. at 627 (emphasis added).

> In [MCL 500.3113], the Legislature excluded from [PIP] benefits individuals who unlawfully take motor vehicles and those who have not procured the automobile insurance required under the no-fault act. If the Legislature had desired to also exclude from coverage those individuals who operate a motor vehicle without a valid operator's permit, it could have included that class of individuals within the purview of the statute. It did not.[4]

Because the Court of Appeals decided that defendant's use of the vehicle was unlawful in light of her intoxication and lack of licensure, its decision appears to conflict with *Bronson*.

Defendant raises several persuasive arguments indicating that the Court of Appeals erred in its interpretation of MCL 500.3113(a). For that reason, I would grant her application for leave to appeal.

CAVANAGH and HATHAWAY, JJ., would grant leave to appeal.

CANTLEY v GENESEE COUNTY ROAD COMMISSION, No. 138799; Court of Appeals No. 288800.

CAVANAGH and HATHAWAY, JJ., would grant leave to appeal.

In re DEMARCO (DEPARTMENT OF HUMAN SERVICES v DEMARCO), No. 139587; Court of Appeals No. 288682.

In re KC (DEPARTMENT OF HUMAN SERVICES v GRIFFIN), No. 139680; Court of Appeals No. 289765.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal October 14, 2009:

SHAY v ALDRICH, No. 138908. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). The parties shall submit supplemental briefs within 42 days of the date of this order addressing whether *Romska v Opper*, 234 Mich App 512 (1999), was correctly decided. The parties should not submit mere restatements of their application papers. Court of Appeals No. 282550.

Leave to Appeal Granted October 14, 2009:

PEOPLE v BRIAN HILL, No. 138668. The parties shall include among the issues to be briefed: (1) whether a person who downloads child sexually abusive material from the Internet, or who burns a CD-R of child sexually abusive material that he has downloaded from the Internet, falls within the scope of MCL 750.145c(2), which criminalizes "mak[ing]" or "produc[ing]" child sexually abusive material, and under what circumstances; (2) how the Court of Appeals interpretation of MCL 750.145c(2) interacts with the prohibition in MCL 750.145c(4) on the "possession" of child sexually abusive materials; and (3) whether the Court of Appeals inter-

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[4] *Id*. at 627-628.

pretation of "makes" has legal consequences for other criminal offenses that involve downloading material from the internet.

The Clerk of the Court is directed to place this case on the January 2010 session calendar for argument and submission. Appellant's brief and appendix must be filed no later than November 25, 2009, and appellee's brief and appendix, if appellee chooses to submit an appendix, must be filed no later than December 21, 2009. Court of Appeals No. 281055.

CORRIGAN, J. I find the order granting leave to appeal overbroad, particularly with regard to issue 1, because it goes well beyond the actual facts of this case. I encourage the parties and any amici curiae to clearly address the facts of *this case,* where defendant did not merely download child sexually abusive material from the Internet; defendant burned approximately 50 compact disks on which he compiled thousands of pictures depicting nude children in sexually explicit poses and engaged in sexual acts.

Summary Disposition October 16, 2009:

PEOPLE v THOMAS HILL, No. 138691. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we affirm that part of the judgment of the Court of Appeals that held that defendant's constitutional right to self-representation was not violated, but for a reason other than that stated by the Court of Appeals. In reaching this conclusion, the Court of Appeals ruled that because defendant's request was made solely through counsel and the record does not provide a basis for concluding that his request was knowingly and intelligently made, reversal was not warranted. The Court of Appeals erred in doing so, because our caselaw does not require that defendant must personally assert his constitutional right to self-representation pursuant to Const 1963, art 1, § 13, and MCL 763.1 before the request is valid. Moreover, if the Wayne Circuit Court had complied with the requirements of *People v Anderson*, 398 Mich 361 (1976), and MCR 6.005(D), a reviewing court could evaluate whether defendant's request was knowingly, intelligently, and voluntarily made. Accordingly, we vacate that part of the Court of Appeals analysis. We note, however, that the ruling of the Wayne Circuit Court denying the request for self-representation "at this time" did not deny defendant his constitutional right to self-representation where defendant's request was not timely and granting the request at that moment would have disrupted, unduly inconvenienced, and burdened the administration of the court's business. *People v Russell*, 471 Mich 182, 190 (2004). The trial court also did not foreclose defendant's opportunity to raise the self-representation issue again after jury selection. The record reflects, however, that defendant never renewed his untimely request. For this reason, we agree with the Court of Appeals that defendant's constitutional right to self-representation was not violated. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 281375.

KELLY, C.J. (*dissenting*). I concur in the order to the extent that it vacates the Court of Appeals majority's erroneous analysis of the issue

concerning the right to self-representation. I respectfully dissent, however, from the decision to affirm the Court of Appeals judgment. I would peremptorily reverse defendant's conviction.

I agree with dissenting Judge JANSEN that reversal is required here because the trial court "made *no inquiry* into defendant's assertion of the right to self-representation."[1] The trial court's failure to do so contravenes this Court's decision in *People v Anderson*.[2]

In *Anderson*, we explicitly rejected a strict rule that would preclude assertion of a defendant's right to proceed without counsel if the request is not made before the trial begins.[3] Subsequent cases repeatedly reaffirmed *Anderson*'s rejection of a timeliness requirement on requests for self-representation.[4] Moreover, many courts have held that a self-representation request is generally timely if made before the jury is empaneled.[5] Here, defendant's request was made before the jury was empaneled. Consequently, contrary to the majority, I would conclude that defendant's request was timely.

Moreover, I would not excuse the failure to inquire into defendant's request by simply observing that the request "would disrupt, unduly inconvenience, and burden the court and the administration of the court's business."[6] I recognize that defendant's request came on the morning of trial and therefore had significant potential to unduly inconvenience the trial court. However, I agree with Judge JANSEN that, even if the request were untimely, the trial court would not be excused from giving it at least minimal consideration.[7] The trial court in this case summarily denied defendant's request without any such inquiry or consideration.

In *People v Russell*, we emphasized the mandatory nature of the trial court's duty to inquire into a defendant's request for self-representation.[8]

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[1] *People v Hill*, 282 Mich App 538, 554 (2009) (JANSEN, P.J., dissenting) (emphasis in original).

[2] *People v Anderson*, 398 Mich 361 (1976).

[3] *Id.* at 368.

[4] *People v Dennany*, 445 Mich 412, 432 n 12 (1994); *People v Rice*, 231 Mich App 126, 136 (1998), rev'd on other grounds by *People v Rice*, 459 Mich 899 (1998).

[5] E.g., *United States v Young*, 287 F3d 1352, 1353 (CA 11, 2002).

[6] *People v Russell*, 471 Mich 182, 190 (2004).

[7] *Hill*, 282 Mich App at 555-556 (JANSEN, P.J., dissenting), citing *Tennis v State*, 997 So 2d 375, 379 (Fla, 2008); *Gladden v State*, 110 P3d 1006, 1010 (Alas App, 2005); *State v Brown*, 342 Md 404, 414 (1996); *People v Windham*, 19 Cal 3d 121, 128 (1977); *Rodriguez v State*, 982 So 2d 1272, 1274 (Fla App, 2008); *State v Weiss*, 92 Ohio App 3d 681, 685 (1993).

[8] *Russell*, 471 Mich at 190 ("Upon a defendant's *initial* request to proceed pro se, a court *must* determine that (1) the defendant's request is unequivocal, (2) the defendant is asserting his right knowingly,

The absence of any inquiry here compels me to conclude that the trial court's failure to consider defendant's request was equivalent to a wrongful denial of defendant's right to represent himself.

Nor is affirmance warranted because of defendant's failure to raise the self-representation issue again later. *Anderson* requires an "unequivocal" request to proceed pro se. It does not require repeated requests. Here, defense counsel told the trial court that "Mr. Hill has informed me that he would like to ask the court to represent himself in pro per." This statement constituted an unequivocal request for self-representation.

Moreover, although the majority makes much of the trial court's language in denying defendant's request "at this time," that denial occurred the morning of the trial. On what basis might defendant conclude that a subsequent request, made *during* the trial, would be more likely to succeed?

I respectfully dissent and would reverse the judgment of the Court of Appeals.

Leave to Appeal Granted October 16, 2009:

LIGHTHOUSE PLACE DEVELOPMENT, LLC v MOORINGS ASSOCIATION, No. 139015. On order of the Court, the application for leave to appeal the April 28, 2009, judgment of the Court of Appeals is considered, and it is granted, limited to the slander of title issue. The parties shall include among the issues to be briefed: (1) whether the trial court clearly erred in rejecting the defendant's assertion that it acted on advice of counsel in authorizing the recording of a 2005 amendment to a 1997 agreement with Harbor Grand, LLC, which 2005 amendment purported to remove from a list of easements to be terminated by the 1997 agreement a parking easement provided to the Moorings in a 1985 agreement between the defendant and New Buffalo Harbor, Inc; and (2) whether, if the defendant acted on advice of counsel in recording the 2005 amendment, a finding of malice is precluded, requiring the dismissal of the plaintiff's slander of title claim against the defendant. Court of Appeals No. 280863.

Summary Disposition October 21, 2009:

PEOPLE v KENT LEE, No. 136666. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 283778.

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intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business.") (emphasis added).

SHEMBER v UNIVERSITY OF MICHIGAN MEDICAL CENTER, No. 137409. By order of March 25, 2009, the application for leave to appeal the August 21, 2008 judgment of the Court of Appeals was held in abeyance pending the decision in *Bush v Shabahang* (Docket Nos. 136617, 136653, and 136983). On order of the Court, the case having been decided on July 29, 2009, 484 Mich 156 (2009), the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the opinion of the Court of Appeals and the order of the Washtenaw Circuit Court granting the defendants' motion for summary disposition, and we remand this case to the Washtenaw Circuit Court for reconsideration of the defendants' motion in light of this Court's decision in *Bush v Shabahang* and MCL 600.2301. Reported below: 280 Mich App 309.

PEOPLE v TROSTLE, No. 137551. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Kent Circuit Court, and we remand this case to the trial court for resentencing. An indeterminate prison sentence is a departure from an intermediate sanction under the sentencing guidelines. *People v Stauffer*, 465 Mich 633 (2002). The trial court did not articulate substantial and compelling reasons that justified the departure sentence that it imposed. On remand, the trial court shall sentence the defendant to an intermediate sanction, or articulate on the record substantial and compelling reasons for departing from such a sentence. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 287648.

MILLER v MALIK, No. 137905. By order of April 28, 2009, the application for leave to appeal the September 18, 2008 judgment of the Court of Appeals was held in abeyance pending the decision in *Bush v Shabahang* (Docket Nos. 136617, 136653, and 136983). On order of the Court, the case having been decided on July 29, 2009, 484 Mich 156 (2009), the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the opinion of the Court of Appeals and the order of the Oakland Circuit Court granting the defendants' motion for summary disposition, and we remand this case to the Oakland Circuit Court for reconsideration of the defendants' motion in light of this Court's decision in *Bush v Shabahang* and MCL 600.2301. Reported below: 280 Mich App 687.

LAJOICE v NORTHERN MICHIGAN HOSPITALS, INC, No. 138108. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the opinion of the Court of Appeals and the order of the Emmet Circuit Court granting the defendants' motion for summary disposition, and we remand this case to the Emmet Circuit Court for reconsideration of the defendants' motion in light of this Court's decision in *Bush v Shabahang*, 484 Mich 156 (2009). Court of Appeals No. 277587.

PEOPLE v DAVID JOHNSON, No. 138238. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Tuscola Circuit Court for the appointment of appellate counsel. *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005). The circuit court shall initially determine whether former counsel can still represent

the defendant. The circuit court shall direct the court reporter to prepare and file that portion of the February 7, 2006 trial transcript that contains the factual basis for the defendant's plea in Case No. 05-009572-FC. Appointed counsel may file an application for leave to appeal to the Court of Appeals, and/or any appropriate postconviction motions in the trial court, in accordance with MCR 7.205(F), except that the time for filing shall be determined based on the date of the circuit court's order appointing counsel. Because the defendant was sentenced and should have been appointed counsel, after January 1, 2006, counsel shall have six months from the date of the filing of the transcript to file any post-conviction motions.

In the course of accepting the defendant's *nolo contendere* plea, the trial judge added a term not agreed to by the parties. In advising the defendant of the trial rights that he would be waiving by pleading no contest, the trial judge asked the defendant if he understood that by pleading no contest he would be giving up the rights to seek an appeal to the Court of Appeals, to receive a free transcript, and to court-appointed counsel to perfect an appeal. The inquiry was not preceded by any statement that the defendant had the right to court-appointed appellate counsel under *Halbert* or under the then recently amended court rules. When asked by the trial judge whether he understood and agreed to this waiver, the defendant indicated that he did. At the time of the defendant's plea and sentence, he was entitled to those appellate rights. See *Halbert* and MCR 6.425(F) and (G). After twice denying the defendant's subsequent requests for the appointment of appellate counsel, the trial judge filed an order granting the appointment over two years after sentence was imposed. This delay in appointing counsel prevented the defendant from filing any timely, appropriate postconviction motions and thereby preserving any substantive issues. The motions for stay or peremptory reversal and to take judicial notice are denied as moot. We do not retain jurisdiction. Court of Appeals No. 288460.

Leave to Appeal Granted October 21, 2009:

PEOPLE v DUPREE, No. 139396. The parties shall include among the issues to be briefed whether any of the common law defenses of self-defense, necessity or duress are applicable to the crime of possessing or carrying a firearm while ineligible to do so as a result of a prior felony conviction (felon-in-possession) proscribed by MCL 750.224f, and, if so, whether the defendant has the burden of proof to establish the defense.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Reported below: 284 Mich App 89.

Leave to Appeal Denied October 21, 2009:

PEOPLE v CASSARRUBIAS, No. 136580. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283135.

PEOPLE v PAYNE, No. 139053; Court of Appeals No. 291232.

PEOPLE v SULLIVAN GREEN, No. 139224; Court of Appeals No. 291052. KELLY, C.J., and CAVANAGH, J., would grant leave to appeal.

KIDDER v PTACIN, No. 139225; reported below: 284 Mich App 166. HATHAWAY, J., would grant leave to appeal.

PEOPLE v BREEDING, No. 139435; reported below: 284 Mich App 471.

Reconsideration Denied October 21, 2009:

SIMON v WIDRIG, No. 137161. Leave to appeal denied at 483 Mich 901. Court of Appeals No. 277070.

KELLY, C.J., and CAVANAGH, J., would grant reconsideration.

Summary Disposition October 23, 2009:

PEOPLE v MARIO CLARK, No. 138247. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of the issues raised in the defendant's application to this Court, including the due process issue left open by *People v Breeding*, 284 Mich App 471 (2009), lv den 485 Mich 917 (2009). Court of Appeals No. 289283.

WARD v MICHIGAN STATE UNIVERSITY, No. 138380. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to that court for reconsideration of the defendant's appeal in light of this Court's order on reconsideration in *Chambers v Wayne County Airport Auth*, 483 Mich 1081 (2009). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. Court of Appeals No. 281087.

KELLY, C.J. (*concurring*). I concur in the order vacating the judgment of the Court of Appeals and remanding the case for reconsideration in light of this Court's order on reconsideration in *Chambers v Wayne Co Airport Auth*.[1] I write separately to address the dissenting justices' claim that the Court, by remanding in light of *Chambers*, is ignoring *Rowland v Washtenaw Co Rd Comm*.[2]

The dissenting justices show that the notice requirements of MCL 691.1406, the public building exception to governmental immunity, are similar to those of the highway exception statute. They conclude that, because the latter provision was at issue in *Rowland*, *Rowland* is controlling here. However, the highway exception statute is not involved here. This case involves the building exception to governmental immu-

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[1] *Chambers v Wayne Co Airport Auth*, 483 Mich 1081 (2009).

[2] *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007).

nity. While the dissenting justices may prefer to extend *Rowland*'s reasoning beyond the facts and law involved in that case to those of this case, the Court is not required to do so. *Rowland* is not binding here.

Moreover, the Court of Appeals based its decision in this case on this Court's December 19, 2008, order in *Chambers*.[3] We vacated that order on June 12, 2009, when addressing the plaintiff's motion for reconsideration. Thus, because the Court of Appeals relied on an order that is no longer controlling, the underpinning of its decision has been swept away. Hence, the decision should be reconsidered in light of *Chambers*.

YOUNG, J. (*dissenting*). Only in the legal order of Chief Justice KELLY's creation would judges treat differently identical notice provisions that address the same topic—governmental immunity—and that appear in the same statute. To understand how disingenuous is Chief Justice KELLY's failure to apply this Court's interpretation of the highway exception to governmental immunity, MCL 691.1404(1), consistent with the nearly identical building exception to governmental immunity, MCL 691.1406, let me quote the two provisions side by side.

The notice provision at issue in this case, MCL 691.1406, provides, in part:

> As a condition to any recovery for injuries sustained by reason of any dangerous or defective public building, the injured person, within 120 days from the time the injury occurred, shall serve a notice on the responsible governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

Rowland v Washtenaw Co Rd Comm, 477 Mich 197 (2007), applied the highway exception notice provision, MCL 691.1404(1), which provides:

> As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred . . . shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

The Legislature enacted both provisions as part of the same statute, 1964 PA 70, and they use nearly identical operative language.[1] Indeed, the only difference in the operative language of the two immunity provisions is that the word "responsible" modifies "governmental agency" in the public building exception to governmental immunity. This comparison corroborates Justice MARKMAN's claim that the provisions are "nearly identically worded" and unmasks as false Chief Justice KELLY's

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[3] *Chambers v Wayne Co Airport Auth*, 482 Mich 1136 (2008).

[1] The original notice period for each provision was 60 days, and the Legislature subsequently amended each provision to extend the notice period to 120 days. 1970 PA 155.

claim that a *difference in the provisions* themselves distinguishes this Court's interpretation of the plain language of the notice requirement in *Rowland* from the nearly identical notice requirement applicable to the instant case.

In *Rowland*, we held that the plain language of a statute controls its interpretation and that, therefore, a requirement to provide written notice within 120 days as "a condition to any recovery" involving a highway defect must be enforced. *Rowland*, 477 Mich at 201. Here, the public building exception requires the identical 120-day written notice to the governmental agency. There is no question in this case that no notice was "served" on the defendant within 120 days of the injury.

None but the naïve should be deceived that there is any reason to avoid applying in this case the plain language of the statute or *Rowland*'s analysis of the nearly identical sibling governmental immunity provision. Chief Justice KELLY's idea that nearly identical provisions *in the same statute* should receive different constructions because they concern different aspects of governmental immunity would be laughable were it not so destructive to the development of the predictable rule of law. The plain truth is that Chief Justice KELLY and her majority dislike the limitation that the Legislature has placed on lawsuits against governmental entities but refuse to say so openly. She is thus forced into a dodge that cannot sustain scrutiny. If her argument were a real one, Chief Justice KELLY would explain what textual difference in these two immunity provisions justifies a different construction and thus result. She does not because she cannot.

MARKMAN, J. (*dissenting*). On March 12, 2004, a hockey puck struck plaintiff in the eye at a college hockey game at Michigan State University's Munn Ice Arena. She claims that a section of the protective plexiglas around the rink was missing, and if it had not been missing she would not have been injured. Plaintiff brought suit against Michigan State University under the public building exception of the governmental tort liability act (GTLA), MCL 691.1406. Defendant moved for summary disposition based on governmental immunity and lack of statutory notice. The trial court denied defendant's motion for summary disposition and defendant's motion for reconsideration. The Court of Appeals reversed, concluding that plaintiff had not satisfied the statutory notice provision.

The notice provision of MCL 691.1406 states in relevant part:

> As a condition to any recovery for injuries sustained by reason of any dangerous or defective public building, the injured person, within 120 days from the time the injury occurred, shall serve a notice on the responsible governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.
>
> The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the respon-

sible governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding.

Interpreting the notice requirements of the highway exception statute, MCL 691.1404(1), which are nearly identically worded to those of the public building exception statute, MCL 691.1406, this Court stated that "the plain language of this statute should be enforced as written." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 200 (2007). Thus, when a statute requires notice within 120 days, it means 120 days. And when a statute requires notice to be served on an individual who may be lawfully served with civil process, it means that actual notice must be served on someone within the governmental agency who has the authority to accept service.

Chief Justice KELLY contends that, because the highway exception and the public building exception statutes are different provisions, the nearly identical wording of their notice requirements should be interpreted differently. However, both provisions: (a) require notice "within 120 days from the time the injury occurred"; (b) require that the injured person "shall serve a notice upon the [responsible] governmental agency of the occurrence of the injury and the defect"; and (c) require that such notice be served upon an individual "who may lawfully be served with civil process." That these separate provisions can be found on different pages of the Michigan Code is hardly a basis for failing to treat the interpretation of one as dispositive of the interpretation of the other. Chief Justice KELLY's basis for differentiating between these provisions is simply incompatible with a rational judicial process.

In the instant case, more than nine months after the hockey game in which plaintiff was injured, plaintiff's counsel, in a December 30, 2004, letter addressed to "MSU Munn Ice Arena," alerted the "Arena" that his "office represents Carla Ward in the matter of personal injuries she sustained as a result of an *automobile accident* on the above date." (Emphasis added.) Contrary to the requirements of the public building exception of the GTLA, this letter failed to specify: (a) "the exact location"; (b) the "nature of the defect"; (c) "the injury sustained"; and (d) any "names of witnesses known." MCL 691.1406. Further, the letter was not "served upon any individual . . . who may lawfully be served with civil process" as required by MCL 691.1406. Moreover, even assuming the letter provided sufficient notice to defendant, it arrived more than five months after the statutory 120-day period had lapsed.

By remanding to the Court of Appeals for reconsideration, this Court continues to chip away at clearly stated statutory notice requirements. See, e.g., *Beasley v Michigan*, 483 Mich 1025 (2009); *Chambers v Wayne Co Airport Auth*, 483 Mich 1081, 1081-1082 (2009). While it appears that the judicial winds may have changed on statutory notice requirements, *Rowland* remains as Michigan law on this issue. Because the Court of Appeals applied the clear language of MCL 691.1406 in determining that defendant is entitled to summary disposition, I would deny leave to appeal.

CORRIGAN and YOUNG, JJ. We join the statement of Justice MARKMAN.

COMPTON v PASS, No. 138634. Pursuant to MCR 7.302(H)(1), in lieu of

granting leave to appeal, we reverse the judgment of the Court of Appeals. The Court of Appeals erred in analyzing this case under the lost-opportunity standard set forth in MCL 600.2912a(2). The plaintiff alleges that the defendants failed to obtain her informed consent, that this breach of the standard of care caused her to undergo a more extensive medical procedure with a higher risk of morbidity than she would have knowingly elected, and that she was injured as a result. We conclude that the evidence is sufficient to allow a fact-finder to find that the alleged breach of the standard of care caused the plaintiff to suffer physical injury (including the removal of additional lymph nodes, axillary cording, and lymphedema) that more probably than not was proximately caused by the negligence of the defendants. As a result, the requirements of the first sentence of MCL 600.2912a(2) are satisfied, and this is a claim of traditional malpractice. *Stone v Williamson*, 482 Mich 144 (2008) (see the opinions of TAYLOR, C.J., at 147, 153; and CAVANAGH, J., at 171). For these reasons, the Court of Appeals erred in ruling that the Oakland Circuit Court should have granted the defendants' motion for summary disposition. We remand this case to the Court of Appeals for consideration of the remaining issues raised by the parties but not previously addressed by that court. Court of Appeals No. 260362.

MARKMAN, J. (*concurring*). I concur in the order reversing the judgment of the Court of Appeals for the reasons stated in my previous concurring statement in *Compton v Pass*, 482 Mich 1038, 1039 (2008).

PEOPLE V LENDERMAN, No. 138986. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Genesee Circuit Court and we remand this case to the trial court for resentencing. The trial court shall reconsider the scoring of offense variable 3, MCL 777.33, in light of this Court's opinion in *People v McGraw*, 484 Mich 120 (2009). On remand, the trial court shall sentence the defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Babcock*, 469 Mich 247 (2003). In all other respects, leave to appeal is denied because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 291110.

CORRIGAN, J. (*concurring*). I concur in the order remanding for resentencing because this Court's decision in *People v McGraw*, 484 Mich 120 (2009), may affect the scoring of offense variable 3 (physical injury to victim), but I continue to adhere to my dissenting opinion in *McGraw*, 484 Mich at 136.

YOUNG, J. (*concurring*). Although *People v McGraw*, 484 Mich 120 (2009), controls the scoring of offense variable 3 (physical injury to victim), I continue to adhere to the position stated in Justice CORRIGAN's dissent in *McGraw*, 484 Mich at 136, with which I concurred.

WEAVER, J. (*dissenting*). I dissent because I would not vacate the sentence and remand this case. Instead, I would grant leave to appeal in order to reconsider *People v McGraw*, 484 Mich 120 (2009), for the reasons stated in the dissenting opinion in that case, *id*. at 136.

In re MITCHELL (DEPARTMENT OF HUMAN SERVICES v MITCHELL), No. 139114. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals for the reasons stated in the Court of Appeals dissenting opinion and because the trial court committed plain error, *People v Carines,* 460 Mich 750, 763 (1999), in failing to timely appoint counsel in violation of MCL 712A.17c(4) and (5), MCR 3.915(B)(1), MCR 3.965(B)(5), and MCR 3.974(B)(3)(a)(i), and in failing to advise the respondent that his plea could later be used in a proceeding to terminate his parental rights in violation of MCR 3.971(B)(4). Accordingly, we remand this case to the Clinton Circuit Court, Family Division, for further proceedings not inconsistent with this order. The motion to file brief amicus curiae is granted. We do not retain jurisdiction. Court of Appeals No. 286895.

Leave to Appeal Denied October 23, 2009:

PEOPLE v COX, No. 137508; Court of Appeals No. 286638.

PEOPLE v BOTELLO, No. 137805; Court of Appeals No. 286814.

YOUNG, J. (*concurring*). Because I conclude that defendant is not entitled to the relief that he seeks—an additional 142 days of jail credit—I concur in the denial of leave to appeal. I write only to respond to Chief Justice KELLY's mischaracterization of the relevant issues in this case.

In 2003, defendant was sentenced to three years of probation for retail fraud, with the first year to be served in jail. Defendant subsequently escaped from jail and was later arrested for the escape on January 5, 2004. On May 27, 2004, defendant was sentenced to two years of probation with nine months in jail, to be served consecutively with the remainder of his retail fraud term. After his release from jail, but while still on probation for both offenses, defendant pleaded guilty to violating probation. He was sentenced to two concurrent prison terms for the underlying offenses for which he was on probation at the time, and the trial court subsequently amended the sentence to make the prison terms consecutive. Defendant appealed this resentencing, arguing in his original brief to the Court of Appeals that "[b]ecause of the change from concurrent to consecutive sentencing, [the] Court should remand Mr. Botello's case for a full resentencing." Both the Court of Appeals and this Court had previously denied leave to appeal the trial court's sua sponte resentencing. *People v Botello*, 480 Mich 1138 (2008). Defendant subsequently filed a motion seeking clarification of his jail credit, which the trial court denied. He now appeals the trial court's ruling on *that* motion, arguing to this Court that he is not receiving his appropriate amount of jail credit.

Chief Justice KELLY questions the validity of defendant's current sentence, and in doing so appears to be resuscitating defendant's challenge in his previous application for leave to appeal that he must be resentenced. This case, however, only concerns the amount of jail time credit he is entitled to while serving his current sentence, and the lower

courts have correctly decided this issue. Defendant received 344 days credit for his retail fraud sentence and 227 days credit for his escape sentence.

Defendant believes that he is entitled to additional credit for the time between January 5, 2004, when he was incarcerated after his arrest for violating the terms of his probation for retail fraud and for escaping from prison, and his sentencing on May 27, 2004. The amount of time credited toward his retail fraud sentence, however, specifically included this time. Defendant is not entitled to credit on his escape sentence. MCL 750.195(2) provides that a person convicted of escape from prison "shall be imprisoned for the unexpired portion of the term of imprisonment the person was serving at the time of the violation, and any term of imprisonment imposed for the violation of this subsection shall begin to run at the expiration of that prior term of imprisonment." Under the plain terms of this statutory provision, defendant was required to serve his entire jail sentence for retail fraud before beginning to serve his jail sentence for escape.

Because this jail credit issue is the only issue before us, I concur in denying leave to appeal. Defendant has already appealed the validity of the trial court's sua sponte decision to resentence him. Moreover, the defendant has *conceded* the trial court's interpretation of MCL 750.195(2), thereby accepting that the trial court properly amended his sentences to make them consecutive.[1] Thus, defendant's claim on *this* appeal has no merit and Chief Justice KELLY has inappropriately, in my opinion, attempted to revive a stale claim made in defendant's prior appeal and done so even though the defendant has conceded the issue she raises.

CORRIGAN, J., joined the statement of YOUNG, J.

KELLY, C.J. (*dissenting*). I dissent from the Court's order denying defendant's application for leave to appeal. Because the trial court improperly amended defendant's judgment of sentence, I would remand this case to the trial court for reinstatement of the original judgment of sentence.

Defendant violated the terms of his probation for retail fraud by escaping from jail. He served a jail sentence for his escape conviction, consecutively to his remaining jail term for his retail fraud offense. He was thereafter placed back on probation for both the retail fraud and escape offenses. When he violated the terms of his probation again, the trial court sentenced him to concurrent prison terms for the retail fraud and escape charges.

The trial judge later received a letter from the Michigan Department of Corrections indicating that the escape sentence should be served consecutively to the retail fraud sentence. On his own motion, the trial judge amended defendant's judgment of sentence accordingly without giving the parties notice or an opportunity to be heard. Defendant

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[1] Defendant has argued to the Court of Appeals that he is entitled to a full resentencing hearing when "a judge mistakenly impos[es] a concurrent sentence when it should have been consecutive."

successfully petitioned the trial court for resentencing, but the court re-imposed the same consecutive sentence without issuing a new judgment.

Defendant's original judgment of sentence imposing concurrent sentences was correct. MCL 750.195(2)[1] required defendant to serve his jail sentence for escape consecutively to his jail sentence for retail fraud. That he did. However, MCL 750.195(2) does not require subsequent *prison* sentences for probation violations to be consecutive. Thus, the amended judgment of sentence under which defendant is now imprisoned is invalid for two reasons. First, it was imposed sua sponte by the trial court after final judgment had entered and without the parties being given notice and an opportunity to be heard, a violation of MCR 6.435(B). Second, in violation of MCR 6.429(A), the trial court modified a sentence that was valid when entered. Moreover, as we explicitly held in *People v Holder*, 483 Mich 168 (2009), a trial court may not sua sponte amend an otherwise valid judgment of sentence.

Contrary to Justice YOUNG's assertion, I am not "attempt[ing] to revive a stale claim made in defendant's prior appeal . . . ." Defendant did not previously appeal the trial court's resentencing on *Holder* grounds. Nor did he appeal the substantive sua sponte change to his sentence under MCR 6.435(B). This is likely attributable to the fact that the trial court re-imposed the same consecutive sentence without actually issuing a new judgment that could be appealed.

By denying leave to appeal, a majority of the Court is allowing a judgment of sentence that is in direct conflict with our court rules. That majority also fails to follow our recently established precedent in *Holder*. Even more troubling is the fact that the majority allows the trial court's amendment of defendant's judgment of sentence—an amendment never sought by the prosecutor—to remain intact. At the same time, it fails to afford defendant an opportunity to substantively challenge the merits of the amendment.

I would remand the case to the trial court for reinstatement of defendant's original judgment of sentence.

PEOPLE v MORTE SCOTT, No. 138615; Court of Appeals No. 290294.

PEOPLE v LOPEZ-NEGRETE, No. 139205; Court of Appeals No. 286247.

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[1] MCL 750.195(2) provides:

> A person lawfully imprisoned in a jail for a term imposed for a felony who breaks jail and escapes, breaks jail though an escape is not actually made, escapes, leaves the jail without being discharged from the jail by due process of law, or attempts to escape from the jail, is guilty of a felony. A person who violates this subsection shall be imprisoned for the unexpired portion of the term of imprisonment the person was serving at the time of the violation, and any term of imprisonment imposed for the violation of this subsection shall begin to run at the expiration of that prior term of imprisonment.

PEOPLE v RICKS, No. 139407; Court of Appeals No. 283053.

MARKMAN, J. (*dissenting*). Because I believe it to be a jurisprudentially significant issue, I would grant leave to appeal to consider whether, pursuant to *Crawford v Washington*, 541 US 36 (2004), the admission of a law enforcement officer's testimony concerning the substance of an anonymous phone call violated defendant's Sixth Amendment right to confront the witnesses against him.

In re TORRES (DEPARTMENT OF HUMAN RESOURCES v TORRES), No. 139771; Court of Appeals No. 290703.

CAVANAGH, J., would grant leave to appeal.

Leave to Appeal Denied October 26, 2009:

PEOPLE v LEMAN HARRIS, No. 136566; Court of Appeals No. 281537.

PEOPLE v GAVIN, No. 137473; Court of Appeals No. 278268.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v MARIO GRAY, No. 137808; Court of Appeals No. 287748.

PEOPLE v ENFIELD, No. 137906. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283912.

PEOPLE v VERNON ADAMS, No. 138027; Court of Appeals No. 286607.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v HAKEEM WILLIAMS, No. 138098; Court of Appeals No. 288538.

PEOPLE v SCHWARTZ, No. 138242; Court of Appeals No. 282028.

PEOPLE v DJONAJ, No. 138263; Court of Appeals No. 280294.

PEOPLE v COREY JONES, No. 138374; Court of Appeals No. 280430.

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

PEOPLE v ROCCA, No. 138375; Court of Appeals No. 280295.

PEOPLE v BAZZI, No. 138407; Court of Appeals No. 280423.

PEOPLE v CHARLES CRAIG, No. 138446; Court of Appeals No. 288912.

PEOPLE v JAMES BEY, No. 138466; Court of Appeals No. 290113.

PEOPLE v DORTCH, No. 138496; Court of Appeals No. 289458.

PEOPLE v JAMES HARRIS, No. 138508; Court of Appeals No. 282691.

PEOPLE v QUATRINE, No. 138539; Court of Appeals No. 287572.

PEOPLE v HORACEK, No. 138604. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286904.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v LABARON DAVIS, No. 138630. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287527.

PEOPLE v STRAWS, No. 138633. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288313.

PEOPLE v VARDIMAN, No. 138651; Court of Appeals No. 289944.

PEOPLE v CEDRIC SMITH, No. 138660. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).Court of Appeals No. 289017.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v ALMARAZ, No. 138694. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287889.

PEOPLE v LARRY, No. 138716. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287069.

PEOPLE v DANIEL JENKINS, No. 138732. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287970.

PEOPLE v PAUL HENDRIX, No. 138735. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 290011.

PEOPLE v GARDETTE, No. 138748. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 289328.

PEOPLE v PAUL DAVIS, No. 138762. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288056.

PEOPLE v SHEPARD, No. 138771. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288355.

TEVIS v AMEX ASSURANCE COMPANY, No. 138783; reported below: 283 Mich App 76.

PEOPLE v LETGRATE, No. 138786; Court of Appeals No. 284695.

PEOPLE v INGRAM, No. 138810. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288081.

PEOPLE v STERHAN, No. 138820; Court of Appeals No. 273684.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v HARLAN, No. 138828. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288001.

PEOPLE v WYNN, No. 138836. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288046.

PEOPLE v FARR, No. 138854. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 289534.

PEOPLE v BOX, No. 138855; Court of Appeals No. 289085.

PEOPLE v JOHNNY LEWIS, No. 138891; Court of Appeals No. 291201.

PEOPLE v EDDIE JAMES, No. 138911; Court of Appeals No. 282280.

KAMPHAUS v BURNS, No. 138939; Court of Appeals No. 279962.

PEOPLE v THORP, No. 138966; Court of Appeals No. 289479.

WORMSBACHER v PHILLIP R SEAVER TITLE COMPANY, INC, No. 138971; reported below 284 Mich App 1.

GRAY v DETROIT MUNICIPAL PARKING DEPARTMENT, No. 138980; Court of Appeals No. 274356.

PEOPLE v JULIUS DAVIS, No. 138987; Court of Appeals No. 280547.

BRONKEMA v FERWERDA ENTERPRISES, INC, No. 138990; Court of Appeals No. 275528.

PEOPLE v LAURY, No. 139003; Court of Appeals No. 290810.

PEOPLE v MCGIVNEY, No. 139012; Court of Appeals No. 282547.

BLANTON v DEPARTMENT OF CORRECTIONS, No. 139039; Court of Appeals No. 289597.

PEOPLE v TAMIR BELL, No. 139041; Court of Appeals No. 282222.

PEOPLE v VERMILLION, No. 139043; Court of Appeals No. 291078.

PEOPLE v SWOOPE, No. 139064; Court of Appeals No. 282398.

PEOPLE v WOFFORD, Nos. 139065 and 139067; Court of Appeals Nos. 278240 and 278246.

PEOPLE v BETTS, No. 139072; Court of Appeals No. 282399.

PEOPLE v KEVIN MORRIS, No. 139073; Court of Appeals No. 291523.

PEOPLE v WOLFE, No. 139078; Court of Appeals No. 290572.

PEOPLE v EARL HOWARD, JR, No. 139090; Court of Appeals No. 290348.

MICHIGAN SECOND INJURY FUND v TOYOTA ENGINEERING & MANUFACTURING NORTH AMERICA, INC, No. 139109; Court of Appeals No. 286616.

PEOPLE v KIRBY, No. 139130; Court of Appeals No. 291291.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v ANTHONY WARD, No. 139152; Court of Appeals No. 284314.

PEOPLE v PATRICK LEWIS, No. 139153; Court of Appeals No. 277505.

PEOPLE v PHILIP NORRIS, No. 139154; Court of Appeals No. 283289.

PEOPLE v WIELAND, No. 139167; Court of Appeals No. 282699.

PEOPLE v MENCH, No. 139171; Court of Appeals No. 291237.

PEOPLE v EVANS, No. 139172; Court of Appeals No. 283454.

HERTZ v MILLER, No. 139175; Court of Appeals No. 289975.

PEOPLE v LATHROP, No. 139181; Court of Appeals No. 284710.

PEOPLE v BILLY MORROW, No. 139182; Court of Appeals No. 290408.

PEOPLE v NAGY, No. 139183; Court of Appeals No. 291423.

PEOPLE v JONATHAN MORGAN, No. 139184; Court of Appeals No. 284986.

PEOPLE v AIELLO, No. 139185; Court of Appeals No. 283241.

SKINNER v QUICK-SAV FOOD STORES LTD, No. 139198; Court of Appeals No. 290281.

PEOPLE v WIDNER, No. 139202; Court of Appeals No. 283306.

PEOPLE v MUMIN, No. 139207; Court of Appeals No. 283211.

PEOPLE v STITT, No. 139215; Court of Appeals No. 284097.

PEOPLE v HATCHER, No. 139216; Court of Appeals No. 283459.

PEOPLE v MICHAEL JOHNSON, No. 139228; Court of Appeals No. 291266.

HATHAWAY, J. (*not participating*). Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

PEOPLE v SHANE BROWNING, No. 139231; Court of Appeals No. 282689.

PEOPLE v TERRANCE BAILEY, No. 139233; Court of Appeals No. 276424.

DOWNS v DOWNS, No. 139234; Court of Appeals No. 290217.

PEOPLE v TERRANCE BAILEY, No. 139235; Court of Appeals No. 276593.

PEOPLE v ANTHONY LOMAX, No. 139236; Court of Appeals No. 284526.

PEOPLE v TYRONE WILSON, No. 139238; Court of Appeals No. 277572.

PEOPLE v LEBEAU, No. 139240; Court of Appeals No. 291612.

PEOPLE v BAUGHAN, No. 139241; Court of Appeals No. 291756.

PEOPLE v STAGGER, No. 139244; Court of Appeals No. 282220.

PEOPLE v LENOIR, No. 139247; Court of Appeals No. 291299.

PEOPLE v LECHNER, No. 139257; Court of Appeals No. 292049.

PEOPLE v BYRD, No. 139272; Court of Appeals No. 291445.

KRAMER v SCHINDLER ELEVATOR CORPORATION, No. 139274; Court of Appeals No. 290826.

PEOPLE v JASON WARD, No. 139284; Court of Appeals No. 291526.

In re CLARK ESTATE (CLARK v SIRIANI), No. 139286; Court of Appeals No. 282000.

PEOPLE v BACON, No. 139289; Court of Appeals No. 282923.

PEOPLE v LANCE ELDER, No. 139290; Court of Appeals No. 291305.

PEOPLE v GERALD HILL, No. 139298; Court of Appeals No. 277813.

PEOPLE v BENJAMIN SMITH, No. 139299; Court of Appeals No. 291546.

PEOPLE v ERVIN, No. 139305; Court of Appeals No. 291668.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her opinion in *People v Idziak*, 484 Mich 549 (2009).

PEOPLE v BEAN, No. 139308; Court of Appeals No. 285140.

PEOPLE v TIMOTHY TAYLOR, JR, No. 139313; Court of Appeals No. 284594.

PEOPLE v CORWIN THOMPSON, No. 139323; Court of Appeals No. 283761.

PEOPLE v WATT, No. 139334; Court of Appeals No. 284227.

PEOPLE v RICHARD HILL, No. 139336; Court of Appeals No. 291805.

PEOPLE v RONNIE STEWART, No. 139338; Court of Appeals No. 291032.

PEOPLE v HOLT, No. 139340; Court of Appeals No. 283214.

FURNESS GOLF CONSTRUCTION, INC v RVP DEVELOPMENT CORPORATION, Nos. 139351 and 139352; Court of Appeals Nos. 279398 and 279399.

PEOPLE v NICHOLAS, No. 139355; Court of Appeals No. 283850.

PEOPLE v RODRICK JONES, No. 139363; Court of Appeals No. 290027.

PEOPLE v DONALD COOK, No. 139365; Court of Appeals No. 292048.

PEOPLE v BROWNELL, No. 139389; Court of Appeals No. 283540.

JOHNS v ABC BEVERAGE MANAGEMENT, INC, No. 139405; Court of Appeals No. 291243.

SIMCOX v SIMCOX, No. 139406; Court of Appeals No. 284287.

PEOPLE v CHADWICK, No. 139411; Court of Appeals No. 280256.

PEOPLE v JOHNNY THOMAS, No. 139412; Court of Appeals No. 292321.

PEOPLE v MOSLIMANI, No. 139421; Court of Appeals No. 290644.

PEOPLE v GERARD DAVIS, No. 139434; Court of Appeals No. 284626.

PEOPLE v LAY, No. 139451; Court of Appeals No. 292256.

SAMI POOTA & SONS, INC v MICHIGAN LIQUOR CONTROL, No. 139463; Court of Appeals No. 285836.

PEOPLE v HOLLOWAY, No. 139464; Court of Appeals No. 286368.

PEOPLE v MARLON JOHNSON, No. 139465; Court of Appeals No. 283847.

PEOPLE v HOLLIDAY, No. 139487; Court of Appeals No. 291990.

PEOPLE v DONTAE COOK, No. 139496; Court of Appeals No. 292010.

PEOPLE v BOWDITCH, No. 139500; Court of Appeals No. 292396.

PEOPLE v CORDNEY SMITH, No. 139551; Court of Appeals No. 285030.

Reconsideration Denied October 26, 2009:

MARK CHABAN, PC v GETSINGER, Nos. 136752 and 136753. Summary disposition entered at 483 Mich 1092. Court of Appeals Nos. 282109 and 282481.

CORRIGAN, J. I am not participating in this case because I retained defendant Joseph P. Buttiglieri to represent my husband's estate in probate court and on other matters.

PEOPLE v BRANNER, No. 137373. Leave to appeal denied at 483 Mich 1120. Court of Appeals No. 275911.

KELLY, C.J., would grant reconsideration and, on reconsideration, would grant leave to appeal for the reasons set forth in her dissenting opinion in *People v Branner*, 483 Mich 1120 (2009).

NOE v CITY OF DETROIT, No. 137392. Leave to appeal denied at 483 Mich 901. Court of Appeals No. 278727.

KELLY, C.J., would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v HANN, No. 137913. Leave to appeal denied at 484 Mich 865. Court of Appeals No. 286812.

PEOPLE v KINT, No. 138013. Leave to appeal denied at 484 Mich 866. Court of Appeals No. 287853.

WILCOXSON-BEY v PROVIDENCE HOSPITAL & MEDICAL CENTERS, INC, No. 138033. Summary disposition entered at 483 Mich 1023. Court of Appeals No. 279146.

CORRIGAN, J., would grant reconsideration.

STANNY v PROGRESSIVE MICHIGAN INSURANCE COMPANY, No. 138053. Leave to appeal denied at 484 Mich 866. Court of Appeals No. 280916.

COCHRAN v ATTORNEY GRIEVANCE COMMISSION, No. 138054. Superintending control denied at 483 Mich 1252. AGC: 2139/07.

PEOPLE v WOODS, No. 138063. Leave to appeal denied at 484 Mich 867. Court of Appeals No. 287863.

HAYES v LANGFORD, No. 138100. Leave to appeal denied at 483 Mich 1125. Court of Appeals No. 280049.

CORRIGAN, J., would grant the motion for reconsideration for the reasons set forth in Justice MARKMAN's dissenting statement in this case, 483 Mich 1125 (2009).

MARKMAN, J., would grant the motion for reconsideration and, on reconsideration, would vacate this Court's order of July 7, 2009, and reverse the Court of Appeals for the reasons set forth in his dissenting statement in this case, 483 Mich 1125 (2009).

PEOPLE v DENNIS, No. 138202. Leave to appeal denied at 484 Mich 868. Court of Appeals No. 287595.

PEOPLE v SCHMIDT, No. 138209. Leave to appeal denied at 483 Mich 1081. Court of Appeals No. 280127.

KELLY, C.J., would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v ZIEGLER, No. 138229. Leave to appeal denied at 484 Mich 868. Court of Appeals No. 278270.

PEOPLE v FLOYD, No. 138274. Leave to appeal denied at 485 Mich 861. Court of Appeals No. 286762.

In re GRIFFIN (NACOVSKY v HALL), No. 138381. Summary disposition entered at 483 Mich 1031. Reported below: 281 Mich App 532.

GLOD v CLINTON RIVER CRUISE COMPANY, INC, No. 138393. Leave to appeal denied at 483 Mich 1113. Court of Appeals No. 279422.

PEOPLE v HENSLEY, No. 138435. Leave to appeal denied at 483 Mich 1113. Court of Appeals No. 280781.

PEOPLE v GATES, No. 138482. Leave to appeal denied at 483 Mich 1113. Court of Appeals No. 281205.

PEOPLE v RICHARD MARTINEZ, No. 138485. Leave to appeal denied at 483 Mich 1113. Court of Appeals No. 289235.

PEOPLE v ALDRIDGE, No. 138488. Leave to appeal denied at 483 Mich 1113. Court of Appeals No. 280984.

PEOPLE v KORY GROSS, No. 138527. Leave to appeal denied at 483 Mich 1114. Court of Appeals No. 289418.

PEOPLE v SIMPSON, No. 138546. Leave to appeal denied at 483 Mich 1114. Court of Appeals No. 279353.

PEOPLE v CARICO, No. 138565. Leave to appeal denied at 484 Mich 869. Court of Appeals No. 277973.

PEOPLE v MARK OWENS, No. 138612. Leave to appeal denied at 483 Mich 1114. Court of Appeals No. 278960.

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

PEOPLE v DESHON MILLER, No. 138616. Leave to appeal denied at 484 Mich 870. Court of Appeals No. 281466.

RODRIGUEZ v MERCHANT, No. 138662. Leave to appeal denied at 484 Mich 870. Court of Appeals No. 288495.

PARKER v ATTORNEY GENERAL, No. 138896. Leave to appeal denied at 484 Mich 873. Court of Appeals No. 287463.

LINDSEY v DAIMLERCHRYSLER CORPORATION, No. 138905. Leave to appeal denied at 484 Mich 873. Court of Appeals No. 288834.

Superintending Control Denied October 26, 2009:

WELSING v ATTORNEY GRIEVANCE COMMISSION, No. 139381; AGC: 1371/08.

MITCHELL v ATTORNEY GRIEVANCE COMMISSION, No. 139420; AGC: 1364/04.

Summary Disposition October 28, 2009:

PEOPLE v LARRY JOHNSON, No. 138926. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Oakland Circuit Court, and we remand this case to the trial court for resentencing. The sentence is invalid because the trial court scored 25 points under offense variable OV 13 based on crimes that were not committed during a five-year period encompassing the sentencing offense. *People v Francisco*, 474 Mich 82 (2006). This Court decided *Francisco* before the defendant's appellate counsel filed an application for leave to appeal in the Court of Appeals on direct appeal. Therefore, the scoring of OV 13 should have been challenged on direct appeal. On remand, the trial court shall sentence the defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance

with *People v Babcock*, 469 Mich 247 (2003). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 288828.

LAKETON TOWNSHIP v ADVANSE, INCORPORATED, No. 139040. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the February 9, 2007, opinion and order and the February 28, 2007, judgment and final order for injunctive relief of the Muskegon Circuit Court. Under § 200 of the 1979 zoning ordinance, use of the subject premises, which were zoned Residential District A, was restricted to "single family dwellings." Single family dwellings were a subset of the 1979 ordinance's more expansive definition of "dwelling." Therefore, the defendant's expansion of the rental use of the subject premises to include the main residence situated on the property, after purchasing it in 2003, constituted an impermissible expansion of an existing nonconforming use lawful under the 1979 ordinance. Court of Appeals No. 276986.

KENSINGTON HEIGHTS COOPERATIVE v OROZCO, No. 139112. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the district court's April 14, 2008 order granting a default and default judgment. In granting plaintiff's motion to compel discovery, the district court placed defendant on notice that she was subject to a default judgment for failure to comply with the discovery request. Such a sanction was reasonable given the facts of this case and defendant's repeated failure to comply with discovery requests. Accordingly, the district court did not abuse its discretion in entering the default judgment for plaintiff. Court of Appeals No. 289817.

AL-NAIMI v FOODLAND DISTRIBUTORS, INC, No. 139267. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we remand this case to the Oakland Circuit Court for further proceedings not inconsistent with this order. Court of Appeals No. 285375.

Leave to Appeal Denied October 28, 2009:

PEOPLE v GOLBA, No. 133353; reported below: 273 Mich App 603.
CAVANAGH, J., would grant leave to appeal.

FUJA v LUX ELECTRONIC PRODUCTS, No. 137735; Court of Appeals No. 288545.

PEOPLE v SYLVESTER SANDERS, No. 138062. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286712.

PEOPLE v ANTHONY SMITH, No. 138282; Court of Appeals No. 277736.

PEOPLE v BRINSON, No. 138353; Court of Appeals No. 289337.

PEOPLE v TERRANCE WHITE, No. 138410; Court of Appeals No. 281343.

BOOTH v CLINTON MACHINE COMPANY, No. 138721; Court of Appeals No. 288944.

DIXON v BORCULO GARAGE, No. 138948; Court of Appeals No. 289233.

LALONE v RIEDSTRA DAIRY LTD, Nos. 139028 and 139097; Court of Appeals Nos. 290415 and 290277.

PEOPLE v RUSHLOW, No. 139258; Court of Appeals No. 284569.

GREEN v DAIMLERCHRYSLER CORPORATION, No. 139268; Court of Appeals No. 291604.

KELLY, C.J., would grant leave to appeal.

PEOPLE v KENDALL, No. 139275; Court of Appeals No. 290001.

SCHINDLER v ASPLUNDH TREE EXPERT COMPANY, No. 139317; Court of Appeals No. 279295.

PEOPLE v MCCOLLOUGH, Nos. 139357 and 139358; Court of Appeals Nos. 282449 and 282450.

MICHIGAN DEFERRED PRESENTMENT SERVICES ASSOCIATION, INC v ROSS, No. 139513; Court of Appeals No. 292685.

Summary Disposition October 30, 2009:

PEOPLE v ORLANDO GRAY, No. 139309. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentene of the Gogebic Circuit Court and we remand this case to the trial court for resentencing. On remand the trial court shall reconsider the scoring of offense variable 15 in light of this Court's opinion in *People v McGraw*, 484 Mich 120 (2009). The trial court shall sentence the defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Babcock*, 469 Mich 247 (2003). In all other respects, the application for leave to appeal is denied because we are not persuaded that the question presented should be reviewed by this Court. Court of Appeals No. 291210.

CORRIGAN, J. (*concurring*). I concur in the order remanding for resentencing so that the sentencing court can consider whether this Court's decision in *People v McGraw*, 484 Mich 120 (2009), affects the scoring of offense variable 15, but I continue to adhere to my dissenting opinion in *McGraw*, 484 Mich at 136.

WEAVER, J. (*dissenting*). I dissent because I would not vacate the sentence and remand this case. Instead, I would grant leave to appeal in order to reconsider *People v McGraw*, 484 Mich 120 (2009), for the reasons stated in the dissenting opinion in that case, *id*. at 136.

Leave to appeal denied October 30, 2009:

ROBERTS V TITAN INSURANCE COMPANY, No. 138461; reported below: 282 Mich App 801.

CORRIGAN, J. (*dissenting*). I would grant leave and hold that the "family joyriding exception," first articulated in Justice LEVIN's plurality opinion in *Priesman v Meridian Mut Ins Co*, 441 Mich 60 (1992), and applied by the Court of Appeals in *Butterworth Hosp v Farm Bureau Ins Co*, 225 Mich App 244 (1997), is inconsistent with MCL 500.3113(a).

Plaintiff, 12-year old Kyle Roberts, was severely injured when he drove a Ford Explorer into a tree. Roberts did not have permission to use the vehicle and was intoxicated at the time of the accident. The title owner of the vehicle was Steven Vandenburg, with whom Roberts and his mother and next friend, Lillian Irwin, lived. Roberts is unrelated to Vandenburg. Vandenburg had given Irwin permission to use the vehicle and she used it for all her daily needs. At the time of the accident, the only insurance policy Irwin had was a no-fault policy issued to her by defendant Titan Insurance Company. She originally sought the policy for her 1994 Jeep Cherokee but subsequently transferred it to a 1995 Ford Escort. Irwin testified at her deposition that she did not own or use the Escort and that she sought coverage of the vehicle for her son Vernon Austin, III.

Titan denied Roberts personal protection insurance (PIP) benefits.[1] Citing MCL 500.3113(a), Titan argued that Roberts was not entitled to benefits because he had taken the vehicle unlawfully. Roberts filed a complaint, alleging that Titan had breached the policy by denying him PIP benefits. Titan filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing, in part, that Roberts was precluded from receiving benefits under MCL 500.3113(a) because he had taken the vehicle unlawfully. In response, Roberts argued that the "family joyriding exception" to MCL 500.3113(a) applied.

The trial court granted Titan's motion for summary disposition because it concluded that Roberts "[w]ithout question" unlawfully took the vehicle and that "[t]he family joyriding exception to MCL 500.3113(a) as stated by the *Priesman* court is not binding on this court or case." Roberts appealed, and the Court of Appeals reversed on the basis of the application of the "family joyriding exception." *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339 (2009).[2] The Court noted that it disagreed with the *Butterworth* Court's adoption of the exception but that it was required to follow it as binding precedent. *Id*. at 362.

MCL 500.3113 provides, in relevant part:

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[1] Under MCL 500.3114(1), a personal protection insurance policy generally applies "to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident."

[2] The court concluded that Irwin was the "owner" of the vehicle for purposes of the no-fault act, MCL 500.3101(2)(h). *Id*. at 354-356.

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle.

In *Priesman*, this Court considered whether "an underage, unlicensed driver injured while driving his mother's automobile without her knowledge or consent may recover medical benefits from the no-fault insurer of her automobile." *Id*. at 61. In an opinion authored by Justice LEVIN, a plurality concluded that such a driver is entitled to recover no-fault benefits.[3] After noting that the no-fault act does not define "taken unlawfully," the plurality observed that [t]he Uniform Motor Vehicle Accident Reparations Act, a model act considered by the Legislature when the no-fault act was adopted, excepts from coverage a "converter"—a person who steals—unless covered under a no-fault policy issued to the converter or a spouse or other relative in the same household. [*Id*. at 66 (emphasis omitted).]

It concluded that, in departing from the language of the Uniform Motor Vehicle Reparations Act (UMVARA), the Legislature intended to "to except from no-fault coverage thieves while driving stolen vehicles even if they or a spouse or relative had purchased no-fault insurance, and not necessarily to except joyriders from coverage." *Id*. at 67. It reasoned:

> Legislators generally are also parents and sometimes grandparents. Some may have had experience with children, grandchildren, nephews, nieces, and children of friends who have used a family vehicle without permission. Some may have themselves driven a family vehicle without permission.
>
> We are not persuaded that legislators, sitting at a drafting session, concluded that the evil against which the UMVARA exception was aimed was not adequate because it did not cover teenagers who "joyride" in their parents' automobiles, especially automobiles covered by no-fault insurance, in the context that countless persons would be entitled, under the legislation they were drafting, to no-fault benefits without regard to whether they are obliged to purchase no-fault insurance or, if obliged to insure, do in fact do so. [*Id*. at 68.]

Dissenting Justice GRIFFIN wrote that "[a]lthough such an argument may have emotional appeal, it is not supported by the language of [MCL 500.3113(a)], nor by the legislative history of that provision." *Id*. at 73 (GRIFFIN, J., dissenting). Justice GRIFFIN looked to the criminal joyriding statute, MCL 750.414,[4] and concluded that the conduct at issue was "unlawful" because it met all of the elements of unlawful use of a vehicle

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[3] Justice BOYLE concurred in result only.

[4] At the time *Priesman* was decided, MCL 750.414 provided, in relevant part: "Any person who takes or uses without authority any motor vehicle

under that provision. *Id*. at 70-71. He rejected the plurality's suggestion that conduct must result in a criminal conviction in order to be "unlawful," noting that MCL 500.3113(a) "does not require a criminal conviction as a prerequisite to finding that a taking was unlawful." *Id*. at 72. "Moreover, the joyriding statute, applicable to 'any person' who takes a motor vehicle without authority, clearly precludes the inference of an exception for minors or family members." *Id*.

Given the Legislature's consideration of several versions of MCL 500.3113(a) and its decision to depart from the language of the UMVARA, Justice GRIFFIN

> [could not] conclude that the Legislature intended any result other than the result required by the clear and unambiguous language of the statute: Any person who takes a vehicle unlawfully is excluded from no-fault coverage if he is injured while using that vehicle. Like the joyriding statute, § 3113(a) contains no exception for minors or family members. [*Id*. at 75-76.]

In *Butterworth*, the Court of Appeals followed the plurality opinion in *Priesman*, but it noted that its "precedential value" was "somewhat problematic," and that "any joyriding exception seems to be in derogation of the clear language of the statutes." *Butterworth*, *supra* at 249; 249 n 2.

I would grant leave to overrule the "family joyriding exception," which has no basis in the unambiguous language of MCL 500.3113(a). "If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236 (1999). Under the plain language of MCL 500.3113(a), a person who is injured while using a vehicle he took unlawfully is not entitled to PIP benefits. As the Court of Appeals noted in this case, "the only exception to this exclusion is where the person had a reasonable belief that he or she was entitled to take and use the vehicle." *Roberts*, *supra* at 349. Because the "family joyriding exception" is contrary to the plain language of the statute, I would grant leave to overrule it.

YOUNG, J., joined the statement of CORRIGAN, J.

MARKMAN, J. (*dissenting*). I would grant leave to consider whether the "family joyriding exception," first articulated in the plurality opinion in *Priesman v Meridian Mut Ins Co*, 441 Mich 60 (1992), is consistent with MCL 500.3113(a).

SIKKEMA v METRO HEALTH HOSPITAL, No. 138712; Court of Appeals No. 288758.

CORRIGAN, J. (*dissenting*). I would grant defendant's application for leave to appeal because I conclude that plaintiff's notice of intent to file a claim, required by MCL 600.2912b, was insufficient. The notice

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without intent to steal the same, or who shall be a party to such unauthorized taking or using, shall upon conviction thereof be guilty of a misdemeanor . . . ."

establishes that plaintiff's left leg was amputated, although *it does not state when the leg was amputated.* Plaintiff sued two emergency room (ER) doctors and the hospital where the ER was located, alleging that his negligent treatment at the ER in November 2005 caused the need for amputation. The sections of the notice describing the facts and the standards of care applicable to defendants, required by MCL 600.2912b(4)(a) through (d), suggest that the doctors should have diagnosed and treated for compartment syndrome instead of for blood clots and deep vein thrombosis (DVT). The statement of proximate cause, required by MCL 600.2912b(4)(e), states:

> Drs. Hartgerink and Bradley's failure to timely diagnose and treat [plaintiff's] Compartment Syndrome and to comply with the standard of care as set forth in paragraphs 3 and 4 was the proximate cause of his development of severe Compartment Syndrome and his eventual loss of limb. Drs. Hartgerink and Bradley's failure to timely diagnose and treat [the plaintiff's] Compartment Syndrome deprived [plaintiff] of the opportunity for a better treatment result. That loss of opportunity was greater than 50 percent.

The notice fails to explain several crucial elements. First and foremost, it fails to address whether and how compartment syndrome, as opposed to plaintiff's ongoing history of blood clots and DVT, caused the need for amputation. Next, it never discusses whether or how his presenting symptoms in the ER were inconsistent with his history of blood clots and DVT, and thus why a prudent doctor would necessarily test for compartment syndrome. Indeed, although the notice's section on breach alleges that defendants should have consulted other specialists, the notice's fact section specifically admits that defendants *did* consult with those specialists; the specialists refused to evaluate because even they did not suspect compartment syndrome. Most significantly, as noted, the notice never even mentions the date of the eventual diagnosis and amputation, thus leaving the reader with no information concerning the intervening time frame and events between plaintiff's visit to the ER and the unknown date on which compartment syndrome was ultimately suspected and diagnosed. Accordingly, at a minimum, the notice did not apprise defendants of how *their* failure to initially diagnose and treat compartment syndrome *caused* an otherwise avoidable need for amputation. Thus, the notice was statutorily insufficient because it utterly failed to describe the "manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice." MCL 600.2912b(4)(e).

YOUNG, J., joined the statement of CORRIGAN, J.

PEOPLE v MINER, No. 138784; Court of Appeals No. 289506.

CORRIGAN, J. (*concurring*). The Court of Appeals correctly concluded that the sentence imposed in this case, which departed from the sentencing guidelines, was invalid. On September 28, 2007, while driving drunk, defendant crashed into another car, killing the two persons inside. He pleaded guilty to two counts of operating a motor vehicle while intoxicated causing death, MCL 257.625(4). Although the legislative sentenc-

ing guidelines called for a minimum sentence of 43 to 86 months in prison, the sentencing judge imposed five years' probation with the first year to be spent in the county jail.

I am particularly struck by the judge's decision to base this significant downward sentencing departure in part on the judge's finding that defendant "ha[d] done everything that ha[d] been asked of [him]" after his arrest. This finding was clearly erroneous in light of the facts presented in the presentence investigation report; defendant had no objections to the contents of this report. The report indicates that, after his arrest and while on bond, defendant continued to use alcohol daily through October 2007, although the fatal accident occurred on September 28 resulting from his alcohol and drug abuse. He also admitted that he continued to use THC (tetrahydrocannabinol) through December 2007, three months after the accident. This statement itself was inaccurate as he had positive drug tests in January and February 2008. According to a pretrial supervision final report, although his positive tests for benzodiazepines might have been due to a valid prescription for Klonopin, defendant twice tested positive for cannabinoids and once had an abnormally low creatinine level; the report explains that low creatinine levels are indicative of an individual overloading on fluids. Finally, the presentence investigation report suggests that defendant failed to complete one or more of the three substance abuse programs to which he had been referred.

Clearly, defendant did not comply with everything that had been asked of him. At a minimum, he continued to use alcohol and other drugs after the tragic accident caused by his drinking and drug use. Accordingly, I support the Court of Appeals order remanding this case for resentencing within the guidelines.

YOUNG, J., joined the statement of CORRIGAN, J.

KELLY, C.J. (*dissenting*). I dissent from the order denying defendant's application for leave to appeal. I would vacate the portion of the Court of Appeals order directing that defendant be resentenced within the guidelines. Instead, I would remand this case to the circuit court with directions that it must resentence defendant within the guidelines or articulate alternative substantial and compelling reasons for its departure. *People v Babcock*, 469 Mich 247 (2003); *People v Smith*, 482 Mich 292 (2008).

I agree with Justice CORRIGAN's concurring statement insomuch as it accurately recounts the trial court's errors. I object, however, to this Court's implicit endorsement of the clearly erroneous order entered by the Court of Appeals in this case. Nothing in Justice CORRIGAN's statement excuses this Court's failure to enforce MCL 769.34(3), which allows a court to depart from the sentencing guidelines if it gives substantial and compelling reasons for doing so. The court in this case failed to do so. But the court should not be precluded from again imposing a departure sentence if it finds adequate reasons for a departure other than those cited in Justice CORRIGAN's statement.

HATHAWAY, J., joined the statement of KELLY, C.J.

In re HANDORF (EBY v LABO), No. 139742; reported below: 285 Mich App 384.

Summary Disposition November 4, 2009:

ZUNICH v FAMILY MEDICINE ASSOCIATES OF MIDLAND, PC, Nos. 134640 and 134641. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and the orders of the Midland Circuit Court granting the defendants' motions for summary disposition, and we remand this case to the Midland Circuit Court for reconsideration in light of *Bush v Shabahang*, 484 Mich 156 (2009), and *Potter* v *McLeary*, 484 Mich 397 (2009). Court of Appeals Nos. 265027 and 265028.

BOND v COOPER, No. 138653. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and the order of the Oakland Circuit Court granting the defendants' motion for summary disposition, and we remand this case to the Oakland Circuit Court for reconsideration in light of *Bush v Shabahang*, 484 Mich 156 (2009), and *Potter* v *McLeary*, 484 Mich 397 (2009). Court of Appeals No. 273315.

Leave to Appeal Granted November 4, 2009:

In re HANSEN (DEPARTMENT OF HUMAN SERVICES v HANSEN), No. 139507. The parties shall include among the issues to be briefed: (1) whether the respondent's incarceration for a period exceeding two years was an automatic ground for termination under MCL 712A.19b(3)(h); (2) if not, whether the family court erred in finding that the respondent failed to provide proper care and custody when the child's mother, who herself was under the jurisdiction of the family court and unavailable to care for the child, placed the child with the respondent's relative; (3) if the trial court erred in terminating the respondent's parental rights under MCL 712A.19b(3)(h), whether the family court may support termination under MCL 712A.19b(3)(c)(*i*), when the respondent's incarceration and failure to provide proper care and custody were the conditions that led to the adjudication; (4) in the event that termination was appropriate under either MCL 712A.19b(3)(h) or (c)(*i*), whether it was in the best interests of the child under MCL 712A.19b (5); and (5) in evaluating the impact of MCL 712A.19b(5), whether the family court should have applied the post-amendment version of the statute. MCL 712A.19b(5), as amended by 2008 PA 199 (effective July 11, 2008). Reported below 285 Mich App 158.

WEAVER, J. *(dissenting).* I would deny leave to appeal because I am not persuaded that the Court of Appeals was clearly erroneous in its decision to affirm the trial court's order terminating respondent father's parental rights, and I am not persuaded that granting leave will achieve justice in this case.

Leave to Appeal Denied November 4, 2009:

HARRIS v ROBERTS, No. 139113; Court of Appeals No. 289876.

CORRIGAN, YOUNG, and MARKMAN, JJ., would remand this case to the Court of Appeals for consideration as on leave granted.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal November 6, 2006:

DADD v MOUNT HOPE CHURCH AND INTERNATIONAL OUTREACH MINISTRIES, No. 139223. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). The parties shall submit supplemental briefs within 42 days of the date of this order addressing: (1) whether, in light of *Van Vliet v Vander Naald*, 290 Mich 365 (1939), *Westerhouse v De Witt*, 215 Mich 295 (1921), and *Howard v Dickie*, 120 Mich 238 (1899), the reciprocal duty or interest giving rise to the qualified privilege at issue in this case applies to all church members generally, or only to members who are decision-makers engaged in the conduct of church business; (2) when and under what conditions does the qualified privilege cease to apply with regard to persons who are no longer church members; and (3) if an instruction on qualified privilege was required, whether the failure to give this instruction was harmless error in light of the jury's findings on the jury verdict form. The parties should not submit mere restatements of their application papers. Court of Appeals No. 278861.

Summary Disposition November 6, 2009:

DAVIS v FOREST RIVER, INC, No. 136114. On order of the Court, leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered by the Court, we hereby vacate the judgment of the Court of Appeals, and now affirm the substance of the trial court's grant of judgment in the plaintiff's favor for different reasons from those stated by the Court of Appeals.

Immediately after purchasing a recreational vehicle, the plaintiff experienced serious problems with the vehicle. In accordance with the terms of the vehicle's express warranty, the plaintiff repeatedly delivered the vehicle to an authorized dealer for repairs, which were to be remedied within a "reasonable time, not to exceed sixty days." However, at one point, the vehicle was not returned to the plaintiff for 169 days, and, in total, it was out of service for 219 days during its first year. Because of continuing problems with the vehicle, the plaintiff was required to cancel a number of planned trips. The plaintiff has not used the vehicle since June 2003 because he fears additional breakdowns while on the road.

The Uniform Commercial Code applies to this breach of warranty action, as it involves a sale of goods. MCL 440.2102. Concerning the measure of damages, subsection 2714(2) of the code, MCL 440.2714(2), provides that "the measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." "The calculation of damages under this general rule presumes that the purchaser will retain title to the goods." *Murphy v Mallard Coach Co,* 179 AD2d 187, 194 (NY App, 1992). In view of the specific history of this matter, we find that "special circumstances" warrant a departure from the general measure of damages. In accord,

Leavitt v Monaco Coach Corp, 241 Mich App 288, 298-99 (2000). Because these circumstances have irreparably, and reasonably, damaged the plaintiff's confidence in the integrity of this vehicle, if he were to retain title, he would not "be put in as good a position as if [defendant] had fully performed." MCL 440.1106. See also, *Dynamic Recycling Services, Inc v Shred Pax Corp*, 569 NE2d 570, 578 (Ill App, 1991) ("The 'special circumstances' exception must be viewed in light of section 1-106 of the Code."). We, therefore, conclude that the plaintiff should be allowed to relinquish title. In light of this, the measure of damages under MCL 440.2714(2) is consistent with the trial court's primary grant of judgment in the plaintiff's favor. These damages include the purchase price of the vehicle less the sum paid to the plaintiff pursuant to case evaluation, and repayment of interest paid on the loan and statutory interest pursuant to MCL 600.6013(8), to the extent that such awards of interest are not duplicative. This order does not affect the trial court's award of attorney fees. Given our resolution of the plaintiff's breach of warranty claim and the award of damages, it is unnecessary to reach the remaining issues argued before this Court. Reported below: 278 Mich App 76.

PEOPLE V WEDDELL, No. 137374. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the trial court's judgment. In this case, the defendant presented evidence to support her theory that she was not guilty by reason of insanity. The prosecutor rebutted that evidence and impeached the defendant's witnesses. "It is the province of the jury to determine questions of fact and assess the credibility of witnesses." *People v Lemmon*, 456 Mich 625, 637 (1998). In light of the evidence presented, the trial court did not abuse its discretion by denying the defendant's motion for a new trial on the basis that the verdicts were against the great weight of the evidence after a jury convicted the defendant of being guilty but mentally ill of fleeing and eluding a police officer resulting in a collision, MCL 257.602a(3)(a), and malicious or willful destruction of police property, MCL 750.377b. Court of Appeals No. 277067.

CORRIGAN, J. (*concurring*). I concur with the order reinstating the jury's verdict of guilty but mentally ill. I write to underscore why the Court of Appeals erred when it reversed the jury's verdict of guilty but mentally ill as against the great weight of the evidence and held that the trial court abused its discretion by denying defendant's motion for a new trial. The jury's verdict was not against the great weight of the evidence. Instead, this thoughtful jury's verdict was well-supported on the only issue before it—defendant's state of mind during the crime.

Not only did the prosecutor successfully impeach the testimony of the lone forensic psychologist who supported defendant's claim of insanity, but videotaped evidence of the crime and lay witness testimony supports the jury's measured and sound conclusion. The jury found that defendant was guilty but mentally ill on the charge of eluding a police officer, resulting in a collision and malicious or willful destruction of police property. Because the evidence fully supported the jury's verdict, I concur with the peremptory order reinstating the jury verdict.

I. BACKGROUND

Defendant, a veteran attorney, suffered for some time from bipolar I disorder. On February 10, 2006, she drove her vehicle into Fremont with a large duffle bag attached to the hood ornament. An off-duty police officer observed her vehicle and activated his overhead lights. When defendant slowly accelerated away from the officer, he activated his siren. During a 12-minute, four-mile pursuit, defendant stopped at a traffic light, traveled in the correct lane, and did not speed. At one point, however, defendant slammed on her brakes, causing the officer to collide with her vehicle and damaging his vehicle. After the collision, defendant took off. A second police officer joined the pursuit. The second officer used the video recording system in her vehicle to record the pursuit after the initial collision until defendant's apprehension.

Soon after the second officer became involved, two other police officers joined the pursuit. After a few failed attempts, the officers successfully surrounded defendant's vehicle and repeatedly instructed her to exit from it. Instead, defendant drove forward, colliding with the same vehicle involved in the initial collision. When she could not escape using her vehicle, the police forcibly removed her from it. Defendant remained in the backseat of a police vehicle for about an hour before an officer transported her to a nearby hospital for a psychiatric evaluation. The officers also recorded defendant's behavior in the backseat. Both video recordings were viewed by the jury.

Defendant was charged with eluding a police officer resulting in a collision[1] and with malicious or willful destruction of police property.[2] Before the trial, defendant moved to disqualify the assigned judge, the elected prosecutor, and the entire prosecutor's office on several bases. Defendant averred that disparaging comments had been made during the 1996 campaign when defendant opposed the assigned judge for a circuit judgeship. Defendant claimed that the assigned judge could not be "totally objective." Defendant also moved to disqualify the elected prosecutor because the prosecutor had filed a grievance against her with the Attorney Grievance Commission in 1997. Defendant claimed that the dismissal of this grievance led to a "personal vendetta" by the prosecutor. Finally, because the prosecutor supervised the assistant prosecuting attorneys, defendant argued that the entire prosecutor's office should be recused.

The assigned judge withdrew on his own motion, so a different judge was assigned. That judge thereafter denied defendant's motion to disqualify the prosecutor and the entire prosecutor's office.[3] Defendant next

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[1] MCL 257.602a(3)(a).

[2] MCL 750.377b.

[3] The Court of Appeals correctly held that "defendant's argument that the prosecutor harbored a personal grudge against her and should have been disqualified lacks merit." *People v Weddell*, unpublished opinion per curiam of the Court of Appeals, issued July 31, 2008 (Docket No. 277067), p 5.

interposed legal insanity as an affirmative defense.[4] Consequently, the trial court ordered defendant to undergo examinations regarding her competency to stand trial[5] and her criminal responsibility.[6] Dr. Peggy Heffner, the assigned psychologist from the Center for Forensic Psychiatry, subsequently opined that defendant was competent to stand trial but was not criminally responsible.

From the outset, the prosecutor and defense counsel acknowledged the very narrow issue before the jury. Both sides agreed that the charged offenses took place and that defendant suffered from a mental illness. The dispositive issue, according to both counsel, was whether defendant was legally insane or guilty but mentally ill when the crime occurred. In his opening statement, the prosecutor argued that only one witness, Dr. Heffner, was qualified to testify about the legal differences between a verdict of not guilty by reason of insanity and a verdict of guilty but mentally ill. The prosecutor asserted that cross-examination would reveal that Dr. Heffner's testimony was nonetheless insufficient to meet defendant's burden of showing legal insanity by a preponderance of the evidence. Defense counsel disagreed, arguing that the evidence would show that defendant was legally insane because she was unable to differentiate between right and wrong and to conform her conduct to the law.

The trial lasted two days. The prosecutor called six witnesses and introduced 13 exhibits, including the video recording of the crime discussed earlier. The trial court thereafter denied defendant's motion for a directed verdict, finding sufficient evidence to create a jury question. Defense counsel then called eight witnesses and introduced one exhibit, the video recording of defendant in the back of the police vehicle. Because the trial court permitted the jury to ask questions, the jurors submitted several questions to various witnesses after the court and counsel filtered them. During the attorneys' closing arguments, the prosecutor and defense counsel reiterated that the dispositive issue was whether defendant was legally insane or mentally ill at the time of the charged offenses. Defense counsel explained, "[I]f you decide that I have not proven by a preponderance of the evidence, [that] it's more likely than not that she was legally insane at the time of the crime, . . . then your verdict is guilty but mentally ill. If however you find that I have proven by a preponderance, not beyond a reasonable doubt, just by a preponderance, that[] [it is] more likely than not that she was legally insane at the time of the crime, then your verdict is guilty by reason of insanity." After deliberating less than one hour, the jury found defendant guilty but mentally ill of both offenses.

Defendant moved for a new trial, asserting that the verdict was against the great weight of the evidence. The prosecutor responded that the jury's verdict should stand because defendant failed to shoulder her burden of proof concerning legal insanity at the time of the crime, and

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[4] See MCL 768.21a.

[5] MCL 330.2026(1).

[6] MCL 768.20a(2).

further that the jury was free to disregard an expert opinion. The trial court denied defendant's motion. On appeal, the Court of Appeals reversed and remanded for a new trial.[7] The Court of Appeals concluded that "the jury's verdict unquestionably was against the great weight of the evidence" because of "the absence of evidence in the record contradicting the conclusion that defendant was legally insane at the time she committed the instant offenses."[8] The Court of Appeals manifestly erred by holding that the record lacked such evidence. This record was replete with evidence in support of the jury's conscientious verdict.

II. ANALYSIS

We review a trial court's denial of a motion for new trial for abuse of discretion.[9] An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of principled outcomes.[10] To determine whether a verdict is against the great weight of the evidence, a reviewing court analyzes whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.[11] Additionally, "unless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination."[12]

In this case, the Court of Appeals erred when it concluded that the jury's verdict was against the great weight of the evidence and held that the trial court abused its discretion by denying defendant's motion for a new trial. The Court merely emphasized the number of mental health experts who testified on defendant's behalf without analyzing the substance of their testimony. The Court of Appeals also opined that lay testimony buttressed the unanimous testimony of the mental health experts. Yet, the Court offered no record support for this bald contention. Moreover, the Court entirely ignored substantial defects in defendant's case.

A. TESTIMONY OF DEFENSE MENTAL HEALTH EXPERTS

Three mental health experts testified that defendant was legally insane. Only one of those experts, Dr. Heffner, specialized in forensic psychology. The other two mental health experts specialized in child and adolescent psychiatry and general psychiatry. Both Dr. Dhanu Mahesh

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[7] *People v Weddell*, *supra*.

[8] *Id.* at 5.

[9] *People v Cress*, 468 Mich 678, 691 (2003).

[10] *People v Babcock*, 469 Mich 247, 269 (2003).

[11] *People v Lemmon*, 456 Mich 625, 627 (1998).

[12] *Id.* at 645-646 (citation omitted).

and Dr. Curt Cunningham candidly acknowledged having no expertise in forensic psychology. Ignoring this weakness, the Court of Appeals emphasized the number of defense experts. The Court ignored outright the prosecutor's effective cross-examination that discredited these experts' views—testimony that the jury heard and heeded. For example, when defense counsel asked whether defendant could tell the difference between right and wrong, Dr. Mahesh responded, "[T]hat can be at so many different levels, you know, so I don't know how to answer that."

The prosecutor also questioned how Drs. Mahesh and Cunningham could opine about defendant's mental state at the time of incident when they did not see her until after her arrest. The prosecutor specifically asked Dr. Cunningham how he could offer a professional opinion regarding insanity "even though you don't know any of the details of the crime and how she was acting in that crime beyond what was told to you by defendant and her husband." Dr. Heffner admitted that she would never "make a determination of someone's legal responsibility without first reviewing the police report or some third-party's source that described the incident." Notably, Drs. Mahesh and Cunningham were impeached because they did not review the police report or any third-party accounts of the incident. They relied only on defendant's and her husband's accounts of what transpired. Thus, the prosecutor effectively discredited this defense testimony.

The prosecutor also elicited testimony that neither Dr. Cunningham nor Dr. Heffner compensated for the probability that defendant, as a veteran attorney, understood better than the general population the difference between a verdict of not guilty by reason of insanity and a verdict of guilty but mentally ill. Dr. Heffner acknowledged that among the approximately 100 individuals that she evaluates each year, only "two or three percent" of them were highly educated professionals. Nevertheless, Dr. Heffner could not recall whether she spoke to defendant about the conceptual difference between a verdict of guilty but mentally ill and not guilty by reason of insanity in light of defendant's professional background.

Moreover, the prosecutor repeatedly questioned the defense experts regarding whether defendant could have eluded the police when she was suffering symptoms of mental illness, and only after a triggering event, such as crashing into the officer's vehicle or being arrested, did she suffer a full manic episode that rendered her legally insane. The prosecutor elicited testimony that none of the defense experts could specify when defendant's mental state crossed the line from mental illness to legal insanity. Significantly, Dr. Heffner could not opine about the exact moment defendant became legally insane:

> *Q.* All right. Can you say with any sort of certainty when the Defendant lost her ability to be sane?
>
> *A.* At the exact moment?
>
> *Q.* Yes.
>
> *A.* Certainly I could not.
>
> *Q.* How do you know it didn't happen in the middle of the chase? How do you know that [sic, the] first decision she made to flee and elude the police was not made when she was sane?

A. (No response.)

Q. You can't answer that question?

A. I cannot answer that.

The prosecutor reiterated the importance of Dr. Heffner's inability to answer questions regarding the temporal shift between mental illness and legal insanity during his closing argument, stating:

> So there's this sort of undulation like this of mania, and the doctor said some certain point you reach the point where you're insane about this line. In other parts you're still manic but not insane. All right? So I asked the doctor, "Tell me at what point she reached insanity along this continuum, Dr. Heffner; can you answer that question?" And her answer to that question was, "I cannot say." She has not given you enough of an informed opinion in order for you to find by a preponderance of the evidence that at the time of the crime the defendant was legally insane.

Having carefully reviewed the record, I conclude that the Court of Appeals wrongly emphasized the *number* of experts testifying on defendant's behalf instead of the *nature and quality* of their testimony.

B. TESTIMONY OF LAY WITNESSES AND VIDEO RECORDINGS INTRODUCED AS EXHIBITS

I also reject the suggestion of the Court of Appeals that various lay witnesses, including the police officers, bolstered the testimony of the defense experts. This assertion is utterly unsupported. Indeed, the record supports the opposite conclusion—defendant, although mentally ill, did know right from wrong and could conform her conduct to the requirements of the law.

Deputy Sheriff Phil Green testified that defendant stopped at a traffic light, remained in the correct lane of travel, and did not speed. The video recording corroborated Deputy Sheriff Green's testimony in every respect. Additionally, the evidence showed that defendant was alert and responsive even after the criminal episode. Sergeant Tim Deater testified that after her arrest and the advice of rights, defendant stated that she understood her rights and would answer questions. A video recording also captured this pertinent exchange.

Accordingly, I reject the incorrect assertion by the Court of Appeals that lay testimony corroborated the defense experts' testimony.

C. PROVINCE OF THE JURY

This Court has recognized that "[i]t is the province of the jury to determine questions of fact and assess the credibility of witnesses."[13] A

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[13] *Id.* at 637.

jury enjoys the same power to assess the credibility of experts and lay persons regarding the issue of insanity. "The jury is the ultimate judge of defendant's sanity at the time of the crime, and in this case, since it had before it evidence of defendant's behavior and state of mind upon the basis of which it could have found defendant sane at that time, it was not bound by the expert opinion testimony of the doctor."[14] When instructing the jurors, the trial court explained the importance of credibility determinations about expert witnesses:

> You've heard the testimony from witnesses who are qualified in the area of psychiatry and the treatment of mental illness. . . . However, you do not have to believe an expert's opinion. Instead, you should decide whether you believe it and how important you think it is. When you decide whether you believe an expert's opinion, think carefully about the reasons and facts that he or she gave for their opinion, and whether those facts are true. You should also think about the expert's qualifications, and whether their opinion makes sense when you think about all the other evidence in the case.

As the trial court explained, it is the jury's duty to resolve issues concerning expert witness credibility. Here, the trial court expressly instructed the jurors to decide whether it believed an expert's opinion and how important it believed that expert's testimony to be. Jurors are presumed to follow instructions.[15]

Nevertheless, our Court of Appeals failed to honor the verdict of twelve citizens. Instead, it made its own credibility determination that "the unanimous testimony from the mental health experts—preponderates heavily against the verdict."[16] In so doing, the Court of Appeals ignored the jury's right to disregard an expert's opinion. It is troubling that the Court of Appeals invaded the province of the jury when the record reveals that the jurors were attentive and engaged throughout the trial, as illustrated by their probing questions.[17]

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[14] *People v Krugman*, 377 Mich 559, 563 (1966); see also *Vial v Vial*, 369 Mich 534, 537 (1963) ("Indeed, no trier or triers of fact are bound to accept opinion testimony, however expert and authoritative, as they proceed to determine issues of fact duly committed to them for finding or verdict.").

[15] *People v Graves*, 458 Mich 476, 486 (1998).

[16] *People v Weddell*, *supra* at 4.

[17] The jurors asked about ten questions during the two day trial. Because of the objectionable nature of some questions, the trial court declined to allow them. Nevertheless, the trial court, with the attorneys' consent, allowed the following questions:

> (1) Doctor, do you feel that Ms. Weddell might be a danger to others if another episode could occur when she is driving or otherwise?

The jury's verdict reflected its obvious finding that defendant did not establish by a preponderance of the evidence that she "lacked the substantial capacity either to appreciate the nature and quality or the wrongfulness of . . . her conduct or to conform . . . her conduct to the requirements of the law."[18]

D. DEFENDANT'S MOTION FOR A NEW TRIAL

Finally, the trial court's decision to deny defendant's motion for a new trial did not fall outside the range of principled outcomes. The trial court explained:

> In this case the motion for the judgment not withstanding [sic] the verdict or alternatively for a new trial focused in on the issue of the determination of the jury to reject the defendant's defense of insanity. Instead, in this case the jury agreed that there was a mental

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> (2) Doctor, would it be possible for a person with a mental illness to have the knowledge to fake an episode like this to some extent?
>
> (3) Do you have any reason to believe that Ms. Weddell was doing anything to try to fake symptoms on the date that you saw her?
>
> (4) Doctor, do you feel Ms. Weddell has her bipolar disorder under control at this time?
>
> (5) What is the likelihood of a reoccurrence of another episode?
>
> (6) Do you think she has insight into her situation so that she would recognize when she was entering into one of these episodes similar to what led to the incident that we're here for?
>
> (7) If you had seen Ms. Weddell before the Friday episode that we've been talking about here and after her husband had called you, do you believe this incident would have been avoided?
>
> (8) The testimony yesterday from the police officers is that Ms. Weddell was ignoring their signals to stop her vehicle, but she was still stopping at traffic signals. Yet when she was finally stopped she was nonresponsive to verbal commands. Are those factors consistent with someone who is experiencing a full-blown psychotic episode?

[18] MCL 768.36(1)(c). MCL 768.36(1)(a) and (b) provide two additional requirements to find defendant guilty but mentally ill:

> (a) The defendant is guilty beyond a reasonable doubt of an offense.
>
> (b) The defendant has proven by a preponderance of the evidence that he or she was mentally ill at the time of the commission of that offense.

> illness component, but by its verdict determined that it didn't rise to the level of insanity or what we call legal responsibility.
>
> Under our law, this is probably about the only issue that I know of where the defendant does have the burden of proof. The burden of proof on her part is by the preponderance of the evidence. And by virtue of the jury's verdict, obviously they reached the conclusion that she did not meet the burden of proof on that issue, although agreeing that she did suffer from a mental illness.
>
> Now in reviewing these motions, the law is clear that the court is not to sit as a thirteenth juror, that ordinarily the court is not to substitute its judgment for the judgment of the jury ordinarily [sic]. In this case that even if it's a situation where I as a Judge very likely or possibly could have reached a different view, that doesn't necessarily mean I set aside the jury verdict.
>
> In this case we had the — the defense points out that there was expert testimony, and basically all of the experts offered the opinion that she was not legally responsible. However, the law is clear that the mere opinion of experts is not binding on the jury. In fact, there's a standard instruction where I read to the jury that they are not obligated to accept the opinion of experts. They can consider the opinions of the experts if they feel that the evidence supports that opinion.
>
> So in this case, even though it's a situation where I very well may have reached a different conclusion, the Court having taken a hard look at this because I feel that there was direct evidence presented regarding her behavior, and also the prosecutor's examination of the experts is sufficient to support the jury's conclusion that she did not meet her burden of proof.

In light of the trial court's explanation, I reject the Court of Appeals view that the trial court's decision was unprincipled. The trial court acknowledged that it might have reached a conclusion different from that of the jury. Nevertheless, the trial court explained that it would be inappropriate to "substitute its judgment for the judgment of the jury." Moreover, the trial court took "a hard look" at this case before concluding that the jury's conclusion that defendant "did not meet her burden of proof" was adequately supported. The trial court had an excellent, first hand opportunity to assess the evidence and evaluate whether that evidence preponderated so heavily against the jury's verdict that a miscarriage of justice would result if the verdict were allowed to stand.[19] Accordingly, I conclude that the trial court's decision fell within the range of principled outcomes.

III. CONCLUSION

The Court of Appeals manifestly erred when it concluded that "the jury's verdict unquestionably was against the great weight of the

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[19] *Lemmon, supra* at 627.

evidence."[20] The record reveals ample evidence in support of the jury's conclusion that defendant did not meet her burden of proof by a preponderance of the evidence. "As the trier of fact, the jury is the final judge of credibility."[21] Moreover, the jury could and did lawfully disregard an expert's opinion as the cross-examination of defense experts discredited their opinions. Consequently, I would respect the jury's right to determine whom to credit and whether defendant shouldered her evidentiary burden. Because the jury's verdict was fully supported by the evidence and because the trial court did not abuse its discretion, I concur with the order reinstating the jury's verdict.

KELLY, C.J. (*dissenting*). I dissent from the order peremptorily reversing the Court of Appeals decision. The evidence is overwhelming that defendant was legally insane at the time she committed the offenses in question. The Court of Appeals correctly held that the jury's verdict of guilty but mentally ill is against the great weight of the evidence.

FACTS AND PROCEDURAL HISTORY

After an automobile accident, defendant was charged with fleeing and eluding a police officer resulting in collision[1] and malicious or willful destruction of police property.[2] A jury found her guilty but mentally ill. Defense counsel moved for a new trial on the basis that the verdicts were against the great weight of the evidence. The trial court denied the motion. The Court of Appeals unanimously held that the trial court had abused its discretion and that defendant was entitled to a new trial because the verdicts were against the great weight of the evidence.

Defendant has been diagnosed as suffering from bipolar I disorder.[3] Her bipolar disorder was so severe for a period before the incident in question that she was committed to a psychiatric hospital. On February 8, 2006, her disorder began acting up again. Defendant awoke in the middle of the night screaming. She told her husband she was experiencing an "in and out" feeling. The next day, defendant's problems did not go away. She had trouble thinking clearly, was acting in a confused manner, and kept repeating herself. Defendant's husband wanted to take her to the doctor immediately, but the doctor could not see her until two days later.

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[20] *People v Weddell*, *supra* at 5.

[21] *Lemmon, supra* at 637 (quotation marks and citation omitted).

[1] MCL 257.602a(3)(a).

[2] MCL 750.377b.

[3] Of the four types of bipolar disorder, bipolar I is the most severe. It is "defined by manic or mixed episodes that last at least seven days, or by manic symptoms that are so severe that the person needs immediate hospital care." National Institute of Mental Health, *Bipolar Disorder*, available at <http://www.nimh.nih.gov/health/publications/bipolar-disorder/complete-index.shtml>.

On the day of defendant's appointment with her doctor, she went to the garage and got into a family car. Instead of putting the car in reverse to back out, as one would expect, she put the car in drive. She accelerated forward, slamming the vehicle into the garage wall hard enough to crack the wall. A large hockey bag on a shelf became affixed to the front grillwork of the car when she slammed into it. Lawn chairs became wedged under the car. Shattered glass was everywhere. With the bag hanging from the grille, defendant backed out of the garage and onto the road, dragging the lawn chairs under her.[4]

An off-duty police officer spotted defendant's car with the large bag hanging from the front and attempted to stop it. But defendant did not stop. She continued down the road, sometimes obeying traffic signals, other times driving erratically. At one point, defendant drove into oncoming traffic and onto the opposite shoulder of the road. At other times, she drove in the proper traffic lane.

Officers eventually boxed in defendant's vehicle. They found defendant in a confused state. She did not acknowledge the police officers who ordered her out of her car at gunpoint. The officers had to smash the window of her car and pull her out. She was incoherent, mumbling gibberish, repeating "billions and billions of years ago." At one point, it appeared that she was talking to someone who was not there. She asked if she could "wake up now."

Defendant's husband of 17 years eventually arrived at the scene. She did not recognize him. Realizing that defendant was suffering from a medical problem, the arresting officers did not take her to jail, but drove her directly to the hospital. She was transferred to a psychiatric ward. Defendant's delusions continued at the psychiatric facility, where she told the medical staff, "[I]t's a nuclear disaster," "It's a million years ago, isn't it?" "I'm in the womb," "This is a test," "Is the test over yet?" and "This is a disaster. Nuclear disaster. Nuclear disaster." Defendant's delusions continued into the night, and did not stop until the doctors gave her drugs that put her to sleep. She remained at the psychiatric facility for six days.

ANALYSIS

A trial court abuses its discretion when, in denying a motion, it renders a decision that is against the great weight of the evidence.[5] Insanity is an affirmative defense. A defendant is legally insane when he or she lacks "substantial capacity either to appreciate the nature and

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[4] Attached are pictures of defendant's car with the hockey bag attached. As one can see, the hockey bag is bright yellow and very large, spanning half of the front end of the vehicle. It is no surprise that an officer at a distance from the vehicle was able to spot it. What is noteworthy is that defendant, who had just slammed into the bag and was within a few feet of it, was oblivious to its presence.

[5] *People v Abraham,* 256 Mich App 265 (2003).

quality or the wrongfulness of his or her conduct or conform his or her conduct to the requirements of the law."[6] The defendant has the burden of proving insanity by a preponderance of the evidence.[7] Proof by a preponderance of the evidence requires less certainty than proof beyond a reasonable doubt. The defendant merely needs to establish that "the evidence supporting [defendant's insanity] outweighs the evidence supporting its nonexistence."[8]

DEFENDANT'S BURDEN

In this case, defendant attempted to meet her burden through the testimony of several mental health experts, laypersons, and other evidence.

Dr. Peggy Heffner is employed by the state of Michigan as a psychologist and has worked at the Center for Forensic Psychiatry since 1976.[9] She specializes in forensic psychology and has evaluated approximately 2000 patients. She testified that defendant was legally insane at the time of the offense. She also stated:

> My opinion is that at the time of the alleged offense not only was Mrs. Weddell evidencing a mental illness, which is another part of the connection to that, but also as a result of that mental illness she was unable to understand the nature and quality of her behavior or the wrongfulness of her behavior, and she was unable to conform her behavior to the requirements of the law.

Dr. Curt Cunningham is an experienced psychiatrist who has treated the defendant for her bipolar disorder since 1998. He has qualified as an expert witness at least half a dozen times and has testified before on the issue of legal insanity. He stated:

> *A.* Well, if I were to summarize my opinion about everything that I've said so far, Ms. Weddell at the time of this accident was clearly psychotic. She was delusional. Was not responsible for her behavior. I have absolutely no doubt about that. This was complete—There just simply is no other explanation. So if that's the kind of thing that you were asking me, that's my opinion.
>
> *Q.* All right. And like you said, you've testified before about people's legal insanity at the time of the offense, correct?

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[6] MCL 768.21a(1).

[7] MCL 768.21a(3).

[8] See *Blue Cross & Blue Shield of Michigan v Governor,* 422 Mich 1, 89 (1985).

[9] The state of Michigan runs the Center for Forensic Psychiatry as an arm of the Department of Mental Health. The Center provides diagnostic evaluation of patients that the criminal courts commit to the Department of Mental Health.

A. Yes.

* * *

Q. Did [defendant] lack the substantial capacity to either appreciate the nature and quality of or the wrongfulness of her conduct, or to conform her conduct to the requirements of the law?

A. Yes, she lacked that capacity.

Q. Now when you say "yes," there are a couple or's and that sort of thing in here, so to break this question up a little bit more: Did she lack the substantial capacity to appreciate the nature and quality of her actions?

A. Yes.

Q. Did she lack the substantial capacity to appreciate the wrongfulness of her conduct?

A. Yes.

* * *

Q. More specifically, did she lack the substantial capacity to conform her conduct to the requirements of the law?

A. Yes.

Dr. Cunningham also testified that defendant lacked the ability to tell the difference between right and wrong on the date of the incident.

Dr. Dhanu Mahesh is a staff psychiatrist who saw defendant numerous times while she was in the hospital. The trial court qualified her as an expert in adult psychiatry. In Dr. Mahesh's opinion, defendant was legally insane on the day of the offense:

Q. Because of her mental illness, in your professional opinion, did [defendant] lack the capacity to appreciate the nature and quality of her conduct?

A. Yes.

Q. How do you reach that conclusion?

A. Because the mania itself makes people have very poor judgment.

Q. In your professional opinion, because of her mental illness, did Ms. Weddell lack the capacity to appreciate the wrongfulness of her actions?

A. Yes.

Q. And why do you believe that?

A. Because she was in a delusional state and she was not really aware of what she was doing; cognizant of what she was doing.

Q. And as a result, was she unable to conform her conduct to the requirements of the law?

A. Yes.

* * *

Q. Do you believe that she was legally insane on the day of the offense?

A. Yes, I believe so.

Dr. Julie Gage was the emergency room physician who saw defendant when the police brought her to the hospital. Dr. Gage diagnosed defendant as "overtly actively psychotic." She testified that defendant did not know where she was, that her behavior was "very disjointed," and that she was disconnected from reality. Defendant continued her ramblings to Dr. Gage about nuclear disaster and "millions of years ago."

Lance Decker is the mental health facilitator of the psychiatric facility to which defendant was brought after her stay in the hospital. He spent eight hours with defendant on the first day he met her. Mr. Decker testified that, when he met with defendant, she was talking rapidly and not making sense. He also testified that defendant "was not orientated to time, date or place" and "did not know where she was at." Finally, Mr. Decker stated that defendant "was not capable of caring for herself in any shape, manner or form."

Defendant's husband testified about defendant's history of mental problems, her abnormal behavior just before the day of the incident, and her behavior following the accident. Police officers also testified about defendant's bizarre behavior on the day of the incident.

As the Court of Appeals noted, the circumstantial evidence surrounding the incident and testimony from lay persons buttress the testimony from the mental health experts. There was no rational reason for defendant to flee from the police. She had not committed a crime and was not under the influence of drugs or alcohol. Her behavior was abnormal. She drove into her garage wall. She left the garage door open with lawn chairs strewn across the street. Her bizarre behavior occurring immediately before and after the charged offense only strengthens the mental health experts' determination that defendant was legally insane at the time she committed the offense.

Defendant went above and beyond her burden of proving the defense of insanity by a preponderance of the evidence. Once she met this burden, the prosecution was required to establish defendant's sanity beyond a reasonable doubt.[10]

PROSECUTION'S BURDEN

The prosecution presented very little evidence on the issue of defendant's sanity. It did not present a single mental health expert. Instead, it attempted to impeach the mental health experts who testified in support of defendant. However, the experts would not budge on their determination that defendant was legally insane.

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[10] *People v Murphy,* 416 Mich 453, 463-464 (1982).

In closing argument, the prosecution suggested to the jury that the testimony of one of the mental health experts, Dr. Heffner, that defendant "faked good" during the Minnesota Multiphasic Personality Inventory Test (MMPI) confirmed that defendant was not insane. This flies in the face of *Murphy,* where the prosecution also tried to use the results of the MMPI to undermine the defendant's insanity claim.[11] This Court stated that an abnormal MMPI is not "evidence of sanity."[12] Therefore, the results do not help the prosecution meet its burden. Furthermore, this argument is particularly disingenuous in this case.

"Faked good" sounds like defendant tried to fake a mental condition. But Dr. Heffner explained that "faked good" is a trade term used by psychologists to mean that the subject is denying the presence of problems. So, what defendant did here was pretend that she was sane. If she had tried to "fake" that she was insane, she would have attempted to make the doctor think she was worse off than she really was. Dr. Heffner explained that this is called "faking bad." The fact that defendant tried to underplay her mental problems to Dr. Heffner actually supports the defense theory of insanity, not the prosecution.[13]

The prosecution also attempted to use the testimony of the arresting police officers to meet its burden. Deputy Phil Green testified that, although defendant had a hockey bag hanging from the front of her car, defendant stayed in the correct traffic lane during "most of the chase." But he admitted that she accelerated erratically, slammed on her brakes, swerved her vehicle, failed to stop for the police, and drove into oncoming traffic. Deputy Green also testified that, although defendant did not pull over right away, her driving was not like that of a person trying to flee and elude the police. The fact that defendant followed some traffic laws is not sufficient to overcome the substantial evidence that defendant could not conform her conduct to the requirements of the law. Some competent evidence of sanity may suffice when a defendant has introduced only token evidence of insanity. However, this same evidence of sanity may be totally inadequate when the defendant's evidence of insanity is substantial.[14]

The prosecution also argues that defendant did not become delusional until after she had committed the offenses. This simply is not supported by the evidence. Thirteen witnesses in all testified at trial. All 13, including the prosecution's own witnesses, offered evidence that defendant was delusional. Three of the witnesses were mental health experts. All three mental health experts found that defendant was legally insane at the time of the offense.

Perhaps most persuasive of all, the state of Michigan's own forensic center, which evaluates thousands of individuals a year for the insanity

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[11] *Id.* at 467.

[12] *Id*.

[13] The prosecution also made this argument in its brief to the Court of Appeals.

[14] *Murphy, supra* at 464.

defense, found defendant legally insane at the time of the offense. The lay testimony and circumstantial evidence supported the experts' determination. Defendant drove straight into a garage wall and then back out onto the street, oblivious to a duffel bag attached to the car and lawn chairs dragging beneath. Defendant's actions after the incident were no better: mumbling incoherent phrases about nuclear disaster and millions of years from now. This behavior is explicable in light of defendant's history of mental illness.

It is not credible, as the prosecution contends, that defendant had a moment of lucidity amidst all this behavior, during which she committed the offenses in question. The prosecutor's "moment of clarity" theory also flies in the face of defendant's diagnosed bipolar I disorder. The disorder is specifically characterized by manic episodes lasting *at least seven days*. Defendant began exhibiting delusional symptoms three days before the incident with police. Medical experts testified that a person can continue mundane, routine behaviors, such as obeying traffic signals, when suffering from a manic episode. The prosecution's theory that defendant became sane in the middle of a manic episode, only to slide back in after she committed criminal acts, flies in the face of the evidence. Unsupported speculation is not evidence that defendant was sane.

The evidence offered by the prosecution was wholly insufficient to convince any rational trier of fact that the defendant was sane beyond a reasonable doubt. The prosecution failed to meet its burden of proving that defendant was sane.

RESPECTING PRECEDENT

The Court of Appeals decision is not only appropriate, it is compelled by this Court's decision in *People v Murphy*.[15] In *Murphy*, substantial evidence was offered to show that the defendant was insane. To rebut this, the prosecution used the testimony of four police officers whose contact with the defendant was minimal and occurred only after the crime. The arresting officers testified they did not observe a "mental problem" with defendant.[16] This Court held that "against such a strong showing of insanity, the testimony of the police officers failed to supply evidence which could support a finding of sanity beyond a reasonable doubt."[17] This Court concluded that the prosecutor needed to present something more than minimal evidence of sanity under the circumstances, where all of the vital evidence pointed toward the defendant's insanity. Of particular importance, this Court stated that a "laywitness's observation of abnormal acts by the defendant has greater value as

[15] *Murphy, supra*.

[16] *Id.* at 465.

[17] *Id*.

evidence than testimony that the witness never observed an abnormal act unless the witness had prolonged and intimate contact with the accused."[18]

In the current case, the prosecution introduced even less evidence of sanity than in *Murphy*. As in *Murphy,* the police officers here observed defendant for a short time, much less than did the mental health experts or her husband. Moreover, it cannot be said that the arresting officers saw no mental problem in defendant's behavior: as soon as her husband got to the scene, they asked if his wife had a mental problem, then her husband took her directly to the hospital for a psychiatric evaluation. The officers believed that defendant had a mental problem.

Justice CORRIGAN asserts that the lay witnesses who testified did not bolster the testimony of the defense experts. She points to police officers' testimony that defendant followed some traffic laws and responded to their questions saying that she understood her rights. However, as discussed previously, the officers' observation of abnormal acts such as erratic driving and delusional behavior is of greater value in evaluating defendant's insanity than minimal normal behavior.[19] The officers' testimony that defendant did some things normally only has slight probative value.[20] A defendant need not exhibit only abnormal behavior to be legally insane.

The overwhelming weight of the evidence is that defendant was insane at the time of the offense. Moreover, the prosecutor failed to introduce sufficient evidence that defendant was sane beyond a reasonable doubt. Hence, a verdict of guilty but mentally ill cannot stand.[21] The prosecution in this case fell shorter of meeting its burden than did the prosecution in *Murphy*.

CONCLUSION

Defendant was in a delusional, psychotic manic state and could not understand the wrongfulness of her conduct when she failed to stop her vehicle for police officers. All the mental health experts testifying at trial, even the state's own forensic psychiatrist, opined that defendant was legally insane at the time she committed the offenses in this case. Their testimony was uncontradicted and was supported both by the lay testimony and circumstantial evidence.

The evidence that defendant was legally insane preponderates so heavily against the verdict that it would be a serious miscarriage of justice to permit it to stand.[22] The trial court abused its discretion by

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[18] *Id*. at 466.

[19] See *id*.

[20] *Id*.

[21] *Id*. at 467-468.

[22] *People v Lemmon*, 456 Mich 625, 642 (1998).

> judicial proceeding mandates a presumption of prejudice because "the adversary process itself" has been rendered "presumptively unreliable." *Cronic*, *supra*, at 659. The even more serious denial of the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right, similarly demands a presumption of prejudice. Put simply, we cannot accord any " 'presumption of reliability,' " *Robbins*, [*supra*] at 286, to judicial proceedings that never took place.

The defendant must still establish prejudice but, in this context, does so by demonstrating a reasonable probability that, but for counsel's deficient performance, the defendant would have filed a timely appeal. *Id*. at 484.

In this case, Ellenson filed both the untimely application for leave to appeal and the instant motion for relief from judgment. In the motion for relief from judgment, Ellenson argues that appellate counsel was ineffective for failing to timely file the application. Ellenson, in essence, concedes his own ineffectiveness. Under the circumstances, it has been established that, but for counsel's deficient performance, defendant's application to the Court of Appeals on direct appeal would have been timely filed. Because defendant was deprived of a judicial proceeding because of his counsel's ineffectiveness, he is entitled to a remand to the Court of Appeals for consideration under the standard for direct appeals.

MARKMAN, J., joined the statement of CORRIGAN, J.

PEOPLE v GUSMAN, Nos. 138693 and 139404. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration of both applications as on leave granted. Court of Appeals Nos. 290372 and 291655.

COBLENTZ v CITY OF NOVI, No. 138974. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals. The Court of Appeals erred in affirming the Oakland Circuit Court's application of a "due process" analysis in its April 24, 2008, order awarding the plaintiffs' attorney fees, costs and disbursements pursuant to the Freedom of Information Act, MCL 15.231, *et seq*. (FOIA). MCL 15.240(6) provides that courts shall award reasonable attorneys' fees, costs and disbursements to prevailing FOIA plaintiffs. In determining the reasonable attorney fees due to the plaintiffs, the circuit court considered whether the city's conduct was "corrupt enough" to justify a sanction that "amounts to a severe criminal penalty," and whether the requested attorney fees would bankrupt the city or whether a sanction would "burden . . . the public welfare." Nothing in MCL 15.240(6), or decisions of this Court, authorizes consideration of such factors in determining a reasonable attorney fee award. For the same reason, the Court of Appeals clearly erred in analyzing whether the documents were substantively useful to the plaintiffs' case. We remand this case to the Oakland Circuit Court for a re-determination of the plaintiffs' reasonable attorney fees pursuant to the factors set forth in *Smith v Khouri*, 481 Mich 519 (2008). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining

questions presented should be reviewed by this Court. Court of Appeals No. 285431.

KELLY, C.J. (*concurring*). I concur with the order remanding to the circuit court for a redetermination of reasonable attorney fees pursuant to *Smith v Khouri*, 481 Mich 519 (2008). As this Court's most recent decision regarding attorney fee awards, *Smith* is controlling here. Were it not for *Smith*, I would remand for a redetermination of reasonable attorney fees under this Court's decision in *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich 573 (1982).

WEAVER, J. (*concurring*). I concur in the result but write separately to say I continue to believe that *Smith v Khouri*, 481 Mich 519 (2008), a 4-to-3 opinion to which I signed a well-reasoned dissent, was wrongly reasoned and decided.

Leave to Appeal Denied November 13, 2009:

COBLENTZ v CITY OF NOVI, No. 138976; Court of Appeals No. 290075.

Statements Regarding Decisions on Motions for Disqualification November 18, 2009:

PELLEGRINO v AMPCO SYSTEMS PARKING, No. 137111; Court of Appeals No. 274743.

STATEMENT OF JUSTICE CORRIGAN DENYING PLAINTIFF'S MOTION TO DISQUALIFY

CORRIGAN, J. After careful consideration of plaintiff's motion for recusal, I deny the motion. Like Justice YOUNG, I am deciding this motion under this Court's current and traditional rules of disqualification because it appears to me that the new disqualification rule recently considered by my colleagues violates the Michigan and federal constitutions. I fully concur in and incorporate Justice YOUNG's November 18, 2009 statement denying plaintiff's motion to disqualify.

With particular regard to plaintiff's allegations against me, plaintiff accuses me and my late husband, Joseph Grano, of general bias against his attorney, Geoffrey Fieger. Plaintiff also alleges, based on an affidavit rife with hearsay of attorney Jack Beam, that I disparaged Mr. Fieger to Ohio Judge John E. Corrigan. Finally, plaintiff notes that I was initially appointed to the Court of Appeals by Governor John Engler and that a 2006 fundraising letter from Governor Engler, which was distributed by the Committee to Reelect Justice Maura Corrigan, stated: "We cannot lower our guard should the Fiegers of the trial bar raise and spend large amounts of money in hopes of altering the election by an 11th hour sneak attack."

As is the case with Justice YOUNG, Mr. Fieger has raised these or similar grounds at least 14 times in prior motions to recuse me, most notably in *Grievance Administrator v Fieger*, 476 Mich 231 (2006), and *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003). As in those cases, I am able to accord fair impartial and equal treatment to plaintiff's counsel and his clients. The statements in Governor Engler's letter are protected campaign speech under *Republican Party of Minnesota v White*, 536 US 765 (2002). Moreover, I have never met Judge John E. Corrigan. I did not talk to him on any subject, much less the conduct of Mr. Fieger.

Finally, I rely on the arguments raised in defendant's brief in opposition to plaintiff's motion. Defendant observes that plaintiff filed his motion on October 9, 2009. Thus, plaintiff inexplicably waited five months after this Court granted leave, on May 7, 2009, to move for the recusal of Justices MARKMAN and YOUNG and myself. The motion was filed less than a month before the scheduled oral argument. Accordingly, defendant reasonably characterizes plaintiff's motion—which is based on the same claims that plaintiff has known and raised for years—as a spurious dilatory tactic. Defendant also persuasively observes that the justices named in plaintiff's recusal motion routinely rule in *favor* of parties represented by Mr. Fieger; this fact is directly contrary to plaintiff's claim that we must recuse ourselves due to an inherent bias against Mr. Fieger. Moreover, I agree with defendant and Justice YOUNG that *Caperton v A T Massey Coal Co, Inc*, 556 US____; 129 S Ct 2252, 2263 (2009), is inapposite to plaintiff's grounds for my recusal in this case.

For these reasons, I deny plaintiff's motion to recuse me and I direct the clerk of the Court to transmit my denial statement to the parties.

STATEMENT OF JUSTICE YOUNG DENYING
PLAINTIFF'S MOTION TO DISQUALIFY

YOUNG, J. After careful consideration of the plaintiff's motion for recusal, I deny the motion. I am deciding this motion under this Court's current and traditional rules of disqualification because they are still in effect and the new rule recently considered by my colleagues is patently unconstitutional.

REASONS FOR DENIAL OF PLAINTIFF'S MOTION TO DISQUALIFY

A. NO NEW CLAIMS OF BIAS HAVE BEEN RAISED AND THOSE RAISED ARE WITHOUT MERIT AND HAVE BEEN REPEATEDLY AND UNSUCCESSFULLY PREVIOUSLY LITIGATED BY PLAINTIFF'S COUNSEL

Plaintiff's counsel (and his firm) has filed numerous motions for my recusal, either in his capacity as a party or as an attorney on behalf of his clients. Each of the prior motions has involved various allegations of claimed bias, principally stemming from my Michigan Supreme Court judicial campaigns.[1] Significantly, the current motion asserts no new

[1] By counsel's own admission, he has filed motions for my recusal in the following cases: *Tate v City of Dearborn*, 477 Mich 1101 (2007); *Johnson v Henry Ford Hosp*, 477 Mich 1098 (2007); *Flemister v Traveling Med Services, PC*, 729 NW2d 222 (2007); *Short v Antonini*, 729 NW2d 218 (2007); *Ansari v Gold*, 477 Mich 1076 (2007); *State Automobile Mut Ins Co v Fieger*, 477 Mich 1068 (2007); *Grievance Administrator v Fieger*, 476 Mich 231 (2006); *Lewis v St John Hosp*,

factual basis for recusal than the more than a dozen previous disqualification motions plaintiff's counsel has filed against me. Moreover, even though it asserts no new grounds for disqualification, this motion was strategically filed on the eve of oral arguments in this case.

As stated, plaintiff's counsel has sought my recusal on numerous occasions. After careful consideration, and in accordance with this Court's longstanding practice of handling motions for judicial recusal,[2] I have denied each of these prior motions as lacking merit. While counsel's political life outside the courtroom has relevance in that realm, it has no bearing on my consideration of his or his client's legal matters.[3] Counsel's clients are entitled to justice under law, no more or less. I have previously and will continue to entertain the arguments counsel makes on behalf of his clients with due regard to their merits under law. As explained in the brief opposing the motion for disqualification, some of my decisions in cases involving plaintiff's counsel have been favorable to counsel's position,[4] while others have not been favorable, as the merits of each case required.

Heretofore, the only appeal from a Michigan Supreme Court justice's denial of a motion for disqualification was to the Supreme Court of the United States and plaintiff's counsel has availed himself of that appellate

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474 Mich 1089 (2006); *Heikkila v North Star Trucking, Inc*, 474 Mich 1080 (2006); *Stamplis v St John Health Sys*, 474 Mich 1017 (2006); *McDowell v Detroit*, 474 Mich 999 (2006); *Harter v Grand Aerie Fraternal Order of Eagles*, 693 NW2d 381 (2005); *Gilbert v Daimler-Chrysler Corp*, 469 Mich 883 (2003); *Graves v Warner Bros*, 469 Mich 853 (2003).

[2] As has been explained previously, see, e.g., *Johnson*, 477 Mich at 1099, this Court's longstanding practice of judicial recusal is nearly identical to that of the United States Supreme Court. See also Statement of Recusal Policy, United States Supreme Court, November 1, 1993, available at 483 Mich 1237.

[3] Indeed, I have ruled both for and against Mr. Fieger when *he* was the party. See, e.g., *Grievance Administrator v Fieger*, 670 NW2d 563 (2003). What has always and only mattered and will continue to matter to me is the *merits* of his and his client's claims.

[4] See, e.g., *Beaudrie v Henderson*, 465 Mich 124 (2001); *Amtower v William C Roney & Co*, 232 Mich App 226 (1999). Moreover, I have denied leave to appeal in numerous other circumstances where counsel has received relief from the Court of Appeals. See, e.g., *Cauff v Fieger, Fieger, Kenney & Johnson, PC*, 483 Mich 1021 (2009); *Wilson v Keim*, 483 Mich 900 (2009); *Rodriguez v ASE Industries, Inc*, 483 Mich 853 (2009); *Overbay v Botsford Gen Hosp*, 482 Mich 1154 (2008); *Jackson-Ruffin v Metro Cars, Inc*, 482 Mich 1017 (2008); *LaBarge v Walgreen Co*, 480 Mich 1136 (2008); *Briggs v Oakland Co*, 480 Mich 1006 (2007); *Conn v Asplundh Tree Expert Co*, 478 Mich 930 (2007); *Janusz v Sterling Millwork, Inc*, 476 Mich 859 (2006).

route. Plaintiff's counsel has appealed my previous denials of his motions to disqualify to the United State Supreme Court at least three times, and that Court has denied certiorari on each occasion.[5] Moreover, counsel has litigated in federal court the constitutionality of this Court's historic practice of handling motions for judicial recusal under which I am deciding this motion.[6] Again, he has been unsuccessful.[7] This history of litigation in the federal courts further underscores that plaintiff's claims of prejudice are without merit.

B. *CAPERTON* HAS NO APPLICABILITY TO PLAINTIFF'S MOTION TO DISQUALIFY

While there is nothing new presented in plaintiff's motion to disqualify that has not been considered and rejected more than a dozen times, there is one area of the law that *has* changed since counsel's last motion for recusal. The United States Supreme Court recently decided *Caperton v A T Massey Coal Co, Inc* and required a justice's recusal in what it repeatedly described as an "extraordinary situation" based on "extreme facts."[8] In *Caperton*, the Court concluded that "there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."[9] Plaintiff's motion does not make any allegations of this nature. Accordingly, *Caperton* is inapposite to counsel's motion and does not require my recusal.

For all of these reasons, I therefore deny plaintiff's motion for recusal. I direct that the clerk of the Court transmit my denial statement to the parties forthwith.

Summary Disposition November 19, 2009:

SPARKS V CITIZENS INSURANCE COMPANY OF AMERICA, No. 139070. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 289395.

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[5] *Graves*, *supra*, cert den 542 US 920 (2004); *Gilbert*, *supra*, cert den 546 US 821 (2005); *Grievance Administrator v Fieger*, *supra*, cert den 549 US 1205 (2007).

[6] *Fieger v Ferry*, 2007 WL 2827801 (ED Mich, 2007).

[7] *Id.*

[8] *Caperton v A T Massey Coal Co, Inc*, 556 US ___; 129 S Ct 2252, 2263 (2009).

[9] *Id.* at ____; 129 S Ct at 2263-2264.

BALDWIN v AMERICAN AXLE & MANUFACTURING HOLDINGS, No. 139416. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 291117.

HATHAWAY, J., not participating due to a familial relationship with counsel of record.

Leave to Appeal Granted November 19, 2009:

GADIGIAN v CITY OF TAYLOR, No. 138323. The parties shall include among the issues to be briefed: (1) whether the Court of Appeals correctly interpreted MCL 691.1402a(2); and (2) what evidence a plaintiff must present to rebut the inference of reasonable repair. Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 282 Mich App 179.

LANSING SCHOOLS EDUCATION ASSOCIATION v LANSING BOARD OF EDUCATION, No. 138401. The parties shall include among the issues to be briefed whether (1) the Court of Appeals erred in concluding that the plaintiff school teachers and union lack standing to seek enforcement of Section 1311a(1) of the Revised School Code, MCL 380.1 *et seq*., and (2) whether *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726 (2001), was correctly decided. Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 282 Mich App 165.

YOUNG, J. (*dissenting*). I dissent from the majority's direction to the parties to reconsider the precedentially binding opinion of *Lee v Macomb Co Bd of Comm'rs*.[1] This order is yet another installment in Chief Justice KELLY's promise to "undo a great deal of the damage that the Republican Court has done."[2]

When this Court decided *Lee*, a majority of *six* justices accepted this Court's adoption of the federal standing test articulated in *Lujan v Defenders of Wildlife*.[3] Indeed, the *Lee* majority adopted the *Lujan* test to clarify the essential elements of standing based, in part, on Justice CAVANAGH's previous advocacy of *Lujan* as an appropriate guide in this respect.[4] While Justice WEAVER has never disguised her disagreement

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[1] 464 Mich 726 (2001).

[2] Brian Dickerson, *Justices Gird for Gang of 3½*, Detroit Free Press, January 11, 2009, at 1B.

[3] *Lee*, *supra* at 739-740, adopting the standing test from *Lujan v Defenders of Wildlife*, 504 US 555, 560-561 (1992); see also *Lee*, *supra* at 750 (KELLY, J., dissenting) (in which Justice CAVANAGH joined then-Justice KELLY's approval of this Court's adoption of the *Lujan* test, but dissented on the basis of the majority's application of that test to the facts).

[4] *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629, 651-652 (1995) (CAVANAGH, J., dissenting in part and concurring in part).

with the adoption of the *Lujan* test,[5] Justice CAVANAGH[6] and then-Justice KELLY[7] only later disavowed their acceptance of the *Lujan* test. Given this history, the standing analysis employed in *Lee* was a predictable target of the new majority's effort to "undo" the work of the TAYLOR Court.

Although the new majority's pattern of overturning precedent has become predictable, its hypocrisy has yet to become stale. Despite years of purported fidelity to stare decisis,[8] the new majority has zealously set out to dismantle the decisions of the TAYLOR Court with which they disagree. The ax has been quick and unerring, taking out decisions by any means possible: openly or *sub silentio*,[9] through direct appeal or reconsiderations of our prior orders and opinions.[10] As noted in my recent dissent to the order granting leave to appeal in *Hoover v Michigan Mut Ins Co*:

> Chief Justice KELLY was once concerned that "if each successive Court, believing its reading is correct and past readings wrong, rejects precedent, then the law will fluctuate from year to year, rendering our jurisprudence dangerously unstable."[11]

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[5] See, e.g., *Lee*, *supra* at 743-745 (WEAVER, J., concurring in part and dissenting in part); *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280, 310, 312 (2007) (WEAVER, J., dissenting) (describing *Lee* and its progeny as "the majority of four's assault on standing in Michigan"); *Miller v Allstate Ins Co*, 481 Mich 601, 617 (2008) (describing those cases as "the majority of four systematically dismantl[ing] Michigan's law on standing").

[6] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 675-676 (2004) (CAVANAGH, J., concurring in the result).

[7] See, e.g., *Michigan Chiropractic Council v Financial & Ins Services Comm'r*, 475 Mich 363, 382-383 (2006) (KELLY, J., concurring); *Nat'l Wildlife Federation*, *supra* at 680-687 (KELLY, J., concurring).

[8] For examples of the new majority's prior claims of "fidelity to stare decisis," see *Potter v McLeary*, 484 Mich 397, 450-451 n 43 (2009) (YOUNG, J., concurring in part and dissenting in part).

[9] For examples of the new majority's orders that effectively overruled precedent by ignoring applicable law, see *Lenawee Co Bd of Rd Comm'rs v State Auto Prop & Cas Ins Co*, 485 Mich 853, 856 n 1 (2009) (YOUNG, J., dissenting).

[10] A prime example of the new majority using a motion for reconsideration or rehearing as a springboard to overrule precedent, despite the failure to present new issues or demonstrate palpable error as required by court rule, is *United States Fidelity & Guaranty Co v Michigan Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1 (2009).

[11] 485 Mich 881, 882; 772 NW2d 338 (2009) (YOUNG, J., dissenting), quoting *Pohutski v City of Allen Park*, 465 Mich 675, 712 (2002) (KELLY, J., dissenting).

The current order is further evidence that Chief Justice KELLY's "fears for preserving precedent pertained only to precedent with which she [and other members of the new majority] personally agreed."[12] The current direction for the parties to address whether *Lee* was correctly decided evinces the new majority's willingness to reject precedent. It is the new majority's prerogative to do so. However, the new majority's retreat from its previous reverence for precedent should not go unnoticed.

BROOKS v STARR COMMONWEALTH, No. 139144. The parties shall include among the issues to be briefed: (1) whether, under the facts of this case, defendant Starr Commonwealth's alleged failure to "immediately" notify, within the meaning of MCL 803.306a(1), appropriate authorities of Michael Kirksey's escape constituted negligence per se, (2) whether defendant Starr Commonwealth's conduct was a proximate cause of plaintiff's loss, and (3) whether MCL 803.306a(1) creates a duty with respect to the general public. Court of Appeals No. 277469.

Leave to Appeal Denied November 19, 2009:

KIEFER v MARKLEY, No. 139006; reported below: 283 Mich App 555.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ., would reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and remand this case to the Washtenaw Circuit Court for reinstatement of the complaint.

HINZ v ALMY and HINZ v MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES, Nos. 139083 and 139084; Court of Appeals Nos. 285125 and 285126.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v PARISH, No. 139131; Court of Appeals No. 289552.

KELLY, C.J., and CAVANAGH, J., would grant leave to appeal.

THEODORE v HORENSTEIN, No. 139206; Court of Appeals No. 285153.

KELLY, C.J., and HATHAWAY, J., would grant leave to appeal.

PEOPLE v KENNETH ROBINSON, No. 139281; Court of Appeals No. 281531.

KELLY, C.J., would grant leave to appeal.

SCOTT v NORTHWEST AIRLINES, INC, Nos. 139326, 139342, and 139343; Court of Appeals Nos. 290990 and 291012.

KELLY, C.J., and CAVANAGH, J., would grant leave to appeal.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal November 20, 2009:

PEOPLE v LEONARD JACKSON, No. 138988. We direct the Clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). The parties shall submit supple-

[12] *Hoover*, *supra* at 882.

mental briefs within 42 days of the date of this order addressing whether the defendant is entitled to resentencing, where the Court of Appeals vacated two of the defendant's three convictions, resulting in a reduction of the guidelines sentence range, but where the defendant's minimum sentence is within the corrected guidelines sentence range. MCL 769.34(10); *People v Francisco*, 474 Mich 82 (2006). The parties should avoid submitting a mere restatement of the arguments made in their application papers. Court of Appeals No. 281380.

RAAB v RIVER RIDGE-SALINE, LLC, No. 139255. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). The parties shall submit supplemental briefs within 42 days of the date of this order addressing whether the Washtenaw Circuit Court violated AO 1998-1 by remanding the case based on its review of documents the plaintiffs submitted with their response to the defendant's motion for summary disposition. See *Etefia v Credit Technologies Inc*, 245 Mich App 466 (2001). The parties should avoid submitting a mere restatement of the arguments made in their application papers. Court of Appeals No. 280335.

In re ABDULLAH (PEOPLE v ABDULLAH), No. 139586. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers. Court of Appeals No. 284905.

Summary Disposition November 20, 2009:

PEOPLE v WOOLSEY, No. 138153. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the assessments of court-appointed attorney fees imposed by the Macomb Circuit Court, and remand this case to that court for reconsideration of the assessments in accordance with the statutory procedure and *People v Jackson*, 483 Mich 271 (2009). We note confusion in the circuit court record, and contradictory statements by the trial judge, regarding the applicable statutes and case law. Under MCL 769.1*l* and *Jackson*, a prisoner may be required to commence repayment of attorney fees through the entry of an order to remit. Where an order to remit has been entered pursuant to MCL 769.1*l*, the prisoner is generally presumed to be able to commence repayment. *Jackson*, *supra* at 275. In addition, MCL 600.4803(1) permits a trial court to impose a 20% late fee on outstanding balances of fees imposed against a defendant, including a fee for a court-appointed attorney. In this case, we observe that at the resentencing hearing the circuit court stated that it was assessing a 20% late fee for nonpayment, yet it also suggested that repayment was suspended while the defendant remained incarcerated. Neither the January 9, 2008 judgment of sentence nor the March 18, 2008 order to remit indicates a due date for payment of the fees. On remand, the Macomb Circuit Court shall resolve these inconsistencies, and shall also address the defendant's contention that monies have already been deducted from his prisoner account. In all other respects,

leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 288666.

PEOPLE v PONTIUS, No. 139366. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Kalamazoo Circuit Court for amendment of the judgment of sentence. The trial court shall strike from the judgment of sentence any provision that the sentences in this case are consecutive to the sentence in the "Calhoun County Case." A trial court does not have authority to modify a valid sentence. MCR 6.429(A); *People v Holder*, 483 Mich 168 (2009). Where a court imposes a sentence that is partially invalid, only the invalid part of the sentence may be set aside. MCL 769.24; *People v Thomas*, 447 Mich 390, 393 (1994). The trial court stated on the record at the original sentence hearing that the sentences in this case were concurrent with the sentence in the Calhoun County Case. It was subsequently determined that the term of years imposed for Count 1, conspiracy to commit murder, was invalid. Although the trial court had authority to change the conspiracy to commit murder sentence from a term of years to a life sentence, the trial court did not have authority to change the concurrent sentences to consecutive sentences because the concurrent sentences were valid. Court of Appeals No. 282187.

CORRIGAN, J., would direct the prosecutor to respond.

Leave to Appeal Denied November 20, 2009:

PEOPLE v EARNEST WARREN, No. 137666; Court of Appeals No. 276816.

MARKMAN, J. (*dissenting*). The issue here is whether the trial court is obligated under the sentencing guidelines to score all felonies or only the highest class felony. Because I believe the trial court is obligated by the plain language of the guidelines to score all felonies, I would reverse the Court of Appeals in part and remand to the trial court for resentencing.

MCL 777.21(2) states, "If the defendant was convicted of multiple offenses, subject to section 14 of chapter XI, score each offense as provided in this part." Section 14 of chapter XI (MCL 771.14[2][e]) requires the probation officer to score only the highest class felony when concurrent sentences are imposed. The prosecutor argues that when concurrent sentences are imposed, the trial court only has to score the highest class felony, while defendant argues that, even if the probation officer only has to score the guidelines for the highest class felony, the court must score the guidelines for all felonies.

While there is room for legitimate puzzlement with regard to why different obligations would obtain for the trial court and the probation officer, MCL 777.21(2) nonetheless is explicit that the trial court must score all felonies. This interpretation is underscored by other sentencing statutes. MCL 769.34(2) states that "the minimum sentence imposed by a court of this state for a felony . . . committed on or after January 1, 1999 shall be within the appropriate sentence range . . . ," and MCL 769.34(3) states, "A court may depart from the appropriate sentence range . . . [only] if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." In

order for the trial court to know whether it is sentencing "within the appropriate sentence range," it must obviously score an offense in the first place. Moreover, there is no apparent reason why a thoroughly comprehensive scheme of sentencing guidelines would arbitrarily except from its coverage certain felonies. That the *probation officer* may have a more limited scoring obligation where concurrent sentences are imposed does little, in my judgment, to overcome the explicit statutory directive that the *trial court* must "score each offense."

As a result of the majority position, a trial court is now empowered to sentence a defendant on the lower class felony to a term that may exceed the guidelines—even the guidelines that are applicable to the highest class felony—without having to articulate any "substantial and compelling" reason for what would otherwise be a clear upward departure. It is inconceivable to me that the drafters of the guidelines could have contemplated that their rules be so easily circumvented, and for no apparent good reason. I respectfully dissent.

PEOPLE v DEERING, No. 138193; Court of Appeals No. 274208.

PEOPLE v STEVEN WINSTON, No. 139176; Court of Appeals No. 283055.

CORRIGAN, J., did not participate for the reasons stated in her statement in *People v Parsons*, 728 NW2d 62, 66 (order entered March 6, 2007, Docket No. 132975).

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

STATE TREASURER v SPRAGUE, No. 139227; reported below: 284 Mich App 235.

KELLY, C.J., and CAVANAGH and MARKMAN, JJ., would grant leave to appeal.

PEOPLE v CLOUTIER, No. 139230; Court of Appeals No. 283059.

PEOPLE v DELGADO, No. 139282; Court of Appeals No. 291847.

KELLY, C.J., would grant leave to appeal.

PEOPLE v BOYLE, No. 139285; Court of Appeals No. 281047.

CAVANAGH, J., would grant leave to appeal.

PEOPLE v MAHON, No. 139448; Court of Appeals No. 283086.

CORRIGAN, J. (*concurring*). I believe that the Court of Appeals erred in holding that the trial court should have scored offense variable (OV) 10, MCL 777.40, at zero points because there was no evidence that the victim was vulnerable. I concur in the Court's denial order because this issue is moot given defendant's agreement, on remand to the trial court, to a new *Cobbs*[1] agreement that included the previously imposed sentences.

A defendant may be scored 15 points for OV 10 if he engaged in "predatory conduct." MCL 777.40(1)(a). MCL 777.40(3)(a) defines "predatory conduct" as "preoffense conduct directed at a victim for the

[1] *People v Cobbs*, 443 Mich 276 (1993).

primary purpose of victimization." In *People v Cannon*, 481 Mich 152 (2008), this Court discussed what behavior constitutes "predatory conduct." This Court instructed courts to ask the following three questions in deciding whether 15 points are properly assessed under OV 10:

> (1) Did the offender engage in conduct before the commission of the offense?
>
> (2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?
>
> (3) Was victimization the offender's primary purpose for engaging in the preoffense conduct?
>
> If the court can answer all these questions affirmatively, then it may properly assess 15 points for OV 10 because the offender engaged in predatory conduct under MCL 777.40. [*Cannon*, *supra* at 162.]

On remand from this Court for reconsideration in light of *Cannon*, *supra*, the Court of Appeals determined that OV 10 was improperly scored at 15 points because there was "no evidence from which to conclude that the [victim] was vulnerable, i.e., suffered from a readily apparent susceptibility that defendant took advantage of in order to commit the offense." *People v Mahon*, unpublished opinion per curiam of the Court of Appeals, issued June 16, 2009 (Docket No. 283086), p 2. I disagree.

An employee of TJ's Lounge asked defendant to leave the establishment around 11:00 p.m. because he was drunk. Defendant told the employee that he was "going to come back and get revenge" on her. At 2:30 a.m., the employee and two of her coworkers walked out of TJ's at the end of their shift. Defendant was waiting outside the front door with a loaded rifle. He ordered them back inside the bar at gunpoint. Defendant stated, "I told you I would be back for revenge." Under the circumstances, the victims were vulnerable. Defendant accosted them when they were leaving the bar at 2:30 a.m. when it was dark and most people were likely gone because the bar was closed. Rather than confronting the victims in the bar, defendant waited until they were outside when they were isolated and susceptible to injury. Given these circumstances, the Court of Appeals erred in concluding that OV 10 should have been scored at zero points.

Nevertheless, I concur in the Court's order because the Court of Appeals' error is moot given defendant's agreement to the re-imposition of the original sentences.

YOUNG and MARKMAN, JJ., joined the statement of CORRIGAN, J.

Reconsideration Granted in Part November 20, 2009:

WOLVERINE COMMERCE, LLC v PITTSFIELD CHARTER TOWNSHIP, Nos. 138314 and 138315. On order of the Court, the motion for reconsideration of this Court's May 29, 2009 order is considered, and it is granted to the extent provided in this order. On reconsideration, we further order

that this case is remanded to the Court of Appeals for consideration of the defendant's claim of appeal in Court of Appeals No. 282532. In all other respects, the motion for reconsideration is denied and this Court's order of May 29, 2009, continues in full force and effect. Court of Appeals Nos. 278417 and 282532.

MARKMAN, J. (*concurring*). In light of this Court's order of May 29, 2009, I concur in the instant order. However, I continue to believe that this Court should grant leave to appeal to consider the Court of Appeals' application of the "self-created hardship" doctrine.

Summary Disposition November 23, 2009:

ROUSSEAU v MASUGA, Nos. 138983 and 138984. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals in part and the order of the Chippewa Circuit Court granting defendant Tendercare's motion for summary disposition, and we remand this case to the Chippewa Circuit Court for reconsideration of that defendant's motion in light of this Court's decisions in *Bush v Shabahang*, 484 Mich 156 (2009), and *Potter v McLeary*, 484 Mich 397 (2009), and MCL 600.2301. Court of Appeals Nos. 280441 and 281093.

PEOPLE v GIDDINGS, No. 139211. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Bay Circuit Court for a determination of whether the corrected version of the defendant's presentence report was sent to the Department of Corrections. If the corrected version was not sent, the court shall direct the probation officer to send it. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 290767.

PEOPLE v GREGORY, No. 139571. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand the case to the Oakland Circuit Court for the ministerial task of entering an amended judgment of sentence to reflect the defendant's conviction offense of third-degree criminal sexual conduct, MCL 750.520d(1)(a). According to the Department of Corrections, the defendant's conviction offense is identified as second-degree criminal sexual conduct. Upon entry of an amended judgment of sentence, the trial court shall forward a copy to the Department of Corrections. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. Court of Appeals No. 292633.

Leave to Appeal Denied November 23, 2009:

PEOPLE v HASKIN, No. 136523; Court of Appeals No. 272103.

GREAT LAKES SOCIETY v GEORGETOWN CHARTER TOWNSHIP, No. 138129; reported below: 281 Mich App 396.

PEOPLE v JOHN ANDERSON, No. 138173; Court of Appeals No. 279772.

LAKEWOOD HILLS v EAST GRAND RAPIDS BOARD OF ZONING APPEALS, No. 138389; Court of Appeals No. 280972.

PEOPLE v MARSILI, No. 138511. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288155.

PEOPLE v CORRION, No. 138525. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288138.

PEOPLE v THREATT, No. 138741; Court of Appeals No. 287891.

PEOPLE v DOROTHY, No. 138757; Court of Appeals No. 290036.

PEOPLE v LARRY JACKSON, No. 138772. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288765.

PEOPLE v FOX, No. 138792. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 289324.

PEOPLE v DEMETEILUS GREENE, No. 138796. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287464.

PEOPLE v MIHELCICH, No. 138798; Court of Appeals No. 282098.

PEOPLE v CUBLE, No. 138813; Court of Appeals No. 290409.

PEOPLE v ANTOINE THOMAS, No. 138827; Court of Appeals No. 279702.

PEOPLE v SPEARS, No. 138843. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288118.

PEOPLE v FRANKIE BROWNING, No. 138872. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288203.

PEOPLE v BOES, No. 138882. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 290345.

PEOPLE v KITTKA, No. 138890. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 290445.

PEOPLE v BIEGAJSKI, No 138893. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 290491.

PEOPLE v KELLY, No. 138901; Court of Appeals No. 279068.

PEOPLE v DANIEL, No. 138914. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 289361.

PEOPLE v WALLS, No. 138924. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 290108.

PEOPLE v RODNEY BAKER, No. 138933. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288661.

PEOPLE v FITTS, No. 138934. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 289364.

PEOPLE v BREWER, No. 138936. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 289703.

PEOPLE v VAN DIVER, No. 138945. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 289195.

PEOPLE v AARON, No. 138946. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288680.

PEOPLE v JAMAAL DOUGLAS, No. 138951. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 289414.

PEOPLE v BAUER, No. 138962. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 290020.

PEOPLE v FRENCH, No. 138968. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288020.

PEOPLE v JOHNIGAN, No. 138972. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 289354.

PEOPLE v BOONE, No. 138973. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 290613.

PEOPLE v SUSDORF, No. 138989; Court of Appeals No. 282549.

PEOPLE v TYRONE WARD, No. 138996. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 290289.

PEOPLE v DAVID, No. 138998. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288228.

PEOPLE v RIDDLE, No. 138999. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 289807.

LEFKO v WALTER TOEBE CONSTRUCTION COMPANY/MDOT, No. 139000; Court of Appeals No. 289502.

PEOPLE v MALLORY, No. 139002; Court of Appeals No. 290127.

PEOPLE v ANTHONY JONES, No. 139011; Court of Appeals No. 291541.

KELLY, C.J., did not participate because she served on the Court of Appeals panel that affirmed the defendant's conviction on direct appeal.

PEOPLE v KOCHER, No. 139016. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 291253.

PEOPLE v PHILIP ANDERSON, No. 139024; Court of Appeals No. 282019.

PEOPLE v REECE, No. 139026; Court of Appeals No. 281661.

PEOPLE v HAMD, No. 139030; Court of Appeals No. 282618.

PEOPLE v EMERY, No. 139036; Court of Appeals No. 282613.

PEOPLE v BAUGH, No. 139051; Court of Appeals No. 284248.

PEOPLE v KENNY WILLIAMS, No. 139054; Court of Appeals No. 290333.

PEOPLE v DRUMMOND, No. 139058. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 290436.

PEOPLE v ZAVALETA, No. 139069; Court of Appeals No. 282195.

SIMPSON v PINES HEALTH CARE CENTER, No. 139100; Court of Appeals No. 290233.

PEOPLE v BAY, No. 139106. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 289264.

PEOPLE v BUSH, No. 139119. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 290607.

PEOPLE v WITHERSPOON, No. 139120; Court of Appeals No. 290581.

PEOPLE v LANCE CARTER, No. 139149; Court of Appeals No. 291591.

SCHIED v STATE OF MICHIGAN, No. 139162; Court of Appeals No. 282804.

PEOPLE v LONNIE GREENE, No. 139169; Court of Appeals No. 278834.

PEOPLE v CARPER, No. 139173; Court of Appeals No. 290319.

PEOPLE v JOHNICAN, No. 139174; Court of Appeals No. 283952.

SCHWENDENER v MIDWEST BANK AND TRUST COMPANY, Nos. 139177 and 139179; Court of Appeals Nos. 289303 and 290401.

PEOPLE v LEWIS-ELLIOTT, No. 139180; Court of Appeals No. 282685.

MARQUETTE GENERAL HOSPITAL, INC v CHOSA, No. 139200; reported below: 284 Mich App 80.

PEOPLE v RANDY SHELTON, Nos. 139217 and 139219; Court of Appeals Nos. 291336 and 291342.

PEOPLE v VORE, No. 139232; Court of Appeals No. 282747.

PEOPLE v REDWINE, No. 139242; Court of Appeals No. 280326.

PEOPLE v BOLDEN, No. 139246; Court of Appeals No. 282601.

PROGRESSIVE MICHIGAN INSURANCE COMPANY v ROZAFA TRANSPORT, INC, Nos. 139249 and 139250; Court of Appeals Nos. 283000 and 283395.

PEOPLE v LEE CAMPBELL, No. 139297; Court of Appeals No. 284243.

PEOPLE v TERRY BROOKS, No. 139314; Court of Appeals No. 271831.

PEOPLE v GETTER, Nos. 139339, 139341 and 139344; Court of Appeals Nos. 291692, 291693 and 291695.

PEOPLE v VICTOR, No. 139364; Court of Appeals No. 291450.

PEOPLE v CRY, No. 139369; Court of Appeals No. 283611.

PEOPLE v PRESTON JACKSON, No. 139370; Court of Appeals No. 282325.

ADRIAN & BLISSFIELD RAILROAD COMPANY v DEPARTMENT OF TRANSPORTATION, No. 139374; Court of Appeals No. 282710.

PEOPLE v EMMANUEL ATKINS, No. 139376; Court of Appeals No. 282697.

PEOPLE v ARNOLD, No. 139377; Court of Appeals No. 280805.

PEOPLE v RAPHAEL ROBINSON, No. 139378; Court of Appeals No. 283192.

PEOPLE v CREWS, No. 139380; Court of Appeals No. 291927.

PEOPLES v DEPARTMENT OF CORRECTIONS, No. 139382; Court of Appeals No. 290762.

MUNGER v TRANSGUARD INSURANCE COMPANY OF AMERICA, INC, No. 139386; Court of Appeals No. 284574.

PEOPLE v BULLOCK, No. 139414; Court of Appeals No. 291746.

PRENTICE v BANK OF NEW YORK TRUST COMPANY, NA, No. 139418; Court of Appeals No. 283789.

PEOPLE v SCHULTZ, No. 139425; Court of Appeals No. 283669.

LASK v ROSE MOVING & STORAGE COMPANY, INC, No. 139431; Court of Appeals No. 291401.

DETROIT EDISON COMPANY v CITY OF DETROIT, Nos. 139432 and 139433; Court of Appeals Nos. 278778 and 286460.

PEOPLE v DONNELL SIMS, No. 139446; Court of Appeals No. 285475.

PEOPLE v GURNSEY, No. 139456; Court of Appeals No. 292146.

PEOPLE v EDWARD BENNETT, No. 139457; Court of Appeals No. 292334.

PEOPLE v SPENCER WILLIAMS, No. 139459; Court of Appeals No. 292308.

PEOPLE v ALIBEG, No. 139468; Court of Appeals No. 284250.

PEOPLE v ROBERT WRIGHT, Nos. 139470 and 139471; Court of Appeals Nos. 290230 and 290231.

PEOPLE v CHARLES HILL, No. 139482; Court of Appeals No. 283951.

PEOPLE v HARGROVE, No. 139484; Court of Appeals No. 292221.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v RAEMON SMITH, No. 139485; Court of Appeals No. 284828.

PEOPLE v MORA, No. 139491; Court of Appeals No. 285502.

PEOPLE v PIERSON, No. 139492; Court of Appeals No. 291675.

PEOPLE v FENDER, No. 139495; Court of Appeals No. 292325.

PEOPLE v HECTOR, No. 139498; Court of Appeals No. 283849.

SPECIALIZED VEHICLES, INC v CUNNINGHAM, No. 139506; Court of Appeals No. 291128.

PEOPLE v JOHNNY TAYLOR, No. 139515; Court of Appeals No. 292268.

MIDWEST BANK AND TRUST COMPANY v SCHWENDENER, No. 139520; Court of Appeals No. 290393.

PEOPLE v SOMMER, No. 139523; Court of Appeals No. 291960.

PEOPLE v CATHEY, No. 139526; Court of Appeals No. 292262.

PEOPLE v CHILDREY, Nos. 139528 and 139530; Court of Appeals Nos. 292211 and 292210.

PEOPLE v ALEXANDER WIGGINS, No. 139539; Court of Appeals No. 291055.

PEOPLE v ANDREW BASKIN, No. 139547; Court of Appeals No. 291452.

PEOPLE v SIEBERT, No. 139548; Court of Appeals No. 289589.

PEOPLE v SOUDERS, No. 139552; Court of Appeals No. 292629.

PRINCE v STATE OF MICHIGAN, No. 139553; Court of Appeals No. 291057.

PEOPLE v WAYNE, No. 139559; Court of Appeals No. 292910.

PEOPLE v BRUCE PARKER, No. 139560; Court of Appeals No. 292899.

O'CONNOR v PAROLE BOARD, No. 139564; Court of Appeals No. 291179.

PEOPLE v DEQUAN POWELL, No. 139568; Court of Appeals No. 292541.

PEOPLE v MARIO HARDIN, No. 139569; Court of Appeals No. 281382.

BANK ONE NATIONAL ASSOCIATION v VENTIMIGLIO, No. 139581; Court of Appeals No. 283824.

GURZICK INVESTMENTS LLC v CITY OF MOUNT PLEASANT, No. 139585. This order is without prejudice to the plaintiffs' right to file an application for delayed appeal with the Court of Appeals from the trial court's July 9, 2009 final order, pursuant to MCR 7.205(F). Court of Appeals No. 290519.

PEOPLE v KOGOWSKI, No. 139589; Court of Appeals No. 292641.

PEOPLE v BRYAN THOMAS, No. 139593; Court of Appeals No. 283852.

AZELTON v SHEROSKI, No. 139603; Court of Appeals No. 290651.

PEOPLE v GERRY SWAIN, No. 139620; Court of Appeals No. 283368.

PEOPLE v HERNANDEZ, No. 139626; Court of Appeals No. 284565.

FORTUNATE v FOSTER, MEADOWS & BALLARD, PC, No. 139618; Court of Appeals No. 288548.

PEOPLE v TERRY JONES, No. 139619; Court of Appeals No. 285286.

OUELLETTE v GRAND MALL & OFFICE CENTER, INC, No. 139630; Court of Appeals No. 284514.

PEOPLE v ELERSON, No. 139635; Court of Appeals No. 285481.

PEOPLE v TRUITTE, No. 139637; Court of Appeals No. 289964.

PEOPLE v ERNEST STEWART, No. 139648; Court of Appeals No. 292622.

PEOPLE v BENNIE CARTER, No. 139650; Court of Appeals No. 292739.

PEOPLE v RONALD SMITH, No. 139652; Court of Appeals No. 280333.

PEOPLE v MCCUMBY, No. 139654; Court of Appeals No. 292605.

PEOPLE v ZENTZ, No. 139655; Court of Appeals No. 292562.

PEOPLE v KARMONE FORD, No. 139657; Court of Appeals No. 282805.

GALONSKA v DELPHI CORPORATION, No. 139659; Court of Appeals No. 291415.

PEOPLE v ANTONIO COOK, No. 139673; Court of Appeals No. 292831.

PEOPLE v SLACK, No. 139681; Court of Appeals No. 292584.

PEOPLE v BURKOWSKI, Nos. 139689 and 139691; Court of Appeals Nos. 282011 and 282013.

PEOPLE v TIMOTHY BROWN, No. 139694; Court of Appeals No. 283433.

PEOPLE v EDWARD FISHER, No. 139702; Court of Appeals No. 283160.

In re DEERING (DEERING v PEOPLE OF THE STATE OF MICHIGAN), No. 139798; Court of Appeals No. 293607.

Reconsideration Denied November 23, 2009:

PEOPLE v LANCE JONES, No. 138593. Leave to appeal denied at 484 Mich 870. Court of Appeals No. 282242.

PEOPLE v VIRDEN, Nos. 138594, 139595, and 138596. Leave to appeal denied at 484 Mich 870. Court of Appeals Nos. 281307, 281876, and 281877.

PEOPLE v GATES, No. 138686. Leave to appeal denied at 484 Mich 870. Court of Appeals No. 283640.

PEOPLE v WEBSTER, No. 139127. Leave to appeal denied at 485 Mich 898. Court of Appeals No. 291632.

PEOPLE v HORNE, No. 139168. Leave to appeal denied at 485 Mich 899. Court of Appeals No. 284070.

Superintending Control Denied November 23, 2009:

BELIGANO v ATTORNEY GRIEVANCE COMMISSION, No. 139460; AGC: 2469/08.

HAMILTON v ATTORNEY GRIEVANCE COMMISSION, No. 139653; AGC: 1088/09

Summary Disposition December 2, 2009:

FIRST NATIONAL BANK OF CHICAGO v DEPARTMENT OF TREASURY, No. 137527. On order of the Court, the application for leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we hereby reverse the September 9, 2008 judgment of the Court of Appeals. For the reasons stated in the Court of Appeals dissenting opinion, we find that BankBoston received constitutionally sufficient notice. We remand this case to the Court of Claims for consideration of the issues raised by the plaintiff but not addressed by that court during its initial consideration of this case. Reported below: 280 Mich App 571.

CORRIGAN, J. (*concurring*). I concur in the order reversing the judgment of the Court of Appeals and remanding to the Court of Claims for consideration of plaintiff's remaining issues. I also concur with Justice YOUNG that any additional inquiry regarding the quality of notice given to plaintiff's assignor is unnecessary. I write separately to underscore my agreement with the well-reasoned analysis of the Court of Appeals

dissenting opinion concerning why plaintiff lacks standing to assert BankBoston's right to notice. A thorough review of the stipulated facts and exhibits fails to show how the mortgage assignment from BankBoston to plaintiff, which occurred *after* the certificate of forfeiture had already been recorded, left BankBoston with any residual property interest. See MCL 211.78i(6). Moreover, "it is well settled that the right to notice is personal and cannot be challenged by anyone other than the person entitled to notice." *In re AMB*, 248 Mich App 144, 176 (2001). Therefore, plaintiff's status as the trustee for a separate legal entity, BankBoston Home Equity Loan Trust 1998-1, does not magically fulfill the statutory and constitutional prerequisites for plaintiff to file suit on behalf of a party that previously transferred its entire interest. See MCL 600.2041; *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 740 (2001). Accordingly, I agree with the Court of Appeals dissent that "there is no evidence that the single, isolated mortgage assignment imbued plaintiff with any continuing association with BankBoston, endowed it with any derivative entitlement to know BankBoston's affairs, or enabled it to raise BankBoston's legal claims, if any still existed." *First Nat'l Bank of Chicago v Dep't of Treasury*, 280 Mich App 571, 593 (2008).

YOUNG and MARKMAN, JJ., joined the statement of CORRIGAN, J.

YOUNG, J. (*concurring*). I concur in the order reversing the judgment of the Court of Appeals and remanding the case to the Court of Claims for consideration of plaintiff's remaining issues. I would further note that the constructive notice provided by recording a certificate of forfeiture pursuant to MCL 211.78g(2) provides constitutionally adequate notice for those property interests that are unknown and not of record at the time the property is forfeited to the county treasurer. See *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 317 (1950); *Mennonite Bd of Missions v Adams*, 462 US 791, 798 (1983). Moreover, this particular method of notice "is not substantially less likely to bring home notice than other of the feasible and customary substitutes," *Mullane*, 339 US at 315, and is given in addition to other methods of constructive notice required by law. MCL 211.78i(3)(d) and (5). Because plaintiff has received constitutionally adequate notice, I believe that any further inquiry into the quality of notice given to plaintiff's assignor is wholly unnecessary.

CORRIGAN and MARKMAN, JJ., joined the statement of YOUNG, J.

PEOPLE v STOCKMAN, No. 138233. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for an evidentiary hearing to determine whether trial counsel was ineffective for failing to investigate and present medical testimony that the child complainant's allegations are medically implausible or impossible, as described in the affidavits of Drs. Lee and Richter. We direct that court to commence the hearing within 35 days of the date of this order. We further order that court to submit a transcript of the hearing along with its findings of fact and conclusions of law to the clerk of this Court within 28 days of the conclusion of the hearing. Within 21 days after the transcript is filed, the parties may file supplemental briefs with the Clerk of the Supreme Court. With respect to defendant's claims regarding forensic testing of the "turkey baster," leave to appeal is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). We retain jurisdiction. Court of Appeals No. 278901.

CORRIGAN, J. (*concurring*). I concur in the order remanding to the trial court for an evidentiary hearing and retaining jurisdiction. I write separately to present my view of the trial court's task on remand.

The victim, JB, who was six years old at the time of trial, accused defendant of, among other things, penetrating her genitals with a turkey baster (or "gravy thing"). At trial JB testified as follows:

Q. What did he do with this gravy thing?

A. He put that up here.

Q. He put it where?

A. Up in here.

[*Prosecuting Attorney*] *Hall*. Okay. For the record, she has just pointed to her genital area.

Ms. Hall (continuing)

Q. Do you have a name for that?

A. No.

Q. What do you use it for?

A. Using it.

Q. I'm sorry?

A. Using the bathroom.

Q. To use the bathroom. And tell me about what he did with this, with this gravy thing.

A. (No response)

Q. You don't know?

A. No.

Q. Now, did it go into where you—where pee comes out?

A. Um-hum.

[*Defense Counsel*] *Taratuta*. Objection. That's leading.

The Court. Overruled. Go ahead, counsel.

Ms. Hall. Thank you.

Ms. Hall. (continuing)

Q. [JB], did—[JB], look at me. Did this gravy thing go into where pee comes out?

A. Yes.

Q. Okay. Which portion, which side of it did? Do you remember? Could you point? [The prosecutor held a turkey baster.]

A. Um-hum.

Q. Okay.

A. This one.

Q. Okay. Which portion of it, which side of it went into where pee comes out? Could you point? Do you know? Is that a no?

A. No.

Q. Okay. How do you know that he used this and put this in where pee comes out?

A. Because he told me.

Q. Okay. Did you feel anything?

A. Yes.

Q. What did it feel like?

A. It feel [sic] like it was in my stomach.

Q. It felt like what?

A. It felt like in my stomach.

Q. Okay. Did it hurt?

A. (Nodding yes)

Q. Is that a yes?

A. Yes.

Dr. Hon Lee, who examined JB for sexual abuse some time after the alleged incident occurred, also testified at trial. Lee testified that he did not "find any trauma" to JB's genital area. Lee confirmed that he was aware that JB alleged that "an object . . . was inserted into [her] genital area." But he stated that "[y]ou may or you may not" discover an injury as a result of insertion. Rather, his "conclusion was the general examination was normal, but sexual abuse cannot be ruled out because the time [sic] has passed since the alleged abuse."

The jury convicted defendant, among other offenses, of first-degree criminal sexual conduct under MCL 750.520(b)(1)(a) (sexual penetration of a person under 13 years of age) based on his insertion of the turkey baster into JB's genitals. For purposes of such a conviction, "sexual penetration" means "sexual intercourse, cunnilingus, fellatio, anal intercourse, or *any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body*, but emission of semen is not required." MCL 750.520a(r) (emphasis added). Defendant appealed and the Court of Appeals affirmed. *People v Stockman*, unpublished opinion per curiam of the Court of Appeals, issued March 22, 2005 (Docket No. 251711).

Defendant subsequently filed a motion for relief from judgment, which the trial court denied. The Court of Appeals initially denied leave for lack of merit. *People v Stockman*, unpublished order of the Court of Appeals, entered October 11, 2006 (Docket No. 269343) (*Stockman I*). Defendant then filed an application for leave with this Court and we remanded to the Court of Appeals for consideration as on leave granted. *People v Stockman*, 478 Mich 923 (2007).[1] On remand, the Court of Appeals again affirmed defendant's convictions. *People v Stockman*,

[1] We directed the Court of Appeals to consider:

> (1) whether the defendant has raised a "significant possibility" that he is innocent of the alleged crimes under MCR 6.508(D)(3); (2) whether the affidavits accompanying the defendant's motion

unpublished opinion per curiam of the Court of Appeals, issued December 18, 2008 (Docket No. 278901) (*Stockman II*). Defendant again applied to this Court for leave to appeal.

At issue are two affidavits that defendant claims establish that JB's testimony at trial was medically impossible. First, Lee stated in an affidavit that, when he testified at trial, he "was not told what [defendant] was being accused of, and was not shown a 'turkey baster' in relation to the allegation and my medical examination of the child." He stated that he "also was not told of the testimony of the child." He continued:

> After observing an identical plastic *turkey baster*, and reviewing the testimony of the child, and my own dictation of the medical report, I have come to the following conclusions:
>
> a. vaginal insertion with an instrument of the size and composition of a plastic "turkey baster" in a way described by the victim would have caused severe damage of the delicate structures of the vagina in a six year old child with an average hymenal orifice diameter of only 4 to 6 mm.
>
> b. such damage would include tear of the hymen, fossa navicularis and posterior fourchette. As well, such tear if at all had existed, would cause permanent scarring of tissues easily recognizable by the trained eyes. I did not appreciate any of those findings.
>
> I conclude that the testimony of the child is medically impossible.

A second doctor, Dr. Mark Richter, offered a similar affidavit. Richter stated that he had reviewed JB's testimony, Lee's testimony, and "the medical reports of the clinical examination of the child after an allegation of sexual assault was made." Richter dubiously added, with no citation to the court record or supporting documentation, that "[t]he child reported to authorities and testified that she was sexually assaulted by [defendant] by insertion of a '*turkey baster*' deep into her vaginal canal, internally to the point of her abdomen, causing extreme pain." He thus concluded that, because Lee did not discover any injuries, "[t]he medical examination and testimony of Dr. Lee are medically inconsistent with the allegation and testimony of the child." He continued:

> Given the scenario presented, that a "*turkey baster*" was inserted deep into the 6-year-old child's vagina, from a medical standpoint, it is difficult to imagine any series of events involving a vaginal insertion of an instrument the circumference of a "*turkey baster*" (approx. 7/16 of 1 inch increasing to a 1" diameter) into the

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for relief from judgment entitle him to an evidentiary hearing on any of the issues his application has raised regarding that proposed evidence; and (3) whether the defendant is entitled to an evidentiary hearing on the ineffective assistance of trial counsel for the alleged failures to investigate and procure the favorable medical testimony referenced in the affidavits. [478 Mich 923 (2007).]

> small vaginal canal of a 6 year old child (maximum approx. 1/2") without application of oil based lubrication, and accomplish an absence of scarring, tearing, or damage or rupture of the child's Hymen, that would present a complete absence of evidence of injury upon clinical examination.
>
> As a practicing physician, I conclude that there is such a major disconnect from a medical standpoint between the report/testimony of the child reporting a deep, vaginal insertion with a "*turkey baster*" of increasing diameter and the medical report and testimony of the examining physician, Dr. Lee, providing a complete absence of symptoms of sequalae [sic] of a vaginal insertion (Hymen damage or rupture [especially where it commented that the Hymen border is "thin"], tearing, scarring, discharge, etc.) that, presuming the medical report and testimony are accurate, the version provided by the child is medically impossible. [Brackets in original.]

In *Stockman II*, the Court of Appeals concluded that neither affidavit created an issue of fact warranting an evidentiary hearing regarding the ineffective assistance of counsel or the possibility of defendant's innocence. Most significantly, the Court of Appeals observed that the affidavits

> are based on the factual premise that the baster penetrated deep into JB's vagina to the point of the abdomen, a premise not supported by the record. JB never testified how much of the baster entered her genital area and never testified that it actually entered her vagina. She testified only that it "felt like" it was in her stomach. A child of six is not likely familiar with the sensation of an object in her genital area or with the anatomical structures that lie between the labia majora and the stomach, and thus JB's testimony was more likely a figurative description of the sensation rather than a literal description of the extent of penetration. Her testimony established only that some part of the baster entered some part of her genital area, not that the full length of the baster was inserted into the vagina and beyond. . . . [E]ven the former is sufficient to sustain a conviction, *People v Bristol*, 115 Mich App 236, 238; 320 NW2d 229 (1981) . . . . [*Stockman II*, *supra* at 3.]

The Court of Appeals offers a very plausible—arguably the most plausible—interpretation of JB's testimony. Indeed, the affiants' presumptive descriptions of her testimony, particularly that of Richter, border on spurious; Richter's exaggerated assertion that JB testified that defendant inserted the turkey baster "deep into her vaginal canal, internally to the point of her abdomen, causing extreme pain" is by no means a more accurate description of the testimony than that offered by the Court of Appeals.

To my mind, the only error committed by the Court of Appeals was its failure to acknowledge that, at most, JB's testimony could be interpreted as ambiguous with regard to how deep defendant inserted the turkey baster. Because a jury *could* have concluded that her testimony described deep insertion, the trial court on remand *could* find that trial counsel was

ineffective for failing to present medical testimony such as that offered in Lee's and Richter's affidavits. But the trial court on remand by no means must accept at face value the affiants' characterizations of JB's testimony. Rather, the court simply must determine, as stated in our order, "whether trial counsel was ineffective for failing to investigate and present medical testimony that the child complainant's allegations were medically implausible or impossible, as described in the affidavits."

PEOPLE v WADE, No. 139327. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. The jury verdict form was not dispositive because the trial court properly instructed the jury. On the basis of the trial court's instructions, the jury would have clearly understood that it could find the defendant "not guilty" of first-degree murder and "not guilty" of the lesser offenses of second-degree murder and involuntary manslaughter by checking the "not guilty" box listed on the form under "Count 1." In light of the jury instructions, the trial court's error in using the improper verdict form was harmless, see MCL 769.26; *People v Lukity*, 460 Mich 484, 495 (1999), and the Court of Appeals erred in relying on this Court's decisions, including *People v Clark*, 295 Mich 704, 707 (1940), to hold that the defendant's constitutional right to a trial by jury was violated. Accordingly, we reinstate the defendant's convictions of involuntary manslaughter and possession of a firearm during the commission of a felony. The motion for bond pending appeal is denied as moot. Reported below: 283 Mich App 462.

KELLY, C.J. (*dissenting*). I would grant the prosecutor's application for leave to appeal and order full briefing and oral argument. This case involves a jurisprudentially significant issue of first impression in this state. Therefore, I would not take peremptory action, as I believe it represents an unwarranted rush to judgment.

I find it particularly disturbing that the majority is willing to assume that "the jury would have clearly understood" that it could find defendant not guilty of the lesser offenses. In this case, the jury received conflicting directives: a verdict form that the majority concedes was "improper" and legally proper oral instructions from the trial judge. It is entirely speculative to conclude, as the majority does, that the jury clearly relied on the proper instruction rather than the improper one. While the use of the erroneous jury verdict form may have been harmless error, I cannot summarily reach that conclusion on the record before us.

I dissent from the order peremptorily reversing the Court of Appeals judgment and would instead grant leave to appeal.

CAVANAGH, J., joined the statement of KELLY, C.J.

MANSOUR v AZ AUTOMOTIVE CORPORATION, No. 135615; Court of Appeals No. 277570.

CORRIGAN, J. (*dissenting*). I respectfully dissent from the order denying defendant's application for leave to appeal. Because the split decision in *Petersen v Magna Corp*, 484 Mich 300 (2009), failed to provide a workable standard concerning the circumstances under which a magistrate "may" prorate attorney fees, I would remand this case to the Court of Appeals to

consider defendant's argument that the award of an attorney fee on unpaid medical benefits was erroneous.

MCL 418.315(1) provides that "[t]he worker's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee." In *Petersen*, a majority of this Court merely agreed on the result: workers' compensation magistrates may prorate attorney fees among employers and their insurance carriers. The five opinions did not offer a controlling rationale. Moreover, the five separate opinions in *Petersen* do not establish a standard agreed on by a majority of justices under which workers' compensation magistrates may exercise their discretionary authority in the first instance. *Petersen* merely tells us that a magistrate "may prorate" attorney fees but that an award is not automatic. See *Petersen*, *supra* at 309 (opinion of KELLY, C.J.) ("Hence, magistrates are allowed to award attorney fees, but they are not required to do so."). Consequently, *Petersen* does not explain how magistrates could abuse their discretion in awarding attorney fees, much less specify how magistrates may exercise their discretion.

In MCL 418.315(1), the Legislature differentiated between magistrates' discretionary authority to prorate attorney fees and their mandatory duty to order reimbursement for reasonable medical expenses that an employer fails, neglects, or refuses to pay. See MCL 418.315(1) ("If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the worker's compensation magistrate."). Accordingly, MCL 418.315(1) mandates reimbursement for medical bills that the employer does not pay. In contrast, the award of attorney fees under MCL 418.315(1) is discretionary. Because the award of attorney fees is a discretionary determination, magistrates presumably must make some additional finding before exercising their authority. Yet, neither *Petersen* nor the statutory language assists a workers' compensation magistrate in determining whether to exercise that discretionary authority in a given case.

The dearth of guidance from this Court concerning the standard under which a magistrate may exercise discretion under MCL 418.315(1) will continue to confound members of the bench and bar. In this case, for example, defendant argues that it did not immediately pay medical bills for disc surgery to plaintiff's back because defendant reasonably questioned whether the surgery was related to plaintiff's compensable, work-related back injury, which was merely a back strain. *Peterson* does not establish whether, and under what circumstances, attorney fees are appropriate when a defendant contests his duty to pay a bill that appears unrelated to the compensable injury. Perhaps most significantly, defendant observes that the magistrate made no findings with regard to the attorney fee issue, but simply awarded a fee on the basis of plaintiff's request and the fact that the bills went unpaid for an undetermined amount of time. It would seem that some amount of explicit fact-finding was necessary for the magistrate to properly exercise her discretion in awarding a fee.

Because *Petersen* failed to resolve these issues, I would remand this case to the Court of Appeals for reconsideration of defendant's argument that the award of an attorney fee on unpaid medical benefits was erroneous. Specifically, I would order the Court of Appeals to consider whether the workers' compensation magistrate made sufficient findings and offered adequate analysis to show that she engaged in a proper exercise of discretion in requiring defendant to pay attorney fees under MCL 418.315(1). See *Petersen*, *supra* at 310, 335-336. Moreover, I would ask the Court of Appeals to address defendant's argument that the magistrate erred by awarding attorney fees on medical bills where defendant contested whether the services addressed plaintiff's work-related injury, and thus whether payment was actually owed by defendant. Unless this Court or the Court of Appeals clarifies the standard under which a magistrate may exercise discretion, the award of attorney fees under MCL 418.315(1) will become automatic. Plainly, the Legislature did not authorize the automatic assessment of attorney fees.

Accordingly, I would remand this case to the Court of Appeals to consider defendant's argument that the award of an attorney fee on unpaid medical benefits was erroneous.

YOUNG and MARKMAN, JJ., joined the statement of CORRIGAN, J.

HARVLIE v JACK POST CORPORATION, No. 137402; reported below: 280 Mich App 439.

CORRIGAN, J. (*dissenting*). I respectfully dissent from the order denying defendants' application for leave to appeal. Because the split decision in *Petersen v Magna Corp*, 484 Mich 300 (2009), failed to provide a workable standard concerning the circumstances under which a magistrate "may" prorate attorney fees, I would remand this case to the Court of Appeals to consider defendants' argument that the award of an attorney fee on unpaid medical benefits was erroneous.

MCL 418.315(1) provides that "[t]he worker's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee." In *Petersen*, a majority of this Court merely agreed on the result: workers' compensation magistrates may prorate attorney fees among employers and their insurance carriers. The five opinions did not offer a controlling rationale. Moreover, the five separate opinions in *Petersen* do not establish a standard agreed on by a majority of justices under which workers' compensation magistrates may exercise their discretionary authority in the first instance. *Petersen* merely tells us that a magistrate "may prorate" attorney fees but that an award is not automatic. See *Petersen*, *supra* at 309 (opinion of KELLY, C.J.) ("Hence, magistrates are allowed to award attorney fees, but they are not required to do so."). Consequently, *Petersen* does not explain how magistrates could abuse their discretion in awarding attorney fees, much less specify how magistrates may exercise their discretion.

In MCL 418.315(1), the Legislature differentiated between magistrates' discretionary authority to prorate attorney fees and their mandatory duty to order reimbursement for reasonable medical expenses that an employer fails, neglects, or refuses to pay. See MCL 418.315(1) ("If the employer fails, neglects, or refuses so to do, the employee shall be

reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the worker's compensation magistrate."). Accordingly, MCL 418.315(1) mandates reimbursement for medical bills that the employer does not pay. In contrast, the award of attorney fees under MCL 418.315(1) is discretionary. Because the award of attorney fees is a discretionary determination, magistrates presumably must make some additional finding before exercising their authority. Yet neither *Petersen* nor the statutory language assists a workers' compensation magistrate in determining whether to exercise that discretionary authority in a given case.

The dearth of guidance from this Court concerning the standard under which a magistrate may exercise discretion under MCL 418.315(1) will continue to confound members of the bench and bar. In this case, for example, defendants challenge the award of attorney fees when payment was delayed for approximately three months because of typical processing lags and plaintiff's failure to submit evidence in a timely manner. Defendants contend that the magistrate abused his discretion in awarding attorney fees under the unique facts of this case. Assuming *arguendo* that a three-month delay is an appropriate circumstance for the magistrate to have exercised his discretionary authority, it remains unclear whether the magistrate would necessarily have reached the same result if payment had been delayed for two months or two weeks. Similarly, it is unclear what additional factors would be relevant to the magistrate's discretionary determination. Indeed, the lack of any workable standard complicates the appellate review of such awards as well because a reviewing court has no meaningful basis to consider whether a magistrate abused his discretion in awarding attorney fees.

Because *Petersen* failed to resolve these issues, I would remand this case to the Court of Appeals for reconsideration of defendants' argument that the award of an attorney fee on unpaid medical benefits was erroneous. Specifically, I would order the Court of Appeals to consider whether the workers' compensation magistrate made sufficient findings and offered adequate analysis to show that he engaged in a proper exercise of discretion in requiring defendants to pay attorney fees under MCL 418.315(1). See *Petersen*, *supra* at 310, 335-336. Moreover, I would ask the Court of Appeals to address defendants' argument that the magistrate erred by awarding attorney fees on medical bills that plaintiff failed to prove were not diligently paid after defendants received notice of them. Unless this Court or the Court of Appeals clarifies the standard under which a magistrate may exercise discretion, the award of attorney fees under MCL 418.315(1) will become automatic. Plainly, the Legislature did not authorize the automatic assessment of attorney fees.

Accordingly, I would remand this case to the Court of Appeals to consider defendants' argument that the award of an attorney fee on unpaid medical benefits was erroneous.

YOUNG and MARKMAN, JJ., joined the statement of CORRIGAN, J.

PEOPLE v HOCH, No. 137908; Court of Appeals No. 269739.

CORRIGAN, J. (*concurring*). I concur in the order denying leave to appeal. Nevertheless, I question the conclusion of the Court of Appeals that a new trial was required because the trial judge engaged in an ex parte communication with the jury during its deliberations. A trial judge's substantive communication with a jury may require reversal if that communication was ex parte. *People v France*, 436 Mich 138, 166 (1990). But, without regard to whether the communication here was substantive, I question the reflexive conclusion of the Court of Appeals that the trial court communicated with the jury on an ex parte basis.

"Ex parte" generally means "[d]one or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested." Black's Law Dictionary (7th ed). MCR 6.414(B) provides that a trial court "may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present." Here, the record plainly does not show that defendant was not notified or went unrepresented during the communication. Rather, the trial judge forgot to turn on the recording equipment. The Court of Appeals broadly assumed that the communication was ex parte merely because the judge's communication with the jury was not transcribed and because defendant's trial attorney was not present.

But, crucially, defendant *admitted* at the sentencing hearing that "[s]omebody else stood in" for his attorney, stating:

> [T]he jury sent a note out asking for further instructions on an inadvertent assault as the assault element for robbery. And I wasn't in here. I was kept in the holding cell. And I would just like you to—ask you what I—I was told by my—even my attorney wasn't here. Somebody else stood in. I have no idea who it was, but he said that you refused further instruction on inadvertent assault and I don't know what happened. If I don't ask you now, I'll never know as long as I live. And that's why I'm just askin' to be filled in a little bit on what happened on that.

In other words, it appears from the record that defendant was represented by "somebody" other than his trial attorney. Nothing in the record suggests that the "somebody" who stood in was anyone but a properly assigned substitute attorney. Indeed, neither defendant nor his attorney suggested that defendant was unrepresented during the communication or otherwise complained about the process. Rather, defendant requested additional information about the judge's remarks and reasoning, which the judge proceeded to give him.

Indeed, at the oral argument before this court, the appellate prosecutor confirmed that a second attorney represented defendant during the judge's communication with the jury, stating: "I'm certain there was a substitute." The appellate prosecutor stated that defense counsel at trial, Hugh Marshall, was unavailable when the jury requested clarification from the judge, so Marshall ensured that another attorney filled in and represented defendant during the communication. Marshall recalled that David Morelli was the attorney who agreed to fill in, but apparently Morelli had no specific recollection of the event.

The threshold problem in this case was simply that the record was incomplete because of the trial court's mistaken failure to comply with MCR 6.414(B), which requires the court to "ensure that all communications pertaining to the case between the court and the jury or any juror are made a part of the record." Normally, an appellant may cure such a defect by moving the trial court to certify a settled statement of facts to serve as a substitute for the transcript pursuant to MCR 7.210(B)(2).[1] Defendant observes, however, that he was unable to comply with the initial 14-day deadline provided by this rule because several months elapsed between the filing of the claim of appeal and the time when the trial court reporter confirmed that no transcript of relevant jury communication was available. Accordingly, at the oral argument before this Court, we asked the appellate prosecutor whether it would be appropriate to remand for reconstruction of the record under a process akin to that described in MCR 7.210(B)(2). The appellate prosecutor repeatedly declined this suggestion, stating that remand would be "needless" and "would not make any difference." He requested that this Court rely on the existent record to support his arguments on appeal.

An evidentiary hearing might establish, at a minimum, whether defendant was actually represented during the court's communication

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[1] MCR 7.210(B) provides in part:

> (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 shall file a settled statement of facts to serve as a substitute for the transcript.
>
> (a) Within 14 days after filing the claim of appeal, the appellant shall file with the trial court or tribunal clerk, and serve on each appellee, a proposed statement of facts. The 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 inform the Court of Appeals of the nature of the controversy and of the proceedings in the trial court or tribunal.
>
> (b) The appellant shall notice the proposed statement of facts for prompt settlement before the trial court or tribunal. An amendment or objection to the proposed statement of facts must be in writing, filed in the trial court or tribunal before the time set for settlement, and served on the appellant and any other appellee.
>
> (c) The trial court or tribunal shall settle any controversy and certify a statement of facts as an accurate, fair, and complete statement of the proceedings before it.
>
> (d) The statement of facts and the certifying order must be filed with the trial court or tribunal clerk and a copy of the certifying order must be filed with the Court of Appeals.

with the jury. The appellate prosecutor's comments at oral argument before this Court practically establish as much. Because this issue has not been developed on remand to the trial court, we cannot know what the collective memories and notes of the trial judge, attorneys, and potentially the jury foreperson might reveal. The trial judge may well be able to confirm that he contacted both parties when the jury requested further instruction and that both parties were represented by attorneys during the communication. At a minimum, the trial judge might shed light on his normal practices under such circumstances. If, on remand, the trial court could establish that defendant was properly represented by substitute counsel, the communication would not have been ex parte, and a primary reason underpinning the Court of Appeals order of reversal would be negated. Requiring an entire new trial under these circumstances—as opposed to remanding for an evidentiary hearing—seems to me a great waste of the taxpayers' resources.

Nonetheless, because the appellate prosecutor repeatedly insisted that a remand would be futile, we cannot confirm whether defendant was properly represented by substitute counsel. Accordingly, I feel constrained to concur in the order denying leave.

Finally, in light of defendant's apparent conundrum in presenting a full record on appeal to the Court of Appeals, I ask that this Court open an administrative file to consider whether the 14-day period listed in MCR 7.210(B)(2)(a) should be lengthened or modified in some manner to accommodate situations like that presented here. Perhaps the rule should be amended to allow for an extension of the period, either by the Court of Appeals or by stipulation of the parties, when appropriate. Defendant reasonably observes that many appellants cannot know within 14 days of the filing of the claim of appeal whether a necessary transcript is unavailable.

PEOPLE v MICHAEL ANTHONY, No. 138084; Court of Appeals No. 278577.

MARKMAN, J. (*concurring*). I concur, but write separately to acknowledge the merit in defendant's claim that he was improperly assessed 25 points for offense variable (OV) 13 (continuing pattern of criminal behavior) because his most recent offense was committed ten years before the instant offense. *People v Francisco*, 474 Mich 82, 87 (2006) (only crimes committed within a five-year period are considered for the purposes of OV 13). Nonetheless, trial counsel expressed satisfaction with the inaccurate score that rendered defendant's sentence a 12½-year upward departure from the range that would have resulted from an accurate score. In his application, defendant does not properly raise the claim that trial counsel was ineffective for failing to correct this scoring error. See *People v Kimble*, 470 Mich 305, 314 (2004). If there is to be relief, it must come in response to a motion for relief from judgment. MCR 6.508(D).

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

PEOPLE v CAMEL, No. 139855; Court of Appeals No. 292889.

CAVANAGH, J., would grant leave to appeal.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal December 3, 2009:

In re MASON (DEPARTMENT OF HUMAN SERVICES v MASON), No. 139795. We direct the Clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). At oral argument, the parties shall address whether, under the particular circumstances of this case, the Macomb Circuit Court, Family Division, clearly erred in terminating the respondent-father's parental rights pursuant to MCL 712A.19b(3)(c)(*i*), (g), (h), and (j), where the Department of Human Services failed to maintain contact with the respondent-father throughout the proceedings, failed to ensure his appearance at all court hearings (see MCR 2.004), and failed to provide him with an opportunity to comply with a parent-agency agreement tailored to his circumstances. See *In re Rood*, 483 Mich 73 (2009). The parties may file supplemental briefs within 28 days of the date of this order, but they should not submit mere restatements of their application papers. Court of Appeals No. 290637.

Summary Disposition December 4, 2009:

LOOS v J B INSTALLED SALES, INC, No. 137987. In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the decision of the worker's compensation magistrate. The Court of Appeals improperly held that income tax records regarding whether the plaintiff was paid wages or nonemployee compensation are irrelevant to the question of whether the plaintiff is an employee under MCL 418.161(1)(n). Such records are directly relevant to the question of employee status. *Blanzy v Brigadier*, 240 Mich App 632 (2000); *Betancourt v Ronald Smith*, 1999 ACO #608. Based on the Court of Appeals erroneous legal conclusion in this case, it mistakenly concluded that the Workers' Compensation Appellate Commission (WCAC) had properly performed its administrative appellate review function. The WCAC improperly reversed the magistrate's decision based on a de novo assessment of the record and application of incorrect legal principles regarding whether the plaintiff was an employee. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 700 (2000). Court of Appeals No. 275704.

CAVANAGH, J. (*concurring in part and dissenting in part*). I concur with the majority's statement that tax records are relevant to the question of whether a plaintiff is an employee under MCL 418.161(1)(n). However, because I believe that the Workers' Compensation Appellate Commission (WCAC) properly performed its appellate review function, I respectfully dissent and would affirm the result reached by the Court of Appeals.

Plaintiff fell from a roof and sustained injuries while working for Robinson Roofing, which had contracted with J.B. Installed Sales, Inc., (J.B.) to perform roof work. Plaintiff sought worker's compensation benefits from J.B. under MCL 418.171. The magistrate found that plaintiff was an independent contractor, and therefore denied benefits, because plaintiff's tax records revealed that his earnings from Robinson Roofing were reported as non-employee earnings; his Social Security

records indicated that plaintiff was not an employee of Robinson Roofing; his hospital records indicated that plaintiff identified himself as self-employed; Robinson Roofing did not inform J.B. that it had any employees, as required by their contract; and plaintiff used some of his own tools while working for Robinson Roofing. The WCAC reversed in a unanimous decision, stating that "the statutory language [of MCL 418.161(1)(n)] makes it clear that the proper focus is on the plaintiff's actions and not the parties' labels." 2006 ACO 309, p 6. I agree.

The Worker's Disability Compensation Act defines "employee" in MCL 418.161(1)(n). The statute states that a claimant is an employee "if *the person* in relation to this service does not maintain a separate business, does not hold *himself or herself* out to and render service to the public, and is not an employer subject to this act." MCL 418.161(1)(n) (emphasis added). Given the statutory language, I agree with the WCAC that the proper focus is on the conduct of the person seeking benefits rather than the labels attached to the relationship by the parties. Robinson Roofing's "labeling" that it had no employees, plaintiff's "labeling" of himself as self-employed, and plaintiff's tax records, which were filed based on a Form 1099 that was supplied by Robinson Roofing, should not have been the focus of the magistrate's analysis. Thus, I believe that the WCAC did not misapprehend its administrative appellate review when it determined that the magistrate applied its findings of fact to a misconception of the law. Because I believe that the WCAC did not misapprehend its administrative appellate role in reviewing the magistrate's decision, and there is evidence to support the WCAC's decision, I would affirm the result reached by the Court of Appeals. See *Holden v Ford Motor Co*, 439 Mich 257, 268-269 (1992).

KELLY, C.J., and HATHAWAY, J., joined the statement of CAVANAGH, J.

Leave to Appeal Denied December 4, 2009:

PEOPLE v RICHARDS, No. 137577; Court of Appeals No. 286782. By order of March 27, 2009, the application for leave to appeal the September 10, 2008 order of the Court of Appeals was held in abeyance pending the decision in *People v Idziak* (Docket No. 137301). On order of the Court, the case having been decided on July 31, 2009, 484 Mich 549 (2009), the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. The motion to remand to the trial court for correction of the presentence report is denied.

CORRIGAN, J. (*concurring*). I join the order denying leave to appeal. I write separately to respond to Justice MARKMAN's assertion that the sentencing court plainly erred in scoring 10 points for offense variable 3 (OV 3) for a "bodily injury requiring medical treatment."

Defendant pleaded guilty to domestic assault, third offense, as an habitual offender, fourth offense, for assaulting his girlfriend. The trial court sentenced defendant to 46 to 180 months in prison. Defendant did not challenge the OV 3 scoring at sentencing, nor did he raise the issue in a motion for resentencing or a motion to remand in the Court of Appeals, but he did raise the issue in his Court of Appeals brief. The

Court of Appeals denied leave to appeal for lack of merit. Defendant now applies for leave to appeal in this Court.

Justice MARKMAN concludes that the sentencing court plainly erred by scoring 10 points for OV 3. He finds that "there is absolutely no evidence that the victim here required medical treatment."

The presentence report and the preliminary examination transcript, however, reflect the severity of the beating that defendant inflicted on the victim. Defendant grabbed the victim by the hair and stated that he was going back to prison because of her. He punched her in the face several times. As the victim went into the kitchen to try to grab a knife for protection, defendant again grabbed her by the hair, dragged her into the living room, and got on top of her, pinning her down. Defendant then grabbed the victim around the throat and began choking her to the point that she could no longer breathe. The victim felt completely helpless and was unable to speak. Defendant told her, "I'll kill you, I'll kill you and I'm going back to prison for this." The victim later recounted that as defendant was choking her, she thought she was going to die before help arrived. Defendant finally let up long enough for her to scream and get to her cell phone to call 911.

When police officers arrived, they saw that the victim had large thick abrasions on both sides of her neck. The victim also had a bruise and a swollen right cheek, and she complained that her arms were hurting from blocking defendant's punches to her face. When the presentence report was later prepared, however, the victim stated that she did not go to the hospital for her injuries and that she believed the situation was blown out of proportion.[1]

Justice MARKMAN asserts that the victim's injuries did not require medical attention, but his conclusion stems from an incomplete record caused by defendant's failure to challenge the OV 3 score below. Indeed, it is not beyond the realm of possibility that a defense lawyer may decline to challenge an OV 3 score in a domestic violence guilty plea case precisely to avoid the presentation of proofs that would expose the brutality of a defendant's beating, knowing full well that later review for plain error may still be available under *People v Kimble*, 470 Mich 305, 312-313 (2004). Granting resentencing on an incomplete record in this situation would only reward such gamesmanship.

Accordingly, I concur in the denial of leave to appeal in this case.

MARKMAN, J. (*dissenting*). The trial court scored offense variable 3 (OV 3) at 10 points on the basis that defendant caused "bodily injury requiring medical treatment." MCL 777.33(1)(d). However, there is absolutely no evidence that the victim here required medical treatment. Although I do not disagree with the majority's implicit conclusion that OV 3 can sometimes be scored even absent actual medical treatment, consideration must also be given to the general proposition that medical treatment is not truly "required" if, in fact, it is neither sought nor provided. The victim here testified that she did not seek medical

[1] As often happens in domestic violence cases, the victim in this case did not cooperate with the prosecution.

treatment for her injuries because she considered them "superficial." The presentence investigation report further describes the injuries as bruises and abrasions for which no medical treatment was sought.

Justice CORRIGAN contends that OV 3 was properly scored at 10 points because the victim "thought she was going to die before help arrived." But, however understandable the *victim's* apprehensions may have been under these circumstances, considerably less understandable is why *Justice* CORRIGAN sees relevance in this fact where the specific, and only, legal inquiry under OV 3 is whether the victim suffered a "bodily injury *requiring* medical treatment." Although Justice CORRIGAN proceeds further to justify the scoring of OV 3 on the basis that the victim had "one thick abrasion on the left side of her neck . . . and two thick abrasions on the right side," I find it far more persuasive in answering the only legal question before this Court (a) that the victim did not seek or obtain medical treatment for her injuries and (b) that the police who saw the victim and her injuries did not seek or obtain medical assistance. It is difficult thus to understand how the victim suffered a "bodily injury *requiring* medical treatment," and it is equally difficult to understand how Justice CORRIGAN's reading of the guidelines accords respect to the actual language adopted by our Legislature.

If OV 3 is scored at 5 points, as it should have been (for injuries not requiring medical treatment), defendant's minimum-sentence range under the sentencing guidelines would change from 5-46 months to 2-34 months. Defendant's 46-month sentence would then exceed the guidelines range. Although the scoring error was not preserved at the trial court level, the error was plain and defendant was obviously prejudiced by the error. See *People v Kimble*, 470 Mich 305, 312-313 (2004). Accordingly, I would remand for resentencing.

KELLY, C.J., joined the statement of MARKMAN, J.

EXPRESS SCRIPTS, INC v DEPARTMENT OF MANAGEMENT AND BUDGET, No. 139975; Court of Appeals No. 294888.

CAVANAGH and WEAVER, JJ., would grant leave to appeal.

In re BELL (BELL v BELL), No. 140004; Court of Appeals No. 290285.

Leave to Appeal Denied December 8, 2009:

THOMAS v JOHNSON, No. 138858; Court of Appeals No. 289503.

Leave to Appeal Denied December 9, 2009:

PEOPLE v QUINCY HARRIS, No. 138822; Court of Appeals No. 289217.

PEOPLE v STEELE, No. 138970; reported below: 283 Mich App 472.

PEOPLE v PRATT, No. 139400; Court of Appeals No. 284299.

PEOPLE v BOWKER, No. 139483; Court of Appeals No. 291970.

PEOPLE v THOMAS WASHINGTON, No. 139488; Court of Appeals No. 284249.

KELLY, C.J., and HATHAWAY, J., would hold this case in abeyance for *Berghuis v Smith*, cert gtd 557 US___; 130 S Ct 48; 174 L Ed 2d 631 (2009).

PEOPLE v GUERRA, No. 139157; Court of Appeals No. 283133.

MARKMAN, J. (*concurring*). I respectfully disagree with the Court of Appeals that the trial court did not rely upon defendant's status as an illegal alien as a "substantial and compelling" factor to support its sentencing departure in this case. Rather, the trial court stated to the defendant, "You're not only here illegally, but you're committing crimes." The trial court also repeatedly referenced that defendant was the citizen of a different country, and stated as the first reason on the departure evaluation form that "[d]efendant was an illegal alien at the time he committed this offense." I do not know how much more clear the trial court could have been that defendant's illegal status constituted a factor, indeed apparently a significant factor, in the court's decision to depart upwardly from the guidelines range and impose a minimum sentence of 36 months, rather than one of 12-24 months.

Because, in my judgment, the trial court made itself quite clear, I would affirm its decision. It is hard to imagine a more compelling basis for an upward departure than that a defendant *at the very time of his criminal conduct* is in violation of other substantial criminal laws of this country. Defendant violated the laws of this country by entering it illegally, and he has violated the laws of this country by remaining here illegally. He was in violation of our laws before, during and after his home invasions in Lenawee County, and he was in violation of our laws before, during, and after his home invasions in Hillsdale County. Either by itself or in conjunction with other grounds for upward departure, defendant's status as an illegal alien constitutes a substantial and compelling basis for a sentence above the guidelines range, and it is inconceivable that it could be otherwise.

CORRIGAN and YOUNG, JJ., joined the statement of MARKMAN, J.

KELLY, C.J., and CAVANAGH, J., would grant leave to appeal.

Summary Disposition December 9, 2009:

TAPPEN v CARLTON 54TH LLC, No. 139160; Court of Appeals No. 290919. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v RABY, No. 139348; Court of Appeals No. 278617. Pursuant to MCR 7.302 (H)(1), in lieu of granting leave to appeal, we vacate in part the judgment of the Court of Appeals and remand this case to the Court of Appeals for reconsideration of the defendant's Confrontation Clause issue in light of *Melendez-Diaz v Massachusetts*, 557 US __; 129 S Ct 2527; 174 L Ed 2d 314 (2009). We retain jurisdiction.

PEOPLE v LORINDA SWAIN, No. 139726; Court of Appeals No. 293350. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The Court of Appeals should address among the issues

presented: (1) whether the successive motion for relief from judgment in this case was barred by MCR 6.502(G), and (2) if it was, whether defendant's constitutional rights are implicated given that the trial court found a significant possibility that defendant is innocent based on evidence defendant's attorney failed to present at trial.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal December 11, 2009:

PEOPLE v LEDELL MUSHATT, No. 139413; Court of Appeals No. 283954. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). We order the Ingham Circuit Court, utilizing a procedure analogous to that described in Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint attorney Michael A. Faraone, if feasible, to represent the defendant in this Court. If the defendant is not indigent, he must retain his own counsel. At oral argument, the parties shall address whether offense variable 3 was scored in accordance with *People v McGraw*, 484 Mich 120 (2009). The parties may file supplemental briefs within 42 days of the appointment of appellate defense counsel, but they should not submit mere restatements of their application papers.

PEOPLE v HERCULES-LOPEZ, No. 139537; Court of Appeals No. 280887. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). At oral argument, the parties shall address: (1) whether the defendant was deprived of counsel at a critical stage of the proceedings where the trial court, in the absence of defense counsel, sent jurors a note answering a jury question regarding the necessary intent for conspiracy and counsel was unable to review the note until after the jury returned its guilty verdict; (2) whether the trial court's answer to the jury question merely repeated initial jury instructions or constituted a new nonstandard instruction; (3) if the reinstruction in counsel's absence was not structural error, whether it resulted in plain error under *People v Carines,* 460 Mich 750 (1999); and (4) the relevance, if any, of the conduct of defense counsel after being informed, while deliberations were still progressing, of what transpired relative to the note and the court's instruction. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

The application for leave to appeal as cross-appellant remains pending.

Leave to Appeal Granted December 16, 2009:

FOSTER v WOLKOWITZ, No. 139872; Court of Appeals No. 291825. The parties shall include among the issues to be briefed: (1) whether the Court of Appeals erred in relying on the Michigan Acknowledgment of Parentage Act (MAPA), MCL 722.1001 *et seq*., rather than the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*., to determine that Michigan should exercise subject-matter jurisdiction in this interstate child custody dispute; (2) if the Court of Appeals correctly relied on the MAPA to establish subject-matter jurisdiction in Michigan, whether the statute violates the Equal Protection Clauses of the state and federal constitutions by creating a suspect classification of unmarried fathers who are treated differently than married fathers; and (3) if jurisdiction properly lies in Illinois, as the child's "home state" under the UCCJEA, MCL 722.1102(g), MCL 722.1201(1), whether Michigan is the more convenient forum for resolution of this matter. See MCL 722.1202(2); MCL 722.1207.

The clerk of the court is directed to place this case on the March 2010 session calendar for argument and submission. Appellant's brief and appendix must be filed no later than January 29, 2010, and appellee's brief and appendix, if appellee chooses to submit an appendix, must be filed no later than February 19, 2010.

The Family Law Section of the State Bar of Michigan is invited to file a brief amicus curiae, to be filed no later than March 3, 2010. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae, to be filed no later than March 3, 2010.

CORRIGAN, J. (*concurring*). I concur in the order granting leave. I write separately to ask the parties to comment on an additional element of this case for the benefit of the Court. The parties executed an affidavit of parentage (AOP) under the Michigan Acknowledgment of Parentage Act (MAPA), MCL 722.1003. Under MCL 722.1004, an AOP "may be the basis for court ordered child support," among other things. Accordingly, I note that the matter of child support here was referred to the Monroe County Friend of the Court. Yet defendant apparently refused to provide forms and financial documentation requested by the Friend of the Court concerning his child support obligations. The court ultimately adopted the Friend of the Court's recommendation, which imputed to defendant income equal to that of plaintiff and ordered support. I would ask the parties: (1) whether and how the child support matter affects the jurisdictional question in this case, and (2) whether the Michigan trial court's jurisdiction over child support is coextensive with its jurisdiction over custody.

Summary Disposition December 18, 2009:

BRINDLEY v SEVERSTAL NORTH AMERICA, INC, No. 137949. Court of Appeals No. 286155. By order of March 23, 2009, the application for leave to appeal the November 12, 2008 order of the Court of Appeals was held in abeyance pending the decision in *Henry v Dow Chem* (Docket No.

136298). On order of the Court, the case having been decided on July 31, 2009, 484 Mich 483 (2009), the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for proceedings consistent with this order. It appears that the circuit court made an independent determination that the plaintiffs at least alleged a sufficient factual and legal basis to support each of the prerequisites provided in MCR 3.501(A)(1), as required by *Henry*, 484 Mich at 505, and it does not appear that it abused its discretion in so doing. The circuit court prefaced its analysis, however, with the statement that "the trial court is required to accept the allegations made in support of the request for certification as true." This statement is inconsistent with the standard adopted in *Henry* "to the extent that it could be read to require courts to accept as true plaintiffs' bare assertions that the class certification prerequisites are met." *Henry*, 484 Mich at 505. In this case, as in *Henry*, the Court will refrain from looking behind the circuit court's analysis to guess whether the circuit court actually utilized the correct standard. See *Henry*, 484 Mich at 506-507. Therefore, although it appears that the circuit court's analysis of the class certification prerequisites in MCR 3.501(A)(1) was proper, on remand the circuit court may revisit its analysis if it determines that its original decision depended on an analytical framework that is inconsistent with this Court's decision in *Henry*. The circuit court may, in its discretion, conduct an evidentiary hearing regarding these matters if it deems such appropriate. We do not retain jurisdiction.

CORRIGAN, J. (*dissenting*). I would direct the circuit court to clarify its reasoning in ruling that plaintiffs have met their burden to establish that the class certification requirements of MCR 3.501(A)(1) are met in light of *Henry v Dow Chem Co*, 484 Mich 483 (2009). The record before us does not establish that the circuit court's decision granting certification comported with *Henry.* To the contrary, the record reveals that the court did not truly analyze the certification criteria. Moreover, it expressly relied on the wrong standard: *Neal v James*, 252 Mich App 12 (2002), was overruled by *Henry*, *supra* at 505 n 39. Given the circuit court's errors, we should direct the court to comply with *Henry* on remand. The majority order merely invites the circuit court to "revisit its analysis if it determines that its original decision depended on an analytical framework" inconsistent with *Henry*. This order abdicates our appellate duties. It effectively affirms the circuit court's first decision by permitting the court to rubber-stamp it on remand.

THE TRIAL COURT'S RELIANCE ON *NEAL v JAMES*

First, the circuit court clearly relied on the now-repudiated *Neal* standard in its opinion and order granting class certification, in which it cited *Neal* and stated: "When evaluating a motion for class certification, the trial court is required to accept the allegations made in support of the request for certification as true." *Henry* explicitly rejected this approach. *Id.* at 505 n 39 ("[T]o the extent that *Neal* could be read to require a trial court to accept as true a plaintiff's bare assertion that a class certification prerequisite is met, we overrule *Neal*."). Further, the circuit court

confirmed that it relied on the *Neal* standard when it denied defendant's motion for reconsideration, in which defendant challenged the court's reliance on *Neal*. Thus, the court clearly based its decision on this incorrect standard. For this reason alone, I would direct the court to revisit its analysis on remand in light of *Henry*.

THE CLASS CERTIFICATION CRITERIA IN MCR 3.501(A)(1)

Second, I disagree that "[i]t appears that the circuit court made an independent determination that the plaintiff at least alleged a sufficient factual and legal basis to support each of the prerequisites provided in MCR 3.501(A)(1), as required by *Henry*, 484 Mich at 505." To the contrary, the court's written reasoning is sparse—particularly with regard to the criteria in MCR 3.501(A)(1)(c) through (e). It supplied no oral reasoning; although the written opinion (incorrectly) states that the court "ha[d] heard oral argument," no hearing was ever held. Indeed, defendant raised the lack of hearing as a ground for reconsideration.[1]

With regard to element (c) of MCR 3.501(A)(1) (typicality), the circuit court reasoned:

> [A]lthough there are factual differences between Plaintiff's claims and those of the putative class, her claims arise out of the same course of conduct that gives rise to the claims of the other class members, i.e., Severstal's alleged discharge of fallout and dust. Furthermore, Plaintiff's claims and the claims of the putative class members are based on the same legal theories, nuisance and negligence. Accordingly, the Court finds that the requirement of typicality has been met.

This "analysis" is scarcely distinguishable from the typicality analysis we rejected in *Henry, supra* at 506 n 40, stating:

> For MCR 3.501(A)(1)(c), the typicality prerequisite, the trial court's analysis consisted of a restatement of the standard; a statement that "plaintiffs contend" that their claims "arise from the same course of conduct" and that "they share common legal and remedial theories"; and a quote from a federal district court case stating that the typicality requirement may be satisfied if "there is a nexus between the class representatives' claims [and] defenses and the common questions of fact or law which unite the class." It is unclear from the trial court's analysis whether it independently determined that the plaintiffs alleged basic questions of law and fact sufficient to support their allegation that their legal remedial theories were typical of those of the class.

Similarly, for element (d) (adequacy of representation), the circuit

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[1] In comparison, I note that in *Henry* the trial court heard extensive oral arguments regarding the class certification question. See *Henry, supra* at 514 (YOUNG, J., concurring in part).

court stated *in full*: "MCR 3.501(A)(1)(d) focuses on whether the class representatives can fairly and adequately represent the interests of the class as a whole. In the present case, for the reasons stated in Plaintiff's brief, the court believes that Plaintiff will fairly and adequately protect the class." The *Henry* opinion renders this inadequate. *Henry* rejected the trial court's similar "analysis" of element (d), stating:

> In the circuit court's analysis of MCR 3.501(A)(1)(d), the adequacy of representation prerequisite, it stated that "[t]he representative parties will fairly and adequately assert and protect the interest of the class." It supported this conclusion by reasoning that "no proof has been submitted to this Court that would indicate that the Plaintiffs herein, the representative parties, would not fairly and adequately assert and protect the interest of the class." In other words, the circuit court did not perform an analysis that sufficiently shows that it independently determined that the plaintiffs would adequately represent the class and also potentially shifted the burden to defendant to show that plaintiffs would *not* adequately represent the class. [*Henry*, *supra* at 506 n 40.]

I also question the discussion of element (e) (superiority), in which the court opines:

> For the reasons set forth in Plaintiff's brief, this Court is of the opinion that in this case, a class action is superior to other available means of adjudication. Although the Court is well aware that "mini-trials" will be necessary with respect to issues of proximate causation and damages, and that such mini-trials may also involve the allocation of fault, the determination of common issues of liability via class action treatment is more efficient th[a]n joining hundreds, if not thousands, of individual plaintiffs.

As with elements (c) and (d), and particularly because the court relies primarily on plaintiff's brief, the court did not independently determine under element (e) that a class action is superior to other available means of adjudication, and it potentially shifted the burden to defendant to disprove this element.

CONCLUSION

Accordingly, I would direct the circuit court to clarify its class certification decision on remand in light of *Henry*. Not only were many portions of the court's discussion brief and conclusory, but its conclusions with regard to each criterion for certification should be clarified because the court explicitly relied on the repudiated *Neal* standard. This Court's order is effectively meaningless because it merely invites the circuit court to revisit its analysis if the circuit court so chooses. I therefore invite the circuit court to revisit its analysis in full, and in writing, for the benefit of the parties and future appellate courts.

YOUNG and MARKMAN, JJ., joined the statement of CORRIGAN, J.

Leave to Appeal Granted December 18, 2009:

DUNCAN v STATE OF MICHIGAN, No. 139345; Reported below: 284 Mich App 246. The clerk of the court is directed to place this case on the April 2010 session calendar for argument and submission. Appellants' brief and appendix must be filed no later than February 8, 2010, and appellees' brief and appendix, if appellees choose to submit an appendix, must be filed no later than March 11, 2010.

The Criminal Law Section of the State Bar of Michigan, the Prosecuting Attorneys Association of Michigan, and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae, to be filed no later than March 29, 2010. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae, to be filed no later than March 29, 2010.

MAWRI v CITY OF DEARBORN, No. 139647; Court of Appeals No. 283893. The clerk of the court is directed to place this case on the April 2010 session calendar for argument and submission. Appellant's brief and appendix must be filed no later than February 8, 2010, and appellee's brief and appendix, if appellee chooses to submit an appendix, must be filed no later than March 11, 2010.

The Michigan Association for Justice and Michigan Defense Trial Counsel, Inc. are invited to file briefs amicus curiae, to be filed no later than March 29, 2010. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae, to be filed no later than March 29, 2010.

Summary Disposition December 18, 2009:

PEOPLE v DANTE ROGERS, No. 138925; Court of Appeals No. 288571. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration under the standard for direct appeals, because the defendant was deprived of his direct appeal as a result of constitutionally ineffective assistance of counsel. See *Roe v Flores-Ortega*, 528 US 470, 477; 120 S Ct 1029; 145 L Ed 2d 985 (2000); *Peguero v United States*, 526 US 23, 28; 119 S Ct 961; 143 L Ed 2d 18 (1999). We do not retain jurisdiction.

Leave to Appeal Denied December 18, 2009:

PEOPLE v ALEX JACKSON, No. 139428; Court of Appeals No. 282349.

MARKMAN, J. (*concurring*). I concur and write separately to explain why I believe it is unnecessary to hold this case in abeyance for the United States Supreme Court's decision in *Berghuis v Smith*, 557 US __;

130 S Ct 48 (2009). Simply put, because, in my judgment, this Court's decision in *People v Smith*, 463 Mich 199 (2000), was correct—and, consequently, the Sixth Circuit panel's decision granting habeas relief to Smith was incorrect—there is no need to wait for the United States Supreme Court's decision, which may or may not even address the jury-venire issue that divides this Court and that panel.

In *People v Smith*, this Court considered whether Kent County's former jury-selection system violated the defendant's Sixth Amendment right to an impartial jury drawn from a fair cross-section of the community. This Court asserted that under *Duren v Missouri*, 439 US 357 (1979), to demonstrate a prima facie violation of the fair cross-section requirement, "defendant must show that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process." *Smith*, 463 Mich at 203. We concluded that defendant Smith had not satisfied this burden because he had failed to demonstrate "systematic exclusion." *Id.*

In *Smith v Berghuis*, 543 F3d 326, 340 (CA 6, 2008), a panel of the Sixth Circuit held that our decision in *Smith* constituted an unreasonable application of clearly established federal law. The panel first found fault in this Court's use of three tests for determining "fair and reasonable representation," although each of these has been employed by federal courts and the panel acknowledged that the United States Supreme Court "has not mandated that a particular method be used to measure underrepresentation in Sixth Amendment challenges." *Berghuis*, 543 F3d at 337. The panel's central holding, however, focused on our determination that the underrepresentation had not occurred as a result of "systematic exclusion." *Id.* at 340. Specifically, it concluded that, contrary to this Court's conclusion in *Smith*, the Sixth Amendment *is* concerned with the "disparate impact" of a jury-selection process when such disparities are rooted in "social and economic factors." *Id.* at 341. The panel did not cite the United States Supreme Court case that announced this legal principle—which it found that we (unreasonably) did not apply in *Smith*.

Moreover, in applying its own test to the facts of *Berghuis*, the panel still found that only one of defendant's proffered arguments constituted a Sixth Amendment violation and an unreasonable application of *Duren*, i.e., that the selection of district court jurors before the selection of circuit court jurors systematically siphoned off minority jurors from the circuit court pool. *Id.* at 342. On this point, the panel reasoned that we misapplied *Duren* by requiring that a defendant's proof be "unequivocal." *Id.* at 343. However, what we, in fact, required in *Smith* was not "unequivocal" proof, just *some* proof, explaining that "[n]o evidence has shown that district court juries contained more, fewer, or a number approximately equal to the number of minority jurors appearing in circuit court." *Smith*, 463 Mich at 225.

Thus, in *Berghuis*, the Sixth Circuit applied a test without a basis in United States Supreme Court precedent and discerned a Sixth Amendment violation after misapprehending one of this Court's statements in *Smith*. The Sixth Circuit's decision seems dubious even before the highly

deferential standard of review of state law prescribed by Congress in the Anti-Terrorism and Effective Death Penalty Act (AEDPA) is considered. Pursuant to AEDPA, a writ of habeas corpus shall not issue unless the state court adjudication "resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" 28 USC 2254(d)(1). The Sixth Circuit itself has clarified that "clearly established federal law" is determined by "the holdings, as opposed to the dicta," of United States Supreme Court decisions, as of the time of the state court decision under review. *Walls v Konteh*, 490 F3d 432, 436 (CA 6, 2007). Further, that court has underscored the high level of deference demanded by AEDPA, explaining: "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also have been unreasonable." *Id*. (citation and quotation marks omitted).

That is, the Sixth Circuit panel in *Berghuis*, acting in habeas, was bound by AEDPA to accord considerable deference to this Court's decision in *Smith*. Yet the panel appeared to substitute its own judgment about matters on which the United States Supreme Court has yet to speak. I would venture to suggest that when the Supreme Court considers *Berghuis*, it is more likely to address the Sixth Circuit's misapplication of AEDPA than it is the merits of this Court's understanding of "systematic exclusion." However, it is unnecessary to engage in this type of speculation in order to properly resolve the case before us. In this case, the chief judge of the Wayne County Circuit Court reasonably relied on this Court's decision in *Smith* to rule that the county's jury-selection process had not "systematically excluded" minorities. Because our decision in *Smith*, in my judgment, was correct, defendant's fair cross-section challenge fails and his application for leave to appeal is properly denied.

CORRIGAN and YOUNG, JJ., joined the statement of MARKMAN, J.

KELLY, C.J., and HATHAWAY, J., would hold this case in abeyance for *Berghuis v Smith*, cert gtd 557 US ___; 130 S Ct 48; 174 L Ed 2d 631 (2009).

PEOPLE v TERRANCE WARD, No. 138871; Court of Appeals No. 289477.

MARKMAN, J. (*concurring*). I concur and write separately to explain why I believe it is unnecessary to hold this case in abeyance for the United States Supreme Court's decision in *Berghuis v Smith*, 557 US __; 130 S Ct 48 (2009). Simply put, because, in my judgment, this Court's decision in *People v Smith*, 463 Mich 199 (2000), was correct—and, consequently, the Sixth Circuit panel's decision granting habeas relief to Smith was incorrect—there is no need to wait for the United States Supreme Court's decision, which may or may not even address the jury-venire issue that divides this Court and that panel.

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show that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process." *Smith*, 463 Mich at 203. We concluded that defendant Smith had not satisfied this burden because he had failed to demonstrate "systematic exclusion." *Id.*

In *Smith v Berghuis*, 543 F3d 326, 340 (CA 6, 2008), a panel of the Sixth Circuit held that our decision in *Smith* constituted an unreasonable application of clearly established federal law. The panel first found fault in this Court's use of three tests for determining "fair and reasonable representation," although each of these has been employed by federal courts and the panel acknowledged that the United States Supreme Court "has not mandated that a particular method be used to measure underrepresentation in Sixth Amendment challenges." *Berghuis*, 543 F3d at 337. The panel's central holding, however, focused on our determination that the underrepresentation had not occurred as a result of "systematic exclusion." *Id.* at 340. Specifically, it concluded that, contrary to this Court's conclusion in *Smith*, the Sixth Amendment *is* concerned with the "disparate impact" of a jury-selection process when such disparities are rooted in "social and economic factors." *Id.* at 341. The panel did not cite the United States Supreme Court case that announced this legal principle—which it found that we (unreasonably) did not apply in *Smith*.

Moreover, in applying its own test to the facts of *Berghuis*, the panel still found that only one of defendant's proffered arguments constituted a Sixth Amendment violation and an unreasonable application of *Duren*, i.e., that the selection of district court jurors before the selection of circuit court jurors systematically siphoned off minority jurors from the circuit court pool. *Id.* at 342. On this point, the panel reasoned that we misapplied *Duren* by requiring that a defendant's proof be "unequivocal." *Id.* at 343. However, what we, in fact, required in *Smith* was not "unequivocal" proof, just *some* proof, explaining that "[n]o evidence has shown that district court juries contained more, fewer, or a number approximately equal to the number of minority jurors appearing in circuit court." *Smith*, 463 Mich at 225.

Thus, in *Berghuis*, the Sixth Circuit applied a test without a basis in United States Supreme Court precedent and discerned a Sixth Amendment violation after misapprehending one of this Court's statements in *Smith*. The Sixth Circuit's decision seems dubious even before the highly deferential standard of review of state law prescribed by Congress in the Anti-Terrorism and Effective Death Penalty Act (AEDPA) is considered. Pursuant to AEDPA, a writ of habeas corpus shall not issue unless the state court adjudication "resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" 28 USC 2254(d)(1). The Sixth Circuit itself has clarified that "clearly established federal law" is determined by "the holdings, as opposed to the dicta," of United States Supreme Court decisions, as of the time of the state court decision under review. *Walls v Konteh*, 490 F3d 432, 436 (CA 6, 2007). Further, that court has underscored the high level of deference demanded by AEDPA, explaining: "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly

established federal law erroneously or incorrectly. Rather, that application must also have been unreasonable." *Id*. (citation and quotation marks omitted).

That is, the Sixth Circuit panel in *Berghuis*, acting in habeas, was bound by AEDPA to accord considerable deference to this Court's decision in *Smith*. Yet the panel appeared to substitute its own judgment about matters on which the United States Supreme Court has yet to speak. I would venture to suggest that when the Supreme Court considers *Berghuis*, it is more likely to address the Sixth Circuit's misapplication of AEDPA than it is the merits of this Court's understanding of "systematic exclusion." However, it is unnecessary to engage in this type of speculation in order to properly resolve the case before us. In this case, the chief judge of the Wayne County Circuit Court reasonably relied on this Court's decision in *Smith* to rule that the county's jury-selection process had not "systematically excluded" minorities. Because our decision in *Smith*, in my judgment, was correct, defendant's fair cross-section challenge fails and his application for leave to appeal is properly denied.

CORRIGAN and YOUNG, JJ., joined the statement of MARKMAN, J.

KELLY, C.J., and HATHAWAY, J., would hold this case in abeyance for *Berghuis v Smith*, cert gtd 557 US ___; 130 S Ct 48; 174 L Ed 2d 631 (2009).

In re KRESUK (DEPARTMENT OF HUMAN SERVICES v KRESUK), No. 140106; Court of Appeals No. 292504.

PAGURA v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 140117; Court of Appeals No. 291265.

Summary Disposition December 21, 2009:

HANNERS v SANKARAN, No. 138702; Court of Appeals No. 287233. By order of June 5, 2009, this Court granted a stay of trial court proceedings. The application for leave to appeal the January 20, 2009 order of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the order of the Genesee Circuit Court granting the plaintiff's motion to reinstate the complaint, and we remand this case to that court for entry of an order denying the motion. See *Kidder v Ptacin*, 284 Mich App 166 (2009). The stay of trial court proceedings is dissolved.

HATHAWAY, J., would deny leave to appeal.

PEOPLE v ADRIAN BANKS, No. 138909; Court of Appeals No. 289989. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration under the standard for direct appeals, because the defendant was deprived of his direct appeal as a result of constitutionally ineffective assistance of counsel. See *Roe v Flores-Ortega,* 528 US 470, 477; 120 S Ct 1029; 145 L Ed 2d 985 (2000); *Peguero v United States,* 526 US 23, 28; 119 S Ct 961; 143 L Ed 2d 18 (1999). The motion to remand is denied as moot. We do not retain jurisdiction.

SWANSON v PORT HURON HOSPITAL, No. 139611; Court of Appeals No. 275404. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals, and we remand this case to that court for reconsideration of the parties' appeals in light of this Court's decision in *Bush v Shabahang*, 484 Mich 156 (2009), and MCL 600.2301.

Leave to Appeal Denied December 21, 2009:

PEOPLE v MCKINNEY MUSHATT, No. 137846; Court of Appeals No. 278138.

PEOPLE v MICHAEL JONES, No. 138236; Court of Appeals No. 288852.

MESSENGER v HEOS, No. 138421; Court of Appeals No. 279968.

PEOPLE v MICKEY HICKS, No. 138623; Court of Appeals No. 281385.

PEOPLE v TATUM, No. 138657; Court of Appeals No. 279720.

PEOPLE v PUTRUS, No. 138701; Court of Appeals No. 280767.

PEOPLE v MACKENZIE, No. 138703; Court of Appeals No. 289778.

PEOPLE v BLOWERS, No. 138833; Court of Appeals No. 281188.

DETROIT MEDICAL CENTER v TITAN INSURANCE COMPANY, No. 138869; reported below: 284 Mich App 490.

PEOPLE v HOLLINS, No. 138935; Court of Appeals No. 288561. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v GEORGE FORD, No. 139038; Court of Appeals No. 289996. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

SCIO TOWNSHIP v BATESON, No. 139066; Court of Appeals No. 289816.

PEOPLE v KARVELIS, No. 139089; Court of Appeals No. 282485.

PEOPLE v CALVIN JOHNSON, No. 139104; Court of Appeals No. 289621. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v TURNPAUGH, No. 139123; Court of Appeals No. 291393. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v KIRSCHKE, No. 139124; Court of Appeals No. 289549.

PEOPLE v DUSHAN MOORE, No. 139212; Court of Appeals No. 290761. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v SCOTT-PARKIN, No. 139218; Court of Appeals No. 291058. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

CITY OF ANN ARBOR v AFSCME LOCAL 369, No. 139221; reported below: 284 Mich App 126.

PEOPLE v JOHN CASTANEDA, No. 139239; Court of Appeals No. 290867. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v FARRAN, No. 139264; Court of Appeals No. 290800.

PEOPLE v GIVAN, No. 139269; Court of Appeals No. 290139. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v JONATHAN CLARK, No. 139279; Court of Appeals No. 291513.

DEPARTMENT OF ENVIRONMENTAL QUALITY v VEMULAPALLI, No. 139287; Court of Appeals No. 283372.

PEOPLE v MADDOX EL, No. 139295; Court of Appeals No. 292120. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

HATHAWAY, J., not participating. JUSTICE HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

BAUGHMAN v WESTERN GOLF & COUNTRY CLUB, INC, No. 139316; Court of Appeals No. 279425.

PEOPLE v MUHN, No. 139324; Court of Appeals No. 284173.

PEOPLE v DANIELS, No. 139354; Court of Appeals No. 283451.

BROWN v MILNER, No. 139356; Court of Appeals No. 285574.

PEOPLE v RONALD WHITE, No. 139385; Court of Appeals No. 283750.

PEOPLE v LYLES, No. 139391; Court of Appeals No. 292100.

PEOPLE v HERBERT, No. 139403; Court of Appeals No. 284313.

PEOPLE v PLATT, No. 139410; Court of Appeals No. 283749.

PEOPLE v BLAYLOCK, No. 139436; Court of Appeals No. 278221.

PEOPLE v AVERY, No. 139442; Court of Appeals No. 282611.

PEOPLE v JADE, No. 139444; Court of Appeals No. 284271.

BHAMA v CIVIL SERVICE COMMISSION, Nos. 139445 and 139447; Court of Appeals Nos. 290786 and 290787.

PEOPLE v MATTHEWS, No. 139453; Court of Appeals No. 291196.

PEOPLE v WHALEY, No. 139455; Court of Appeals No. 283712.

PEOPLE v RUDOLPH, No. 139461; Court of Appeals No. 286010.

WARD v BARRON PRECISION INSTRUMENTS and HOWARTH v BARRON PRECISION INSTRUMENTS, Nos. 139474 and 139475; Court of Appeals Nos. 280461 and 280462.

RIEMERSMA-STOREY v RIEMERSMA, No. 139490; Court of Appeals No. 291490.

PEOPLE v AARON TAYLOR, No. 139510; Court of Appeals No. 283737.

PEOPLE v FREY, No. 139511; Court of Appeals No. 284647.

PEOPLE v JENSEN, No. 139512; Court of Appeals No. 283510.

PEOPLE v RINGLE, No. 139517; Court of Appeals No. 283239.

PEOPLE v MINIX, No. 139522; Court of Appeals No. 283060.

PEOPLE v HOWE, No. 139527; Court of Appeals No. 283060.

PEOPLE v TERRENCE DAVIS, No. 139557; Court of Appeals No. 292296.

MARTENS v ROCHESTER COMMUNITY SCHOOLS, No. 139558; Court of Appeals No. 282706.

PERRY v LANSING SCHOOL DISTRICT, No. 139562; Court of Appeals No. 291014.

PEOPLE v TONY WALKER, No. 139566; Court of Appeals No. 292129. For purposes of MCR 6.502(G)(1), the Court notes that contrary to the Court of Appeals' characterization of the defendant's application as from a motion for relief from judgment, the defendant's application sought leave to appeal a judgment of conviction. The application was properly denied, however, due to the lack of merit in the grounds presented.

PEOPLE v COLVIN, No. 139570; Court of Appeals No. 292364.

PEOPLE v VANDURMEN, No. 139576; Court of Appeals No. 282172.

PEOPLE v HAYNES, No. 139577; Court of Appeals No. 281998.

CITIZENS INSURANCE COMPANY OF AMERICA v LADRI, No. 139583; Court of Appeals No. 283557.

PEOPLE v OMEY, Nos. 139594, 139595, 139596, 139597, 139598, 139599 and 139600; Court of Appeals Nos. 281580, 281581, 281582, 281583, 281584, 281585 and 281586.

PEOPLE v BOXX, No. 139609; Court of Appeals No. 292815.

In re ALT, No. 139633; Court of Appeals No. 293046.

PEOPLE v FIELDS, No. 139636; Court of Appeals No. 284190.

PEOPLE v SPROLES, No. 139640; Court of Appeals No. 292586.

TISDALE v SUTTON, No. 139641; Court of Appeals No. 285267.

LAWSUIT FINANCING, INC v MUAWAD, No. 139642; Court of Appeals No. 284717.

CHEN v WAYNE STATE UNIVERSITY, Nos. 139644 and 139645; reported below: 284 Mich App 172.

BREEN'S LANDSCAPE & SUPPLY CENTER v ROBERT C KRAUS, INC, No. 139649; Court of Appeals No. 290266.

PEOPLE v WALTER JENKINS, No. 139660; Court of Appeals No. 283456.

PEOPLE v YAKIMA WILLIAMS, No. 139661; Court of Appeals No. 292813.

PEOPLE v OSBORN, No. 139662; Court of Appeals No. 292790.

PEOPLE v CORBIN, No. 139665; Court of Appeals No. 284302.

PEOPLE v AYALA, No. 139672; Court of Appeals No. 292462.

BOYT v DRAKOS, No. 139674; Court of Appeals No. 282653.

RISKO v GRAND HAVEN CHARTER TOWNSHIP, No. 139678; reported below: 284 Mich App 453.

YPSILANTI FIRE MARSHALL v KIRCHER, No. 139679; Court of Appeals No. 281742.

PEOPLE v BROOM, No. 139685; Court of Appeals No. 284311.

PEOPLE v HEZEKIAH WILLIAMS, No. 139688; Court of Appeals No. 292705.

PEOPLE v TROY BROWN, No. 139690; Court of Appeals No. 291582.

KUEBLER v OGEMA COUNTY ZONING BOARD OF APPEALS, No. 139697; Court of Appeals No. 291509.

PEOPLE v KINDLE, No. 139708; Court of Appeals No. 278583.

ARAMARK SERVICES v DEPARTMENT OF TREASURY, No. 139709; Court of Appeals No. 284267.

PEOPLE v TERRENCE HENDERSON, No. 139713; Court of Appeals No. 285506.

PEOPLE v MORRISON, No. 139717; Court of Appeals No. 284218.

PEOPLE v VASQUEZ, No. 139719; Court of Appeals No. 292733.

NICOLET v BRINKS, INC, No. 139721; Court of Appeals No. 284861.

PEOPLE v JIMMIE REED, No. 139724; Court of Appeals No. 283851.

PEOPLE v REBECCA SMITH, No. 139727; Court of Appeals No. 282546.

PEOPLE v LEATHERWOOD, No. 139728; Court of Appeals No. 292824.

PEOPLE v SPIVEY, No. 139733; Court of Appeals No. 293041.

PEOPLE v SCHNEIDER, No. 139739; Court of Appeals No. 282323.

SCOTT v FRANK HARON WEINER & NAVARRO, No. 139747; Court of Appeals No. 286833.

HOPSON v SELECT AUTO PARTS, INC, No. 139757; Court of Appeals No. 292482.

PEOPLE v RATLIFF, No. 139759; Court of Appeals No. 280521.

PEOPLE v RAINES, No. 139764; Court of Appeals No. 276146.

LAURY v COLONIAL TITLE COMPANY, No. 139770; Court of Appeals No. 284013.

PEOPLE v MICHAEL WILLIAMS, No. 139774; Court of Appeals No. 285025.

PEOPLE v JOHN NORRIS, No. 139775; Court of Appeals No. 284566.

PEOPLE v BOXX, No. 139776; Court of Appeals No. 292830.

BROWN v MESABA AVIATION, No. 139784; Court of Appeals No. 292620.

OLSON v GENERAL MOTORS, No. 139789; Court of Appeals No. 291653.

PEOPLE v HELLAR, No. 139805; Court of Appeals No. 293503.

PEOPLE v CEDRIC ALLEN, No. 139816; Court of Appeals No. 285560.

ROBINSON v GENERAL MOTORS, No. 139820; Court of Appeals No. 285643.

PEOPLE v VOSHELL, No. 139822; Court of Appeals No. 293895.

PEOPLE v YODER, No. 139841; Court of Appeals No. 292833.

PEOPLE v GARCIA, No. 139843; Court of Appeals No. 293216.

PEOPLE v MOSLEY, No. 139850; Court of Appeals No. 285565.

PEOPLE v STIEHL, No. 139851; Court of Appeals No. 283641.

PEOPLE v LANUS, No. 139854; Court of Appeals No. 285081.

PEOPLE v TUJUAN WALKER, No. 139883; Court of Appeals No. 285694.

PEOPLE v SNOW, No. 139893; Court of Appeals No. 285354.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v ADRIAN HILL, No. 139906; Court of Appeals No. 284527.

Reconsideration Denied December 21, 2009:

PEOPLE v DEWULF, No. 137574. Leave to appeal denied at 485 Mich 885. Court of Appeals No. 286152.

PEOPLE v GUNN, No. 138302. Leave to appeal denied at 485 Mich 890. Court of Appeals No. 281528.

PEOPLE v LORENZO TOWNSEND, No. 138345. Leave to appeal denied at 485 Mich 862. Court of Appeals No. 288345.

PEOPLE v POTTS, No. 138429. Leave to appeal denied at 485 Mich 890. Court of Appeals No. 289716.

PEOPLE v BARATH, No. 138513. Leave to appeal denied at 485 Mich 891. Court of Appeals No. 290087.

PEOPLE v AJENE JORDAN, No. 138622. Leave to appeal denied at 485 Mich 893. Court of Appeals No. 281940.

FITZPATRICK v BETANZOS, No. 138807. Leave to appeal denied at 484 Mich 872. Court of Appeals No. 282719.

PEOPLE v MCCLOUD, No. 138821. Leave to appeal denied at 485 Mich 865. Court of Appeals No. 279551.

PEOPLE v ATKINSON, No. 138888. Leave to appeal denied at 485 Mich 866. Court of Appeals No. 280885.

MARILYN FROLING REVOCABLE LIVING TRUST v BLOOMFIELD HILLS COUNTRY CLUB, No. 138932. Leave to appeal denied at 485 Mich 880. Court of Appeals No. 275580.

SEATON v DEPARTMENT OF CORRECTIONS, No. 139019. Leave to appeal denied at 485 Mich 897. Court of Appeals No. 289166.

PEOPLE v SHAWN JAMISON, No. 139061. Leave to appeal denied at 485 Mich 897. Court of Appeals No. 290539.

PEOPLE v KARR, No. 139115. Leave to appeal denied at 485 Mich 898. Court of Appeals No. 289634.

PEOPLE v DAVENPORT, No. 139170. Leave to appeal denied at 485 Mich 899. Court of Appeals No. 279040.

PEOPLE v LEONDRE WALKER, No. 139213. Leave to appeal denied at 485 Mich 899. Court of Appeals No. 283164.

PEOPLE v ANTHONY STEPHENS, No. 139214. Leave to appeal denied at 485 Mich 899. Court of Appeals No. 284251.

Superintending Control Denied December 21, 2009:

LEFTWICH v ATTORNEY GRIEVANCE COMMISSION, No. 139575; AGC: 1085/09.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal December 29, 2009:

BEATTIE v MICKALICH, No. 139438; reported below: 284 Mich App 564. We direct the clerk to schedule oral argument on whether to grant

the application or take other peremptory action. MCR 7.302(H)(1). At oral argument, the parties shall address: (1) whether the equine activity liability act, MCL 691.1661 *et seq*., bars recovery for allegedly negligent acts of an equine activity sponsor, an equine professional or another person; (2) whether a plaintiff must plead in avoidance of the Equine Activity Liability Act; and (3) whether a letter offering the opinions of an expert must meet the criteria of admission provided by MRE 702 to be considered in opposing a motion for summary disposition. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

The Michigan Horse Council and the Michigan Association for Justice are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

FIRST INDUSTRIAL L P v DEPARTMENT OF TREASURY, No. 139748; Court of Appeals No. 282742. We direct the clerk to schedule oral argument on whether to grant either application or take other peremptory action. MCR 7.302(H)(1). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

Summary Disposition December 30, 2009:

PEOPLE v JOSEPH HENDRIX, No. 137865; Court of Appeals No. 277919. By order of March 23, 2009, the application for leave to appeal the October 16, 2008 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Borgne* (Docket No. 134967) and *People v Shafier* (Docket No. 135435). On order of the Court, the cases having been decided on July 1, 2009, 483 Mich 178 (2009), and 483 Mich 205 (2009), the application is again considered. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration of the issue raised by the defendant but not addressed by that court during its initial review of this case, specifically, whether the prosecutor presented sufficient evidence of the defendant's identity as the person who stole the van and pushed the victim from the van during the theft. In all other respects, leave to appeal is denied because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v ROZIER, No. 138963; Court of Appeals No. 291275. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Wayne Circuit Court, and remand this case to that court for resentencing. On remand, the trial court shall sentence the defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Hendrick*, 472 Mich 555 (2005), *People v Babcock*, 469 Mich 247 (2003), and *People v Smith,* 482 Mich 292 (2008). In all other respects, leave to appeal is

denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

WEAVER, J. (*dissenting*). I dissent from the order remanding this case to the trial court. Applying the analysis of my partial dissent and partial concurrence in *People v Babcock*, 469 Mich 247, 280-284 (2003), I would deny leave. The trial court satisfied the requirement of "a substantial and compelling reason" for its departure from the sentencing guidelines, MCL 769.34(3), and its decision did not venture beyond the range of principled outcomes under the circumstances.

PEOPLE v BURKE, No. 139643; Court of Appeals No. 292616. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals and we remand this case to the Court of Appeals, which shall hold this case in abeyance pending its decision in *People v Keith James Campbell* (Court of Appeals Docket No. 291345). After *People v Campbell* is decided, the Court of Appeals shall reconsider this case in light of that decision.

Leave to Appeal Denied December 30, 2009:

MYERS v MUFFLER MAN SUPPLY COMPANY, No. 137608; Court of Appeals No. 277542.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ., would grant leave to appeal.

LENAWEE COUNTY BOARD OF ROAD COMMISSIONERS v STATE AUTO PROPERTY & CASUALTY INSURANCE COMPANY, Nos. 137667 and 137668; Court of Appeals Nos. 285626 and 286158.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ., would grant leave to appeal.

LEE v CITY OF DETROIT, No. 138091; Court of Appeals No. 274530.

KELLY, C.J., and HATHAWAY, J., would grant leave to appeal.

PEOPLE v MARKS, No. 139186; Court of Appeals No. 291138.

HUGHES v ALMENA TOWNSHIP, No. 139197; reported below: 284 Mich App 50.

PRICE v KROGER COMPANY OF MICHIGAN, No. 139318; reported below: 284 Mich App 496.

MARKMAN, J., would grant leave to appeal to consider the Court of Appeals dissenting opinion.

REECE v EVENT STAFFING, No. 139447; Court of Appeals No. 284451.

PEOPLE v WILKES, No. 139486; Court of Appeals No. 285252.

HATHAWAY, J., would grant leave to appeal.

CHALKO v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 139525; Court of Appeals No. 278215.

KELLY, C.J., and HATHAWAY, J., would grant leave to appeal.

PEOPLE v ANTHONY KEITH WILLIAMS, No. 139601; Court of Appeals No. 282100.

KELLY, C.J., would grant leave to appeal.

PEOPLE v PIERRE CRAWFORD, No. 139606; Court of Appeals No. 292878.

HATHAWAY, J., would grant leave to appeal.

STADEL v STADEL, No. 139880; Court of Appeals No. 290903.

Summary Disposition January 7, 2010:

PEOPLE v WATERSTONE, No. 140294; Court of Appeals No. 294667. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The Court of Appeals shall consider whether the Attorney General's prosecution of the defendant is consistent with the requirements of Michigan Rules of Professional Conduct 1.7, 1.9, and 1.10, and with *Attorney General v Pub Service Comm*, 243 Mich App 487 (2000). We further direct the Court of Appeals to issue an opinion within 56 days of the date of this order. We leave it to the discretion of the Court of Appeals whether to order oral argument or further briefing. We further order that district court proceedings are stayed pending the completion of this appeal. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

CAVANAGH, J., would deny leave to appeal.

CORRIGAN, J. I am not participating because I may be a witness in this case.

Summary Disposition January 8, 2010:

KORPAL v SHAHEEN, No. 138724; Court of Appeals No. 290077. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals and the orders of the Saginaw Circuit Court granting the defendants' motions for summary disposition in part, and we remand this case to the Saginaw Circuit Court for reconsideration of the defendants' motions in light of this Court's decisions in *Bush v Shabahang*, 484 Mich 156 (2009), and *Potter* v *McLeary*, 484 Mich 397 (2009). The stay of trial court proceedings is dissolved. The motion for leave to file supplemental authority is granted.

CORRIGAN, J. (*dissenting*). I dissent from the order vacating the Court of Appeals judgment and remanding this medical malpractice case to the trial court. Plaintiffs' application for leave to appeal is an illegitimate second request for reconsideration contrary to both the law of the case doctrine and our rules of appellate procedure. Accordingly, I would deny plaintiffs' application.

During January 2002, defendants allegedly failed to timely diagnose and treat an intestinal leak that resulted from postoperative complications. About one year later, on January 9, 2003, plaintiffs' counsel sent a

notice of intent to file suit to each defendant. On September 25, 2003, plaintiffs filed their complaint, which included certain allegations about chest x-rays. Because neither the notice of intent nor the affidavit of merit contained any allegations regarding defendants' interpretation or handling of chest x-rays, defendants filed related motions for partial summary disposition concerning these claims. The trial court subsequently denied those motions.

On leave granted to defendants, the Court of Appeals reversed the trial court and remanded for entry of an order granting partial summary disposition in favor of defendants.[1] Plaintiffs' application for leave to appeal in this Court was denied.[2] Chief Justice KELLY, Justice CAVANAGH, and Justice WEAVER were shown as favoring reversing "the portion of the judgment of the Court of Appeals that dismissed the plaintiffs' additional claims regarding the chest x-rays with prejudice, because the dismissal should have been *without* prejudice."[3] The Court later denied plaintiffs' motion for reconsideration. Chief Justice KELLY, Justice CAVANAGH, and Justice WEAVER would have granted the motion.[4]

Soon thereafter, the case returned to the trial court. The trial court granted defendants' motions for partial summary disposition and dismissed all claims concerning defendants' interpretation or handling of chest x-rays *with* prejudice.[5] Plaintiffs then unsuccessfully sought leave to appeal in the Court of Appeals.[6] Before trial could begin as scheduled on July 21, 2009, more than seven years after the alleged malpractice occurred, plaintiffs' counsel again applied for leave to appeal in this Court. Plaintiffs raised the identical issues that the Court of Appeals had previously resolved regarding whether the dismissal of plaintiffs' claims related to the chest x-rays should be with or without prejudice. This Court stayed the trial court proceedings pending consideration of the application.[7]

As an initial matter, the trial court did not err in dismissing all claims concerning defendants' interpretation of chest x-rays *with* prejudice, and the Court of Appeals did not err in subsequently denying plaintiff's application for leave. Instead, both courts acted in accordance with the law of the case doctrine. "Under the law of the case doctrine, 'if an appellate court has passed on a legal question and remanded the case for

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[1] *Korpal v Shaheen*, unpublished opinion per curiam of the Court of Appeals, issued December 28, 2006 (Docket No. 266418).

[2] 480 Mich 1193 (2008).

[3] *Id.* (emphasis in original).

[4] 482 Mich 898 (2008).

[5] *Korpal v Shaheen*, unpublished opinion and order of the Saginaw Circuit Court, issued January 7, 2009 (Docket No. 03-049832-NH-2).

[6] *Korpal v Shaheen*, unpublished order of the Court of Appeals, entered March 12, 2009 (Docket No. 290077).

[7] *Korpal v Shaheen*, order of the Supreme Court, entered June 18, 2009 (Docket No. 138724).

further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.' "[8] Under identical facts, the Court of Appeals analyzed the precise legal question raised in plaintiffs' current application. The Court concluded that dismissal of all chest x-ray claims were to be with prejudice and remanded for further proceedings. Because the Court of Appeals already had resolved this exact issue under identical facts in 2006, the trial court was bound by that decision.[9] Similarly, the Court of Appeals panel assigned to review plaintiff's application for leave to appeal after the trial court entered the orders on remand was also bound by the prior decision of the Court of Appeals under the law of the case doctrine.[10]

Assuming *arguendo* that the Court of Appeals erred in concluding that dismissal of all plaintiffs' claims related to the chest x-rays was to be with prejudice, the error would not negate the application of the law of the case doctrine. "[T]he law of the case doctrine applies without regard to the correctness of the prior determination, so that a conclusion that a prior appellate decision was erroneous is not sufficient in itself to justify ignoring the law of the case doctrine."[11] Here there has been no subsequent change in the law or material change in the underlying facts which would justify failing to apply the law of the case doctrine. Instead, plaintiffs' counsel apparently relies on a change in the composition of the Court as a viable basis for relitigating the same legal issue with the hopes of receiving a more favorable result. By its order vacating the Court of Appeals and remanding this case to the trial court, the Court rewards this regrettable display of gamesmanship by plaintiffs' counsel. In contrast, both the trial court and the second Court of Appeals panel correctly applied the law of the case doctrine, which "exists primarily to 'maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.' "[12]

Additionally, plaintiffs' application ignores our well-established rules of appellate procedure. Under MCR 7.313(E), "[t]o move for reconsideration of a Court order, a party must file the items required . . . within 21 days after the date of certification of the order. The clerk shall refuse to

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[8] *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260 (2000), quoting *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454 (1981).

[9] See *Grievance Administrator, supra* at 260 ("[A]s a general rule, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals."); see also *Sumner v Gen Motors Corp*, 245 Mich App 653, 662 (2001) ("[T]he trial court 'may not take any action on remand that is inconsistent with the judgment of the appellate court.' ").

[10] *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 91 (2003).

[11] *Grace v Grace*, 253 Mich App 357, 363 (2002).

[12] *Locricchio v Evening News Ass'n*, 438 Mich 84, 109 (1991), quoting 18 Wright, Miller & Cooper, Federal Practice & Procedure, § 4478, p 788.

accept for filing any motion for reconsideration of an order denying a motion for reconsideration."[13] Essentially, plaintiffs' counsel has filed an untimely *second* request for reconsideration because plaintiffs' current application attempts to relitigate the same issues previously analyzed and resolved in defendants' favor by the Court of Appeals. Indeed, plaintiffs' current application sets forth identical issues concerning which this Court has already denied leave to appeal and reconsideration in the first instance. Insofar as plaintiffs' counsel filed this application with the expectation that plaintiffs could reap the benefits of subsequent changes in the law, I strongly protest such acts of appellate gamesmanship. This Court wrongly rewards plaintiffs' efforts to circumvent our rules of appellate procedure.

Because the order vacating the Court of Appeals judgment and remanding this case to the trial court flouts the law of the case doctrine and our rules of appellate procedure, I would deny plaintiffs' application for leave to appeal.

Order Granting Oral Argument in Case Pending in Application for Leave to Appeal January 8, 2010:

FRIEND v FRIEND, No. 139165; Court of Appeals No. 284330. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). The parties shall submit supplemental briefs within 42 days of the date of this order, including among the issues to be briefed whether this Court should adopt the fugitive disentitlement doctrine. See, e.g., *Matsumoto v Matsumoto*, 171 NJ 110; 792 A2d 1222 (2002); *Stewart v Stewart*, 91 Ariz 356; 372 P2d 697 (1962). The parties should not submit mere restatements of their application papers.

The Family Law Section of the State Bar of Michigan and the Michigan Chapter of the American Academy of Matrimonial Lawyers are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

CORRIGAN, J. (*concurring*). I concur in this Court's order directing that oral argument be heard on defendant's application for leave to appeal. Under current circumstances, however, I question defendant's entitlement to appellate relief given her repeated contempt of the trial court's parenting time and custody orders and the pendency of a warrant for defendant's arrest. Under the "fugitive disentitlement doctrine," any relief this Court would grant defendant after hearing arguments on the application should be contingent on her compliance with the trial court's orders.

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[13] Subchapter 7.200 of the Michigan Court Rules of 1985 includes an analogous provision governing motions for reconsideration filed in the Court of Appeals. See MCR 7.215(I)(3) ("The clerk will not accept for filing a motion for reconsideration of an order denying a motion for reconsideration.").

In response to defendant's application for leave to appeal to this Court, the plaintiff father moved to dismiss on the basis of the fugitive disentitlement doctrine. In the criminal context, this doctrine holds that "an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal." *Ortega-Rodriguez v United States*, 507 US 234, 239 (1993). Under this logic, a criminal defendant's "escape[] from the restraints placed upon him pursuant to the conviction . . . disentitles the defendant to call upon the resources of the Court for determination of his claims." *Molinaro v New Jersey*, 396 US 364, 366 (1970). Several courts have extended the doctrine to civil cases and, in particular, to custody disputes. In *MacPherson v MacPherson*, 13 Cal 2d 271, 277 (1939), the California Supreme Court dismissed the father's appeal, stating that

> [i]n secluding the children in a foreign country and alienating them, appellant violated not only his agreement with plaintiff and the provisions of the interlocutory and final decrees of divorce, but he has also wilfully and purposely evaded legal processes and contumaciously defied and nullified every attempt to enforce the judgments and orders of the California courts, including the very order from which he seeks relief by this appeal. Such flagrant disobedience and contempt effectually bar him from receiving the assistance of an appellate tribunal. A party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state.

In *In re Kamelia S*, 82 Cal App 4th 1224, 1229 (2000), the California Court of Appeal applied the reasoning of *MacPherson* in the context of a dependency proceeding and dismissed the appeal of a father who had removed his daughter from a foster care placement ordered by the juvenile court:

> As an active participant [the father] has been and is aware of the underlying dependency proceedings. His intentional absence violates the orders of the juvenile court and his secluding the minor child undermines and frustrates the entire purpose of the dependency law. It is virtually impossible for the court to extend its protection to Kamelia S. in her unavailable status at a completely unknown location. Appellant is entirely responsible for paralyzing the court's ability to implement the procedures intended to benefit the interests of the dependent minor. He "stands in an attitude of contempt to legal orders and processes of the courts of this state." [Quoting *MacPherson*, *supra* at 277.]

Similarly, in the recent case of *Colombe v Carlson*, 757 NW2d 537 (ND, 2008), the mother violated the trial court's judgment awarding sole legal and physical custody of the parties' children to the father by absconding with the children to another state and refusing to return. The North

Dakota Supreme Court extended what it termed the "fugitive dismissal rule," which it had previously adopted in the criminal context, and dismissed the mother's appeal. The court "recognize[d] that the fugitive dismissal rule should be invoked with great caution and restraint," but "conclude[d] that the fugitive dismissal rule is applicable to civil cases and the facts of this case merit such a harsh result." *Id*. at 541; see also *Matsumoto v Matsumoto*, 171 NJ 110 (2002).

In this case, the defendant mother failed to comply with the counseling and parenting time provisions of the parties' November 29, 2007, divorce judgment. In February 2008, plaintiff filed an ex parte motion for an order to show cause. After a hearing on March 28, 2008, the trial court found defendant in contempt of court. In its April 21, 2008, opinion and order on the hearing to show cause, the trial court ordered the parties and children to appear at the office of the counselor specified in the divorce judgment within 10 days. After defendant failed to comply with that order, plaintiff filed a second ex parte motion to show cause in July 2008. The court ordered defendant to appear at a hearing on September 15, 2008. After she failed to appear, the court issued a contempt order and a warrant for her arrest on December 8, 2008.

Because I question defendant's right to appellate relief while she is in contempt of the trial court's orders, and to avoid the harsh sanction of outright dismissal, I would explore the approach of the Arizona Supreme Court in *Stewart v Stewart*, 91 Ariz 356 (1962),[1] and condition the grant of any relief this Court concludes is otherwise appropriate on defendant's compliance with the trial court's orders.

Leave to Appeal Denied January 8, 2010:

JEWISH ACADEMY OF METROPOLITAN DETROIT v MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, No. 139307; Court of Appeals No. 283885.

CAVANAGH, J., would remand this case to the Court of Appeals for consideration of the issues briefed by the defendant that the Court of Appeals did not consider because those issues were not included in the defendant's statement of questions involved.

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[1] In *Stewart*, the appellant husband challenged the parties' divorce judgment, which was favorable to his wife. The Arizona Supreme Court agreed with the "[t]he majority rule" that an appellate court has discretion to dismiss an appeal when the appellant has violated a trial court order. *Stewart*, *supra* at 358. Noting that no question had been raised about the appellant's ability to comply with the relevant trial court orders and that "dismissal of an appeal because of disregard of trial court orders is discretionary with this court" and dependent on the facts of each case, the Arizona Supreme Court gave the appellant 30 days to comply with all of the trial court's orders. *Id*. at 360. "If at the end of that period he continues to defy those orders his appeal herein will be dismissed." *Id*.

MARKMAN, J. (*dissenting*). In *Communities for Equity v Michigan High School Athletic Ass'n*, 178 F Supp 2d 805 (2001), aff'd 459 F 3rd 676 (CA6, 2006), the United States District Court for the Western District of Michigan held that defendant, Michigan High School Athletic Association's, scheduling of high school athletic seasons violated the United States Constitution, as well as both federal and state civil rights law, and directed the MHSAA to reconfigure its scheduling. In the instant case, the trial court, concluding that the MHSAA has again violated the United States constitution and state law, as well as the Michigan constitution, now enjoins the MHSAA from maintaining an array of rules that define the conditions under which member schools may participate in interscholastic sports competition, and again requires that defendant's schedules be reconfigured. Thus, in yet one more realm of activity, the decisions of judges have preempted the decisions of those who have been authorized by either contract or the representative processes of government to undertake such decisions.

Perhaps, in the end, such preemption may be required by the law or the constitution, but, if so, it will be no thanks to this Court, or the Court of Appeals, that this will ever be known. Defendants here have been deprived even of the opportunity to seek to justify its policies on the grounds that these are in the best interests of hundreds of high schools throughout this state and in the best interests of hundreds of thousands of high school athletes, as well as their families and friends. Moreover, defendants have been denied the opportunity to seek to justify its policies on the grounds that these are in the practical interests of administering statewide tournaments, minimizing the loss of classroom time for student athletes, effectively managing available athletic facilities, minimizing security concerns, maximizing community involvement, optimizing revenues, promoting consistent and predictable conditions under which schools from widely varying geographic and other circumstances can engage in athletic competition, and promoting competitive equity. Neither the Court of Appeals nor this Court will even deign to hear such arguments, and as a result the scope of decision-making by judges will once again be enhanced and the scope of decision-making by other public and private institutions will be diminished.

Instead, the majority allows the Court of Appeals to affirm the trial court's assertion of authority purely on the grounds that defendant's brief on appeal failed to contain a summary statement setting forth all of the questions involved in the appeal, MCR 7.212(C)(5), and therefore that the omitted issues were waived. To clearly understand matters, the Court of Appeals does not argue that any issues were not raised and argued in defendant's brief, that any such issues were not argued thoroughly, that plaintiff did not equally thoroughly respond to these issues in its own brief, or that any harm inured to plaintiffs as a result of the absent summary. Rather, the Court of Appeals argues only that defendant failed to set forth a separate summary. Apparently concluding that such a brief did not "substantially comply" with the court rules, MCR 7.212(I), and that a "supplemental brief" would not be in order "correcting the deficiencies," *id*., the Court of Appeals effectively dismissed this appeal.

While acknowledgedly a matter within the Court of Appeals' discretion, MCR 7.216(A)(10), I believe that this particular exercise constituted an unmistakable abuse of discretion. In virtually every previous decision, in which an appeal was effectively dismissed under this rule, there were *additional* reasons why issues raised in an appellate brief were not considered, such as a failure to support claims with proper legal authority, that a claim was not presented to or ruled upon by the trial court, or that the claims implicated matters of jurisdiction. I am unaware of any previous opinion that suggests that an appellate court may refuse to consider fully-briefed issues—issues constituting the principal issues in an appeal—for the sole reason that such issues were inadvertently not included in the appellant's summary statement of questions involved. Moreover, I am unaware of any opinion that even suggests that a brief of the instant sort does not "substantially comply" with MCR 7.212. For these reasons, I would reverse and remand to the Court of Appeals for that court to fully consider the substantive arguments raised by both parties.

PEOPLE V JOVAN SMELLEY, No. 139591; reported below: 285 Mich App 314. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals opinion that held that the trial court abused its discretion in admitting flight evidence. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

In this homicide case, the prosecutor introduced as circumstantial evidence of defendant's consciousness of guilt that he had been arrested in Georgia two weeks after the homicide. After being released from jail in Georgia, defendant returned to Michigan where he was arrested. The fact that he voluntarily returned to Michigan does not necessarily mean that defendant did not *initially* flee to Georgia out of fear of apprehension.

The Court of Appeals stated, "There is no evidence in the record that defendant left the jurisdiction because he was aware of, or motivated by fear of apprehension for, this homicide. The prosecution did not rebut defense counsel's claim that, before or during the time defendant was in Georgia, defendant had no knowledge about this matter." *People v Smelley,* 285 Mich App 314, 333 (2009).

First, the prosecutor is not required to prove that defendant left the jurisdiction because he was "motivated" by fear of apprehension. If that was required, flight evidence would rarely be admissible because it is obviously difficult to prove somebody's motives. Second, the prosecutor *did* rebut defendant's claim that he had no knowledge about this matter. McLeod's testimony that the shots sounded like they originated from defendant's car and that he was driving this car at the time of the shooting rebutted defendant's claim that he had no knowledge of the homicide.

CORRIGAN, J. (*concurring*). I concur in the order vacating the Court of Appeals judgment in part. I write separately to underscore that the trial court did not abuse its discretion in admitting evidence of flight and in instructing the jury according to the model flight instruction, CJI2d 4.4.

In this criminal case arising from a drive-by shooting in Detroit, the trial court admitted evidence of defendant's flight and subsequent arrest by a DEA agent in Georgia two weeks after the homicide. The trial court determined that the flight evidence was relevant circumstantial evidence of defendant's consciousness of guilt. A jury subsequently convicted defendant of second-degree murder,[1] felon in possession of a firearm,[2] felony-firearm,[3] and assault with intent to do great bodily harm less than murder.[4] Defendant appealed by right, and the Court of Appeals reversed and remanded for a new trial, concluding that the trial court abused its discretion in admitting evidence of defendant's flight. Because the decision to admit this evidence and to instruct the jury about defendant's flight fell within the range of reasonable and principled outcomes, the Court of Appeals erred when it held that the trial court abused its discretion in admitting evidence of defendant's flight.

It is well established that evidence of flight is admissible to support an inference of a defendant's consciousness of guilt.[5] By itself, flight evidence is insufficient to sustain a conviction. Nonetheless, flight evidence is probative because it may show consciousness of guilt.[6] Examples of "flight" include: fleeing the scene of the crime, leaving the state or jurisdiction, running from the police, or attempting to escape custody.[7] Here, defendant left Michigan shortly after the homicide occurred. Soon thereafter, a DEA agent arrested him in Georgia. Once defendant was released from jail in Georgia, he returned to Michigan where he was later arrested.

Although flight evidence is equivocal in nature, "evidence of flight is generally relevant and admissible."[8] Whether defendant fled to Georgia for reasons other than his consciousness of guilt regarding these offenses affects only the weight, and not the admissibility, of the flight evidence.[9] Similarly, the relative remoteness of defendant's flight from the time of his arrest does not affect the admissibility of the evidence, but it is relevant to the weight accorded to such evidence.[10] As this Court has observed, "[i]t is true that flight from the scene of a tragedy may be as consistent with innocence as with guilt; but it is always for the jury to say

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[1] MCL 750.317.

[2] MCL 750.224f.

[3] MCL 750.227b.

[4] MCL 750.84.

[5] *People v Unger*, 278 Mich App 210, 226 (2008); *People v Compeau*, 244 Mich App 595, 598 (2001).

[6] *People v Coleman*, 210 Mich App 1, 4 (1998).

[7] *Id*.

[8] *People v Cutchall*, 200 Mich App 396, 398 (1993).

[9] See *Unger,* 278 Mich App at 226.

[10] *Compeau,* 244 Mich App at 598.

whether it is under such circumstances as to evidence guilt."[11]

Moreover, the trial court instructed the jury according to the model flight instruction, which provides that flight evidence, standing alone, is insufficient to warrant conviction and an individual may flee for innocent reasons.[12] Specifically, the trial court stated that

> [t]here has been some evidence that the defendant left after the alleged crime. This evidence does not prove guilt. A person may run or hide for innocent reasons such as panic, mistake or fear. However, a person may also run or hide because of consciousness of guilt. You must decide whether the evidence is true and whether it shows that the defendant had a guilty state of mind.

Not only was the flight instruction given by the trial court in this case entirely consistent with the model flight instruction, but it also was reasonable and principled instruction based on the evidence presented.

Because the trial court did not abuse its discretion in admitting evidence of defendant's flight or instructing the jury according to the model flight instruction, I concur with the order vacating the Court of Appeals judgment in part.

CAVANAGH, J., would deny leave to appeal.

In re DK (DEPARTMENT OF HUMAN SERVICES v KOENIGBAUER), No. 140038; Court of Appeals No. 289371.

In re LABRECK (LABRECK v OAKLAND PROBATE COURT), No. 140220; Court of Appeals No. 293259.

Leave to Appeal Denied January 15, 2010:

PEOPLE v KADLEK, No. 139102; Court of Appeals No. 285162.

KELLY, C.J. (*dissenting*). I respectfully dissent from the Court's order denying defendant's application for leave to appeal. Because the prosecutor undeniably failed to comply with the statutory notice requirements for seeking a habitual offender enhancement, I would vacate defendant's sentence and remand for resentencing without the enhancement.

The facts of this case are straightforward and not in dispute. Defendant fled from police to avoid being arrested for drunk driving and driving with a suspended license (DWLS). He was charged with third-degree fleeing and eluding, third-offense operating while intoxicated, resisting and obstructing a police officer, DWLS, and with being a habitual fourth offender. Defendant waived his right to a preliminary examination and waived reading of the Information. Defense counsel sought to quash the habitual offender enhancement because service of it

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[11] *People v Cipriano*, 238 Mich 332, 336 (1927).

[12] CJI2d 4.4.

was not made on defendant and proof of service was not filed with the court clerk. The trial court denied the motion to quash.

Defendant later pled guilty to fleeing and eluding a police officer and operating while intoxicated (third offense) as a third-offense habitual offender. In exchange, the prosecutor dismissed the DWLS, the resisting and obstructing charges, and the habitual fourth enhancement. The plea agreement allowed defendant to challenge the propriety of the habitual offender notice. The trial court sentenced defendant to concurrent terms of 3 to 10 years.

On appeal, defendant argued that the prosecutor violated the statutory notice requirements of MCL 769.13 when seeking the habitual offender enhancement. In a split unpublished opinion, the Court of Appeals rejected the argument and affirmed defendant's convictions and sentences.

In his application to this Court, defendant again challenges the validity of his sentences. Specifically, he claims that the trial court should have vacated the habitual offender enhancement because the prosecutor failed to comply with all of the requirements of MCL 769.13. That statute provides, in pertinent part:

> (1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant . . . by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.
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> (2) A notice of intent to seek an enhanced sentence filed under subsection (1) shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement. The notice *shall be filed with the court and served upon the defendant or his or her attorney within the time provided in subsection (1)*. The notice may be personally served upon the defendant or his or her attorney at the arraignment on the information charging the underlying offense, or may be served in the manner provided by law or court rule for service of written pleadings. *The prosecuting attorney shall file a written proof of service with the clerk of the court*.
>
> (3) The prosecuting attorney may file notice of intent to seek an enhanced sentence after the defendant has been convicted of the underlying offense or a lesser offense upon his or her plea of guilty or nolo contendere if the defendant pleads guilty or nolo contendere at the arraignment on the information charging the underlying offense, or within the time allowed for filing of the notice under subsection (1). [Emphasis added.]

There is no claim in this case that the prosecutor complied with MCL 769.13(2) regarding service of the habitual offender enhancement notice. The prosecutor concedes that the notice of intent was never personally served on defendant or his attorney. Nor did the prosecutor file proof of service with the clerk of the court.

Nevertheless, this Court has denied defendant's application for leave to appeal, effectively sanctioning a blatant statutory violation. The language of MCL 769.13(2) is not permissive. Rather, it is mandatory. The prosecutor must serve a defendant with notice of a habitual offender enhancement and must file written proof of such service with the clerk of the court. Thus, the Legislature evinced its intent to require both filing of the notice and service of that notice, presumably to deter any oversight by the prosecutor in this regard.

The Court of Appeals majority held that the prosecutor's failure to comply with MCL 769.13(2) was harmless error. I disagree. Defendant was likely aware that the prosecutor was seeking enhancement of his sentence. But one cannot ignore that the Legislature devoted an entire subsection of the statute, using mandatory language, to requiring service of notice upon a defendant and proof of that notice with the clerk of the court. There must be consequences for failure to comply with the Legislature's mandates. In this case, the consequence should be resentencing without a habitual offender enhancement. By allowing defendant's sentences to stand, this Court undermines the Legislature's express will and writes subsection (2) out of the statute.

For these reasons, I would vacate defendant's sentence and remand for resentencing without the habitual offender enhancement.

PEOPLE v ROSE, No. 139201; Court of Appeals No. 284241.

KELLY, C.J. (*dissenting*). I would grant defendant's application for leave to appeal. I find many aspects of this case troubling. I believe that this Court should reconsider the use of acquitted conduct at sentencing and our decision in *People v Ewing*.[1] Moreover, I am concerned about how the trial judge used a second charge of second-degree criminal sexual conduct, (CSC II), of which defendant was acquitted, in sentencing him.

I. FACTS

Defendant was jury convicted on one count of CSC II, but acquitted of another count of CSC II in regard to the victim's sister. The judge sentenced him at the top of the sentencing guidelines range, resulting in a sentence of 86 to 180 months in prison. The Court of Appeals affirmed the conviction but remanded for resentencing because it concluded that offense variables 7 and 9 had been incorrectly scored. The trial court corrected the scoring of the variables, which lowered the guidelines minimum sentence range to 12 to 30 months. However, the court again sentenced defendant to 86 to 180 months, an upward departure from the guidelines range. In its discussion of why it believed a departure was warranted, the court noted that it had previously found by a preponderance of the evidence that the second act of CSC had occurred. Defendant challenged the use of his acquittal on the second CSC II charge as a violation of his Fifth and Sixth Amendment rights. The Court of Appeals affirmed.

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[1] 435 Mich 443 (1990).

II. THE USE OF ACQUITTED CONDUCT GENERALLY

A. FEDERAL LAW

In *United States v Watts*,[2] the United States Supreme Court held that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge. To qualify for consideration, the conduct need be proven by only a preponderance of the evidence. *Watts* involved a challenge to the use of acquitted conduct under the Double Jeopardy Clause of the Fifth Amendment. Relying on *Watts*, every federal circuit that has considered the issue since has concluded that the use of acquitted conduct at sentencing is constitutional.[3]

In *United States v White*,[4] the Sixth Circuit, sitting en banc, divided 9-6 on whether the use during sentencing of facts underlying an acquittal constitutes a Sixth Amendment violation. The majority concluded that it does not, under *Booker*, as long as the resulting sentence does not exceed "the statutory ceiling set by the jury's verdict . . . . "[5]

The dissenting opinion in *White* undertook a very different analysis, examining the common-law heritage of the use of acquitted conduct. The dissent observed that most states do not allow the use of acquitted conduct at sentencing.[6] Moreover, the dissent noted that the American

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[2] 519 US 148 (1997) (per curiam).

[3] *United States v Magallanez*, 408 F3d 672, 684-685 (CA 10, 2005); *United States v Vaughn*, 430 F3d 518, 526 (CA 2, 2005); *United States v Price*, 418 F3d 771, 787-788 (CA 7, 2005); *United States v Ashworth*, 139 Fed Appx 525, 527 (CA 4, 2005) (per curiam); *United States v Hayward*, 177 Fed Appx 214, 215 (CA 3, 2006); *United States v Farias*, 469 F3d 393, 399 (CA 5, 2006); *United States v Gobbi*, 471 F3d 302, 314 (CA 1, 2006). These courts assumed that *Watts* controls the outcome of both Fifth *and* Sixth Amendment challenges to the use of acquitted conduct.

However, in *United States v Booker*, 543 US 220, 240 & n 4 (2005), the United States Supreme Court explicitly limited *Watts*'s reach to the Fifth Amendment double jeopardy question. Although other courts have recognized that *Watts* is not controlling on the Sixth Amendment question, they have nevertheless been influenced by the other courts that erroneously presumed the contrary. See, e.g., *United States v Dorcely*, 372 US App DC 170, 175 (2006); *United States v Mercado*, 474 F3d 654, 657 (CA 9, 2007). Only one federal court of appeals has recognized that *Watts* has absolutely *no* bearing on a Sixth Amendment challenge and has addressed the issue absent any reliance on that case. *United States v Duncan*, 400 F3d 1297, 1304-1305 & n 7 (CA 11, 2005).

[4] 551 F3d 381 (CA 6, 2008) (en banc).

[5] *Id.* at 385.

[6] *Id.* at 394 (Merritt, J., dissenting).

Law Institute and American Bar Association have joined the ranks of those formally opposed to the use of acquitted conduct at sentencing.[7]

The *White* dissent also criticized the majority's "simple and single-minded reliance on *Watts*" as dispositive of a Sixth Amendment claim.[8] The dissent acknowledged that the federal circuits are uniform on this issue. However, it noted that the *Booker* line of cases has cast doubt on whether *Watts* governs Sixth Amendment challenges to the use of acquitted conduct at sentencing.[9] Moreover, increasingly, federal district and court of appeals judges have questioned whether the use of acquitted conduct is constitutional under the Sixth Amendment and the Due Process Clause. They have even questioned whether it is consistent with common sense.[10]

B. MICHIGAN LAW

In *Ewing*, four justices of this Court sanctioned the consideration of acquitted conduct by a sentencing judge when the facts were proven to the judge by a preponderance of the evidence.[11] The Court further held that a prior acquittal alone is not a sufficient reason to preclude the judge

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[7] *Id.* at 395.

[8] *Id.* at 392.

[9] The dissent noted that the *Booker* Court distinguished *Watts* as irrelevant to the issue of the use of acquitted conduct generally or under the Sixth Amendment. In *Watts*, there was no "contention that the sentence enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment. The issue . . . simply was not presented." *White*, 551 F3d at 392, quoting *Booker*, 543 US at 240 (2005).

[10] *United States v Canania*, 532 F3d 764, 777 (CA 8, 2008) (Bright, J., concurring) ("In my view, the Constitution forbids judges-Guidelines or no Guidelines-from using 'acquitted conduct' to enhance a defendant's sentence because it violates his or her due process right to notice and usurps the jury's Sixth Amendment fact-finding role."); *United States v Mercado*, 474 F3d 654, 658 (CA 9, 2007) (Fletcher, J., dissenting) ("Reliance on acquitted conduct in sentencing diminishes the jury's role and dramatically undermines the protections enshrined in the Sixth Amendment."); *United States v Faust*, 456 F3d 1342, 1349 (CA 11, 2006) (Barkett, J., specially concurring) ("I strongly believe . . . that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment."); *United States v Pimental*, 367 F Supp 2d 143, 153 (D Mass, 2005) (Gertner, J.) ("'To tout the importance of the jury in deciding facts, even traditional sentencing facts, and then to ignore the fruits of its efforts makes no sense-as a matter of law or logic.").

[11] *Ewing*, 435 Mich at 446 (opinion by BRICKLEY, J.); 435 Mich at 473 (opinion by BOYLE, J.). Justice ARCHER disagreed with the majority and would have held that acquitted conduct may not be used at sentencing.

from taking those facts into account when sentencing a defendant for another offense.[12] In support of this holding, Justice BRICKLEY's lead opinion and Justice BOYLE's opinion (joined by Chief Justice RILEY and Justice GRIFFIN) noted that "an acquittal does not necessarily mean that the defendant did not engage in criminal conduct."[13]

Ewing has now lain dormant for almost 20 years,[14] despite significant developments in United States Supreme Court jurisprudence since it was decided. Just as the federal circuits have questioned the use of acquitted conduct at sentencing, I believe we should consider the continued vitality of *Ewing* in light of recent developments.

C. OTHER STATES

It is noteworthy that some state courts consider the use of acquitted conduct at sentencing to be unconstitutional or an abuse of discretion. These courts cite many of the same reasons mentioned by the federal judges who have objected to the practice.[15] For example, the New Hampshire Supreme Court concluded:

> We think that the logical and legal inconsistencies associated with considering acquittals in enhancing sentencing are readily apparent. . . .
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> . . . We think that the presumption of innocence is as much ensconced in our due process as the right to counsel, and that a criminal defendant in Mr. Cote's position is entitled to its full benefit. This benefit is denied when a sentencing court may have used charges that have resulted in acquittals to punish the defendant.
>
> We think it disingenuous at best to uphold the presumption of innocence until proven guilty, a principle that is "axiomatic and elementary, and [whose] enforcement lies at the foundation of the administration of our criminal law," while at the same time punishing a defendant based upon charges in which that presumption has not been overcome. The presumption is not a presumption of "not guilty" or guilty only by a preponderance. It is a presump-

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435 Mich at 459 (ARCHER, J., concurring in part and dissenting in part). Justice CAVANAGH, joined by Justice LEVIN, did not address the issue. 435 Mich at 461-462 (CAVANAGH, J., concurring).

[12] *Id*. at 451 (opinion by BRICKLEY, J.).

[13] *Id*. at 451-52; see also *id*. at 473 n 15 (opinion by BOYLE, J.).

[14] We remanded three cases to the Court of Appeals for reconsideration in light of *Ewing* in the years after the decision was released. Other than that, *Ewing* has not been cited by this Court once since its release.

[15] *State v Marley*, 321 NC 415, 423-425 (1988); *Bishop v State*, 268 Ga 286, 295 (1997), citing *Jefferson v State,* 256 Ga 821, 827 (1987); see n 10 *supra*.

> tion of *innocence,* and innocence means "*absence* of guilt." BLACK'S LAW DICTIONARY 708. (Emphasis added.)[16]

These concerns are similar to those expressed by Justice ARCHER in his concurrence/dissent in *Ewing*:

> Once the cloud of suspicion has been removed from a defendant as to a particular charge, the facts or circumstances surrounding such removal should not come before a subsequent sentencing trial court. In my view, there is no viable justification in support of inviting a defendant to engage in *any* kind of discussion or exchange concerning a prior exoneration of guilt. This expanded version of sentencing allocution, which, according to Justice BOYLE, would require an additional and clearly belated rehashing of a matter which has been definitively resolved and disposed of, will not remove, or, in any way, diminish the eminent danger of precondemnation that would befall a defendant if this practice were allowed. The resurrection of a favorably resolved past accusation for the purpose of merely contemplating its existence would serve *only* to unfairly and unnecessarily prejudice a defendant with the probability of improperly drawn inferences of wrongful conduct.[17]

In sum, I would grant leave to appeal to revisit the use of acquitted conduct at sentencing as a general matter. I would do so to consider developments in constitutional jurisprudence since *Ewing*, the widespread criticism of the practice,[18] and the split among state courts on the issue.

III. THE USE OF DEFENDANT'S ACQUITTAL IN THIS CASE

In *People v Grimmett*, this Court concluded that a sentencing judge may not make an "independent finding of defendant's guilt" on another charge.[19] *Ewing* and later Court of Appeals cases, on the other hand, have allowed sentencing judges to impose sentences using conduct

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[16] *State v Cote*, 129 NH 358, 375 (1987) (citation omitted).

[17] *Ewing*, 435 Mich at 458-459.

[18] See, e.g., Ngov, *Judicial nullification of juries: The use of acquitted conduct at sentencing*, 76 Tenn L R 235, 261 (2009) ("A paradox is thus presented. *Apprendi* [*v New Jersey*, 530 US 466 (2000)] and its progeny, including *Booker*, have elevated the role of the jury verdict by circumscribing a defendant's sentence to the relevant statutory maximum authorized by a jury; yet, the jury's verdict is not heeded when it specifically withholds authorization. Stated differently, the jury is essentially ignored when it disagrees with the prosecution. This outcome is nonsensical and in contravention of the thrust of recent Supreme Court jurisprudence.").

[19] *People v Grimmett*, 388 Mich 590, 608 (1972), overruled on other grounds by *People v White*, 390 Mich 245 (1973), see also *People v Fleming*, 428 Mich 408, 417-418 (1987).

underlying acquitted charges.[20] The dividing line between these two considerations is unclear, as the *Ewing* Court noted.[21]

Here, defendant was acquitted of the second CSC charge, yet the trial judge concluded by a preponderance of the evidence that defendant committed that CSC. Given the trial judge's language, it appears the sentencing departure here was based on an independent finding of guilt, *not* acquitted conduct. At the resentencing hearing, the judge stated "[t]he court made a finding previously that the second sexual act that [sic] actually occurred and the court found that by a preponderance of the evidence."[22]

Also of particular significance to this case is the limiting language in Justice BRICKLEY's *Ewing* opinion. Justice BRICKLEY provided the crucial fourth vote in favor of allowing acquitted conduct to be used in sentencing. He explained that, in the context of prior acquittals, the defendant must be afforded the opportunity to "test the accuracy" of the underlying facts of that acquittal when they are considered during sentencing.[23]

Considering the record here, there is no indication that the judge allowed the defendant to "test the accuracy" of the facts underlying the acquitted conduct used to enhance his sentence, as *Ewing* requires. The fact that defendant did get a chance to "test the accuracy" of this finding during the trial on the additional CSC II count is insufficient to give meaning to the holding in *Ewing*. He had tested the accuracy of those facts and succeeded; the jury, by acquitting him of that count, determined

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[20] *People v Compagnari*, 233 Mich App 233, 236 (1998).

[21] *Ewing*, 435 Mich at 471-472 (opinion by BOYLE, J.) (noting that "[t]he difficulty in drawing a distinction between *People v Lee* [391 Mich 618 (1974)] [the trial court may "notice the existence of pending charges"] and *Grimmett* [the trial court may not "use unsupported assumption of guilt of other crimes as a factor" at sentencing] has created a lack of consistency in the Court of Appeals decisions on this issue. . . . The confusion in the lower courts regarding whether and under what circumstances a court may consider other criminal activity of a defendant which has not resulted in a conviction or charge necessitates some action by this Court to clarify the rule. We would clarify *Grimmett* and hold, in line with the majority of jurisdictions, that any circumstance which aids the sentencing court's construction of a more complete and accurate picture of a defendant's background, history, or behavior is properly considered in individualizing the sentence . . . ."). However, because Justice BOYLE's opinion in *Ewing* garnered only three votes, this confusion was not dispelled by *Ewing*'s release.

[22] Transcript from the March 18, 2008 sentencing hearing. The previous finding the court referred to was from defendant's original sentencing, when the court stated "[t]he court finds by a preponderance of the evidence that he [defendant] did commit the offense." Transcript from the October 19, 2006 sentencing hearing.

[23] *Ewing*, 435 Mich at 454.

that he did not commit the offense. When a judge then finds by a preponderance of the evidence that the defendant did commit the crime, how is the defendant to again "test the accuracy" of those facts? Is the defendant supposed to make his argument at sentencing? Should an evidentiary hearing be held? Is the defendant not then required to defend against the charge twice?

These inconsistencies, coupled with the blurred line between what *Ewing* allows and what *Grimmett* prohibits, illuminate the problems inherent in using facts underlying acquitted conduct at sentencing. Particularly, this practice exposes the difficulty a defendant faces in testing the accuracy of these facts.

IV. CONCLUSION

For these reasons, I think this case raises several jurisprudentially significant issues. I would grant defendant's application for leave to appeal.

KAUPP v MOURER-FOSTER INC, No. 139543; Court of Appeals No. 281578.

KELLY, C.J. (*concurring*). I concur in the order denying defendant's application for leave to appeal. The Court of Appeals majority correctly reversed the trial court because there is a genuine issue of material fact about whether a causal connection exists between the protected activity and plaintiff's discharge.

The record indicates that there was more than a mere temporal proximity between the protected activity and plaintiff's discharge. The Court of Appeals majority explicitly and correctly stated that a "temporal relationship is not enough in and of itself to create a question of fact on the causal relationship of the two events."[1]

The Court of Appeals cited portions of plaintiff's testimony and an email to plaintiff from defendant's co-owner. This evidence supported an inference "that [her] superior expressed clear displeasure with the protected activity engaged in by the plaintiff."[2] This evidence, coupled with the temporal connection between the protected activity and the discharge, is sufficient for plaintiff's claim to survive summary disposition.[3]

MCR 2.116(G)(5) expressly mandates that a court considering a motion for summary disposition consider "affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties." Thus, although the dissent is correct that the "generous" de novo standard of review does not autho-

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[1] *Kaupp v Mourer-Foster Inc*, unpublished opinion per curiam of the Court of Appeals, issued July 14, 2009 (Docket No. 281578), slip op at 3.

[2] *Id*. at 5, quoting *West v Gen Motors Corp*, 469 Mich 177, 187 (2003).

[3] *West*, *supra* at 187.

rize a reviewing court to "abandon its neutral role," the Court of Appeals did not do so here. Rather, it appropriately based its decision on the record before it.

I concur in the order denying leave to appeal.

CORRIGAN, J. (*dissenting*). I respectfully dissent from the order denying defendant's application for leave to appeal. The trial court did not err when it granted defendant's motion for summary disposition. The Court of Appeals majority made plaintiff's case for her when she did not marshal any argument. In so doing, the Court of Appeals managed to ignore the principal ground upon which the trial court relied to find the lack of any causal connection between the protected activity and plaintiff's discharge. Accordingly, I would reverse the judgment of the Court of Appeals and reinstate the trial court's order.

Plaintiff filed suit under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., alleging wrongful termination after she had reported irregularities concerning defendant's overtime policies to state and federal authorities. The trial court granted defendant's motion for summary disposition, concluding that plaintiff failed to demonstrate a causal connection between the protected activity and her discharge. In a divided opinion, the Court of Appeals reversed and remanded the case for trial.[1] The Court of Appeals majority held that plaintiff proffered sufficient evidence to create a genuine issue of material fact about the causal connection. Dissenting Judge BANDSTRA concluded that the trial court properly granted summary disposition based on the facts presented to it. He observed that the majority had inappropriately scoured the record for the facts from which it concluded that a genuine issue of material fact existed.

The trial court did not err when it granted defendant's motion. To establish a prima facie case under the WPA, plaintiff must demonstrate that: (1) she was engaged in protected activity as defined by the act, (2) she was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge.[2] Because only the third element of plaintiff's claim is disputed, the salient legal question is whether a causal connection existed between plaintiff's protected activity in August 2005 and her discharge on September 15, 2005.

Plaintiff did not set forth specific facts to show a causal connection between the protected activity and her discharge. In support of its motion for summary disposition, defendant offered evidence that it discharged plaintiff for two reasons. First, on September 14, 2005, one day before defendant terminated plaintiff, plaintiff engaged in an emotional confrontation with her supervisor about changes to her existing duties, which culminated in plaintiff slamming her supervisor's office door and subsequently sending an e-mail announcing that she was leaving for the day. Second, during the confrontation plaintiff stated that she could not

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[1] *Kaupp v Mourer-Foster Inc*, unpublished opinion per curiam of the Court of Appeals, issued July 14, 2009 (Docket No. 281578).

[2] *West v Gen Motors Corp*, 469 Mich 177, 183-184 (2003).

work for defendant's owner. The brief in support of defendant's motion set forth specific facts and the relevant evidence that supported those facts. For example, defendant argued that plaintiff could not demonstrate a causal connection because plaintiff's supervisor recommended that plaintiff receive a performance bonus four days after he learned that plaintiff had contacted state and federal authorities and *even though* plaintiff had failed to achieve the working goals necessary to qualify for the bonus in the prescribed 90-day period. In response to defendant's motion, plaintiff relied almost exclusively on the existence of temporal proximity and attached her entire 97-page deposition transcript without discussing any specific testimony. As the trial court explained, the evidence demonstrated that defendant terminated plaintiff because of her "unprofessional response from having one of her responsibilities or duties removed," not because plaintiff engaged in a protected activity. Admittedly, defendant discharged plaintiff approximately three weeks after the protected activity occurred. Without something more, however, temporal proximity does not establish that defendant terminated plaintiff *because of* the protected activity.[3] Consequently, I agree with the trial court that plaintiff failed to establish a prima facie WPA claim because she did not show the requisite causal connection.

Additionally, the Court of Appeals majority effectively made plaintiff's case for her. An appellate court reviews a decision to grant a motion for summary disposition de novo,[4] but this generous standard of review does not authorize the Court to abandon its neutral role and become plaintiff's counsel. Not only did the Court of Appeals develop and elaborate plaintiff's arguments for her,[5] but the Court also glaringly ignored one of the two primary bases for the trial court's order, namely that defendant paid plaintiff a performance bonus *after* defendant learned about her protected activity and *before* it terminated her. Perplexingly, the Court's exhaustive analysis of the record did not mention this key fact that broke the causal chain even though it was one of the principal grounds on which the trial court relied. This omission further undermines the finding that a material issue of fact existed regarding plaintiff's WPA claim.

Accordingly, I would reverse the judgment of the Court of Appeals and reinstate the trial court's order.

YOUNG and MARKMAN, JJ., joined the statement of CORRIGAN, J.

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[3] See *West*, 469 Mich at 186 ("[A] temporal relationship, standing alone, does not demonstrate a causal connection between the protected activity and any adverse employment action.").

[4] *Michigan Federation of Teachers & School Related Personnel v Univ of Michigan*, 481 Mich 657, 664 (2008).

[5] See *Goolsby v Detroit*, 419 Mich 651, 655 n 1 (1984), quoting *Mitcham v Detroit*, 355 Mich 182, 203 (1959) (" 'It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.' ").

Appeal Dismissed on Stipulation January 15, 2010:

HOOVER v MICHIGAN MUTUAL INSURANCE COMPANY, No. 138018; reported below: 281 Mich App 617.

Leave to Appeal Granted January 22, 2010:

BEACH v LIMA TWP, No. 139394; reported below: 283 Mich App 504. The application for leave to appeal the April 21, 2009 judgment of the Court of Appeals is considered, and it is granted, limited to the issue whether a plaintiff who seeks to establish an adverse possession claim that would affect property in a recorded plat must file a claim under the Land Division Act, MCL 560.101 *et seq*., if the plaintiff is not expressly requesting that the plat be vacated, corrected, or revised.

The Real Property Law Section of the State Bar of Michigan and the Michigan Municipal League are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v DONALD LOWN, No. 139969; Court of Appeals No. 287033. The parties shall include among the issues to be briefed: (1) whether the 180-day rule, MCL 780.131 and 780.133, is jurisdictional, and if so, whether it permits any delay in trial beyond 180 days from the date of the Department of Corrections notice; (2) whether a strict jurisdictional reading of the rule violates a defendant's constitutional rights when a delay in trial beyond the 180 days is sought by the defendant, as occurred in this case; (3) whether, if some delay in trial beyond 180 days is permitted by the statutory provisions, any such delay should be evaluated by attributing it to the defendant or the prosecution, and if so, whether action of the circuit court, such as delay due to docket management concerns, should automatically be attributed to the prosecution; (4) whether a prosecutor's good-faith efforts to bring a defendant to trial within the initial 180-day period is of any relevance in the application of the statutory provisions, and if so, whether the prosecutor must remain prepared at all times to go to trial in order to avoid dismissal of the case under the rule; and (5) if this Court were to determine that the 180-day rule is jurisdictional and does not permit any delays in the commencement of trial, whether and to what extent that determination should be applied retroactively.

We order the Saginaw Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint counsel from the State Appellate Defender Office to represent the defendant in this Court.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Summary Disposition January 22, 2010:

PEOPLE v BUCKLEY-HENDERSON, No. 139375; Court of Appeals No. 285531. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals. That court shall treat the defendant's brief on appeal as having been timely filed and shall reinstate the appeal. The defendant's attorney acknowledges that the defendant did not contribute to the delay in filing and admits his sole responsibility for the error. Accordingly, the defendant was deprived of his appeal of right as a result of constitutionally ineffective assistance of counsel. See *Roe v Flores-Ortega*, 528 US 470, 477; 120 S Ct 1029; 145 L Ed 2d 985 (2000); *Peguero v United States*, 526 US 23, 28; 119 S Ct 961; 143 L Ed 2d 18 (1999).

Costs are imposed against the attorney, only, in the amount of $250, to be paid to the Clerk of this Court. We do not retain jurisdiction.

CORRIGAN, J. (*concurring*). I concur in the order reinstating defendant's appeal because he was deprived of the effective assistance of appellate counsel. I would also refer his appellate attorney, William T. Street, to the Attorney Grievance Commission (AGC) to investigate Street's failure to successfully prosecute the appeal. Street admits that he was solely responsible for the filing delays that caused the Court of Appeals to dismiss the appeal for want of prosecution. He now applies for leave to appeal to this Court on defendant's behalf, effectively asking that we provide a remedy for his deficient performance.

I would refer attorneys to the AGC under these circumstances for several reasons. Most significantly, when a defendant's appeal is reinstated due to ineffective assistance of counsel, he has no incentive to contact the AGC himself concerning his attorney's failures; he has already received relief for the failures. Yet, to protect future defendants, it is important for the AGC to identify attorneys who may consistently provide ineffective assistance, in order to take any appropriate disciplinary action. Further, referral to the AGC in these cases avoids encouraging attorneys to use this Court to correct for their own ineffective representation at the Court of Appeals.

This Court will consider, as an administrative matter, whether to consistently refer attorneys to the AGC if a defendant's appeal is reinstated as a result of ineffective assistance of counsel. I would urge that we do so as a matter of course in order to treat attorneys uniformly and for the AGC to identify patterns of attorney malfeasance that may constitute professional misconduct.

NOWACKI v STATE EMPLOYEES' RETIREMENT SYSTEM, No. 139604; Court of Appeals No. 285630. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals in part, and we remand this case to the Court of Claims for entry of an order granting the respondents' motion for summary disposition of the petitioner's tort claims. Because the question of whether the petitioner was entitled to rely on the respondent Office of Retirement Services' calculation of his monthly benefit was raised, argued and decided in the administrative contested case hearing, the petitioner was precluded by collateral and administrative estoppel from relitigating the issue. *Num-*

mer v Dep't of Treasury, 448 Mich 534, 544 (1995). Moreover, because summary disposition was appropriate under MCR 2.116(C)(7) (immunity granted by law), the petitioner is not entitled to amend his complaint pursuant to MCR 2.116(I)(5). Even if the petitioner were entitled to amend his complaint, summary disposition is appropriately granted if further amendment would be futile. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 240 (2000). The petitioner cannot show that the miscalculation of his duty disability benefit was the proximate cause of his alleged damages where the undisputed facts of this case indicate that: (1) the petitioner had been notified in writing that he was entitled to only $500 per month in benefits; (2) he had received duty disability benefits previously and received approximately $500 per month; and (3) he had been required to repay overpaid benefits in the past. Had he not spent the overpayment in spite of this knowledge, he could have simply repaid the Office of Retirement Services when it discovered the error, and he would have continued to receive the full amount of his monthly benefit. In all other respects, leave to appeal is denied because we are not persuaded that the remaining questions presented should be reviewed by this Court.

COUTURE V FARM BUREAU GENERAL INSURANCE CO, No. 139676; Court of Appeals No. 283404. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we reinstate the declaratory judgment entered by the Arenac Circuit Court.

PEOPLE V NICHOLAS CHAPMAN, No. 139744; Court of Appeals No. 291568. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of the issue whether the defendant's challenge to the score rendered for offense variable 13 is timely or is otherwise preserved for appellate review, and if so, whether the variable was correctly scored. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

BANASZAK V NORTHWEST AIRLINES INC, No. 139787; Court of Appeals No. 263305. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse in part the decision of the Court of Appeals and we reinstate the ruling of the Wayne Circuit Court granting summary disposition to defendant Northwest Airlines, Inc., on the plaintiff's premises liability claim. The Court of Appeals erred by reinstating the premises liability claim in this construction site injury case. Ordinarily, a landowner is not responsible for injuries caused by a carefully selected contractor to whom he has delegated the task of erecting a structure. *Funk v Gen Motors Corp*, 392 Mich 91, 101 (1974). Northwest Airlines, as controller of the premises, did not have a duty to protect the plaintiff, an employee of an independent contractor hired to perform construction work on the owner's premises, from the construction site hazardous condition that caused the plaintiff's injury. *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 18-20 (2002). On remand, the plaintiff's common work area claim against Northwest Airlines as a general

contractor and as an owner with retained control may proceed in accordance with the Court of Appeals decision.

HATHAWAY, J., would deny leave to appeal.

PEOPLE v SHAWN ADAMS, No. 139907; Court of Appeals No. 286915. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we remand this case to the Wayne Circuit Court for further proceedings not inconsistent with this order. When reviewing courts assess a magistrate's conclusion that probable cause to search existed, courts are to consider the underlying affidavit in a "common-sense and realistic manner." *People v Russo,* 439 Mich 584, 604 (1992). Reviewing courts must also pay deference to a magistrate's determination that probable cause existed. This deference "requires the reviewing court to ask only whether a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause." *Id*. at 603, quoting *Illinois v Gates*, 462 US 213, 236 (1983). Here the affidavit by Officer DeKiere provided the magistrate with more-than-adequate grounds to conclude there was a "fair probability" that contraband and additional evidence of a crime would be found at the defendant's residence. *Id.* at 604. The Court of Appeals erred in concluding otherwise.

Moreover, the Court of Appeals further erred by relying on *United States v Leon,* 468 US 897 (1984), to rule that the good-faith exception to an improperly issued search warrant could not apply in this case because the police officer who supplied the underlying affidavit for the search warrant also executed the warrant. Regardless of whether there was probable cause for the issuance of the search warrant of the defendant's premises in this case, there is no evidence that the officer provided an affidavit so lacking in indicia of probable cause as to render his subsequent official belief in its existence entirely unreasonable. *Id.* at 919-921. The evidence shows that the officer executed the warrant with a good-faith belief that it was properly issued.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal January 22, 2010:

PEOPLE v KADE, No. 139540; Court of Appeals No. 285402. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). We further order the Oakland Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint Dana B. Carron, if feasible, to represent the defendant in this Court. If this appointment is not feasible, the trial court shall, within the same time frame, appoint other counsel to represent the defendant in this Court. At oral argument, the parties shall address the question whether the defendant is entitled to withdraw his plea because he was not advised of the maximum possible sentence as enhanced by his habitual offender status. The parties shall file supplemental briefs within 42 days following the appointment of counsel, but they should not submit mere restatements of their application papers.

KACHUDAS v INVADERS SELF AUTO WASH, No. 139794; Court of Appeals No. 281411. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). The parties may file supplemental briefs within 28 days of the date of this order, but they should not submit mere restatements of their application papers.

Leave to Appeal Denied January 22, 2010:

SUPERIOR HOTELS v MACKINAW TWP, No. 138696; reported below: 282 Mich App 621. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of July 9, 2009. The application for leave to appeal the March 10, 2009 judgment of the Court of Appeals is denied, because we are no longer persuaded that the question presented should be reviewed by this Court.

PEOPLE v JEFFREY JONES, No. 136888: reported below: 279 Mich App 86.

BONKOWSKI v ALLSTATE INSURANCE COMPANY, No. 137672; reported below: 281 Mich App 154.

KELLY, C.J. (*dissenting*). I respectfully dissent from the Court's order denying plaintiff's application for leave to appeal. Because I question whether the Court of Appeals properly interpreted MCL 500.3142, I would grant leave to appeal.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff sustained severe brain and spinal cord injuries after being struck by a car. His father underwent training to provide skilled, multidisciplinary support to his injured son, and has since provided 24-hour care, seven days per week.

Defendant, plaintiff's no-fault insurer, paid attendant care benefits to plaintiff's father at the rate of $19 per hour. Plaintiff contended that his father was entitled to a higher hourly rate because of the specialized care he provided. A jury agreed and awarded plaintiff roughly $1.3 million in attendant care benefits not already paid by defendant. It also awarded approximately $350,000 in no-fault penalty interest under MCL 500.3142, for a total verdict of approximately $1.7 million. The trial court entered a final judgment of over $2.5 million, including costs and no-fault attorney fees, and over $500,000 in interest under the Revised Judicature Act (RJA) provision for interest on money judgments, MCL 600.6013. The court declined to award plaintiff additional attorney fees and denied his request for 12 percent penalty interest under § 3412 for the period ending with satisfaction of the judgment. The trial judge also denied defendant's motion for judgment notwithstanding the verdict.

In a published opinion, the Court of Appeals affirmed the denial of defendant's motion for judgment notwithstanding the verdict, thus leaving the jury verdict intact. Germane to this appeal, the Court of

Appeals also affirmed the trial court's denial of penalty interest under § 3142. The Court of Appeals reasoned that interest awarded under § 3142 is a substantive element of damages. Once a judgment has been entered, it concluded, postjudgment interest is limited to the interest rate applicable under the RJA.[1] It further noted that nothing in the no-fault act supports the conclusion that a trial court is authorized to enhance an award of substantive damages. Instead, the Court held that postjudgment interest is permissible only under the RJA.

ANALYSIS

Plaintiff argues that the Court of Appeals erred in holding that 12 percent penalty interest under § 3412 does not continue to accrue until the judgment is satisfied.

Section 3412 provides:

> (1) Personal protection insurance benefits are payable as loss accrues.
>
> (2) Personal protection insurance benefits are overdue *if not paid* within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue *if not paid* within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue *if not paid* within 30 days after the proof is received by the insurer. For the purpose of calculating the extent to which benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.
>
> (3) An overdue payment bears simple interest at the rate of 12% per annum. [Emphasis added.]

Whether § 3142 permits interest to accrue postjudgment is a question of statutory interpretation. The primary goal of statutory interpretation is to give effect to the intent of the Legislature.[2] The first step in ascertaining such intent is to focus on the language of the statute itself.[3] In its analysis of § 3142, the Court of Appeals utterly failed to consider the language of the statute. The Court instead focused exclusively on extra-statutory considerations, such as unrelated interest provisions of the RJA, the general rule of merger and judgments, and its disapproval of the Court of

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[1] In this case, MCL 600.6013(8) provides the means for calculating the applicable interest rate.

[2] *Petersen v Magna Corp*, 484 Mich 300, 307 (2009) (opinion by KELLY, C.J.).

[3] *Id*.

Appeals decision in *Johnston v DAIIE*. [4] I believe that this Court should consider whether the Court of Appeals failure to analyze and apply the language of § 3142 was fatal to its holding.

Subsection (2) of § 3142 plainly provides that "personal protection insurance benefits are overdue *if not paid* within 30 days . . . ." Thus, the operative language of the statute dictates that benefits are overdue until they are actually paid. The statute makes no reference to the date of entry of a judgment as controlling whether a party is entitled to penalty interest. Plaintiff argues that the Court of Appeals erred in concluding that § 3142 precludes an award of postjudgment interest. In essence, plaintiff asserts, the Court of Appeals usurped the power of the Legislature by replacing the words "if not paid within 30 days" with "until a judgment is entered." It is plaintiff's position that the Legislature could have used the entry of a judgment as the relevant benchmark for determining when benefits are no longer overdue, but it chose not to do so. Instead it used actual payment as the time at which benefits cease to be overdue.

Moreover, plaintiff asserts that § 3142(2) clearly indicates how overdue benefits lose their "overdue" status. That subsection states that "for the purpose of calculating the extent to which benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the . . . mail . . . ." Therefore, it seems that until such mailing is made, payment remains overdue and continues to "bear[] simple interest at a rate of 12% per annum" pursuant to § 3142(3). Again, the statute contains no language indicating that entry of a judgment renders unpaid benefits no longer overdue.

In *Johnston*, the plaintiffs brought suit seeking overdue no-fault benefits from the defendants. The trial court entered summary disposition in favor of the plaintiffs and the defendants appealed. The Court of Appeals held that the plaintiffs may recover interest on the overdue benefits under both § 3142 and § 6013, the applicable judgment interest provision of the RJA. The Court noted that the purpose of the judgment interest statute is to compensate the prevailing party for the expense of bringing an action and the delay in receiving money damages. It noted that the 12 percent interest provision of § 3142 is intended to penalize a recalcitrant insurer, not compensate a claimant. Accordingly, the Court of Appeals explicitly recognized that the interest provisions of the RJA and no-fault act are not mutually exclusive.

Johnston also held that 12 percent interest under § 3142 is to be assessed "until the judgment is satisfied."[5] The Court of Appeals engaged in a thorough analysis of the interest that the plaintiff was entitled to in that case, holding:

> [T]he plaintiff is entitled to the following interest on his overdue no-fault personal protection benefits: interest at 12% per

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[4] *Johnston v DAIIE*, 124 Mich App 212 (1983).

[5] *Id*. at 215.

> annum from the time his benefits became overdue on December 12, 1978, until the day before he filed his complaint on February 23, 1979; interest at 18% per annum from February 23, 1979 until June 1, 1980; and interest at 24% per annum from June 1, 1980, *until the judgment is satisfied*. [Emphasis added.][6]

Plaintiff argues that *Johnston* strongly supports the proposition that § 3142 interest continues to accrue postjudgment. Likewise, the Court of Appeals in this case failed to take into consideration *Johnston*'s explicit recognition of the purpose of judgment interest under the RJA and penalty interest under § 3142.

CONCLUSION

In sum, I believe this Court should grant leave to appeal to more thoroughly consider whether § 3142 interest continues to accrue postjudgment. The Court of Appeals analysis ignores the statutory language and the persuasive holding of *Johnston* that § 3142 interest accrues postjudgment.

HATHAWAY, J., would grant leave to appeal.

PEOPLE v DRAIN, No. 138424; Court of Appeals No. 275327.

CURRY v CITY OF DETROIT, No. 138770; Court of Appeals No. 283523.

HATHAWAY, J., would grant leave to appeal.

CURRY v CORNERSTONE BUILDING GROUP, INC, No. 139164.

CAVANAGH, J., did not participate due to a familial relationship with counsel of record.

PEOPLE v PAULS, No. 139222; Court of Appeals No. 276375.

CAVANAGH, J., would grant leave to appeal.

PEOPLE v HANNA, No. 139387; Court of Appeals No. 291865.

PEOPLE v SUNICH, No. 139397; Court of Appeals No. 283724.

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[6] To fully understand the implication of this holding, it may be easier to break down the interest award. The first award of interest at 12 percent from the day benefits became overdue until the filing of the complaint is simply § 3142 interest of 12 percent on overdue benefits. The second award of 18 percent interest amounts to § 3142 interest of 12 percent plus 6 percent interest under the RJA. The third award of 24 percent interest is § 3142 interest of 12 percent plus 12 percent RJA interest. Johnston applied § 6013(2) of the RJA because of the date on which the complaint in that case was filed. Section 6013(2) does not apply to this case. However, in order to properly understand the Court of Appeals interest award in *Johnston*, it is important to note that § 6013(2) is analogous to § 6013(8), which applies in this case.

PEOPLE v ALVIN FRAZIER, No. 139398; Court of Appeals No. 292085. We note that the trial court orally gave the defendant certain warnings at his plea hearing. He advised defendant that by pleading no contest to the charges against him, he waived his right to court-appointed counsel unless his sentence exceeded the sentencing guidelines, his plea was conditional, the prosecutor sought leave to appeal, or the Court of Appeals or this Court granted his application for leave to appeal. That instruction was legally erroneous. *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005); MCR 6.425(F)(2).

However, the trial court's error was harmless, because defendant received an advice-of-rights form at sentencing informing him of his right to appointed counsel under all circumstances, regardless of whether his conviction was plea-based or trial-based. MCR 6.425(F)(3). Therefore, defendant was not prejudiced by the trial court's erroneous oral instructions. Under MCR 6.425(F)(2)(c), defendant was required to request counsel within 42 days. Because defendant did not request that appellate counsel be appointed until seven months later, his request was properly denied.

Although the error was harmless in this case, trial judges should take care to advise defendants in plea proceedings of their continuing right to court-appointed counsel if they cannot afford counsel.

PEOPLE v SUNICH, No. 139399; Court of Appeals No. 283577.

PEOPLE v NAJOR, No. 139466; Court of Appeals No. 291658.

PEOPLE v HIGHTOWER, No. 139469; Court of Appeals No. 282484.

PEOPLE v KENNETH MILLER, No. 139480; Court of Appeals No. 292077.

PEOPLE v HINKLE, No. 139538; Court of Appeals No. 292053.

KELLY, C.J., and CAVANAGH, J., would grant leave to appeal.

ASLANI v STATE FARM MUT AUTOMOBILE INS CO, No. 139788; Court of Appeals No. 284572. We direct the Clerk of the Court of Appeals and the Clerk of the Wayne Circuit Court to redact the plaintiffs' social security numbers from the case files in accordance with AO 2006-2.

PEOPLE v RICHARDSON, No. 139947; Court of Appeals No. 291617.

MARKMAN, J. (*dissenting*). I respectfully dissent and would grant bond pending appeal. Given that defendant was on bond prior to trial and prior to sentencing without incident; given that defendant, a 60-year-old man, has apparently never been in trouble with the law, either as an adult or as a juvenile; given that defendant has resided at the same home in Detroit for 34 years without prior incident; given the circumstances of defendant's family's heavy reliance upon him; given what I view as significant issues of self-defense and the defense of third persons that have been raised on appeal; given the apparent instability of defendant's neighborhood, as represented in this case by drug-abusing neighbors who had recently moved in; and given that, at the time of this assault, defendant indisputably was approached on his own property by three of his neighbors, two of whom were under the

influence of both alcohol and drugs and one of whom was wielding a baseball bat, I believe that defendant has satisfied the standards of MCL 770.9a.

Summary Disposition January 27, 2010:

SAULT STE MARIE TRIBE OF CHIPPEWA INDIANS v BOUSCHOR, No. 137990; Court of Appeals No. 276712. By order of September 18, 2009, we directed the parties to provide supplemental briefs. On order of the Court, the briefs having been received, the application for leave to appeal the November 18, 2008 judgment of the Court of Appeals is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we affirm on alternative grounds the Court of Appeals affirmance of the trial court's denial of defendant Bernard Bouschor's motion for summary disposition. MCL 691.1407(5) provides immunity to "elective . . . executive official[s]" of the *state of Michigan* "acting within the scope of [their] . . . authority," not to those of a sovereign Indian nation. The defendant, as a former executive official of a sovereign Indian nation, is therefore not entitled to governmental immunity under the law of the state of Michigan. MCL 691.1407(2) provides qualified immunity to an "officer . . . of a governmental agency" who "reasonably believes he or she is acting within the scope of his or her authority." Similar to MCL 691.1407(5), MCL 691.1407(2) applies only to officers of "the state or a political subdivision." See MCL 691.1401(c), (d). Accordingly, the defendant is not entitled to qualified immunity under Michigan's governmental tort liability act. In incorporating Michigan's governmental tort liability act into its own tribal code, as it did for all laws of the state of Michigan that do not conflict with the tribal code, the plaintiff tribe has only provided immunity to *Michigan* governmental employees and officers, not to its own employees and officers.

SAULT STE MARIE TRIBE OF CHIPPEWA INDIANS v BOUSCHOR, No. 137988; Court of Appeals No. 276712. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals as to the plaintiff's claim of legal malpractice against the defendant law firm and we reinstate the judgment of the Chippewa Circuit Court denying the defendant law firm's motion for summary disposition. We agree with the trial court that there were outstanding issues of material fact with regard to the defendant firm's potential legal malpractice liability. In all other respects, leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

PEOPLE v HAMMOND, No. 139705; Court of Appeals No. 291359. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

In re SANDERS, No. 140202. The Judicial Tenure Commission has issued a Decision and Recommendation, to which the respondent, 36th District Court Judge Brenda K. Sanders, consents. It

is accompanied by a settlement agreement, in which the respondent waived her rights, stipulated to findings of fact and conclusions of law, and consented to a sanction that would be no less than a public censure and no greater than a public censure and a 42-day suspension without pay.

In resolving this matter, we are mindful of the standards set forth in *In re Brown*, 461 Mich 1291, 1292-1293 (2000):

> [E]verything else being equal:
>
> (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
>
> (2) misconduct on the bench is usually more serious than the same misconduct off the bench;
>
> (3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;
>
> (4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;
>
> (5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;
>
> (6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery;
>
> (7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.

In the present case, those standards are being applied in the context of the following stipulated findings of fact of the Judicial Tenure Commission, which, following our de novo review, we adopt as our own:

> 1. Respondent is, and at all material times was, a judge of or a judicial candidate for, the 36th District Court in Detroit, Michigan.
>
> 2. As a judge, and as a candidate for a judge, Respondent is subject to all the duties and responsibilities the Michigan Supreme Court imposed on her, and is subject to the standards for discipline set forth in MCR 9.104 and MCR 9.205.
>
> **Count I**
>
> **Inappropriate Political Activity While a Judge or Judicial Candidate**
>
> 3. On November 4, 2008, Respondent was elected to the position of judge of the 36th District Court for a six-year term that began January 1, 2009.
>
> 4. On December 8, 2008, Respondent signed the Oath of Office for Judge of the 36th District Court.

5. While she was still a candidate for judge, Respondent also filed to run for Mayor of Detroit in a special nonpartisan Detroit mayoral primary to complete the term of former Mayor Kwame Kilpatrick.

6. After becoming a judge, Respondent remained a candidate on the ballot in the February 24, 2009 special primary.

7. According to campaign rules, Respondent was unable to timely remove her name from the ballot for the mayoral primary.

8. Notwithstanding having been elected to the position of judge, Respondent actively participated in certain campaign activities for the special February 24, 2009 primary.

9. On December 16, 2008, Respondent filed a Statement of Organization form for mayoral candidate committees which listed the name of her committee: "Committee to Elect Brenda K. Sanders for Mayor" and identified her as Treasurer and Designated Record Keeper.

10. Respondent completed a Metro Times questionnaire which appeared on January 28, 2009, in the Metro Times, a local newspaper, entitled "Detroit Mayoral Candidate Questionnaire: Brenda K. Sanders."

11. Respondent also appeared on "Flashpoint: Straight Talk from the Candidates," a televised commercial-free program in which she discussed her platform for mayor, which aired on Sunday, February 1, at 8:30 a.m., and which continued to be accessible to viewers on the station's web site, ClickOnDetroit.com.

12. Respondent campaigned as a judge during her televised campaign appearance as a mayoral candidate, referring to her "former" career as an attorney and her status as a "new face in our local government."

13. Respondent knew, or should have known, that as a judicial candidate and as a judge, she was and is subject to the rules governing political and campaign conduct as provided in Canon 7 of the Michigan Code of Judicial Conduct [MCJC] and the Michigan Constitution 1963, art 6.

Count II

Inappropriate Campaign Conduct/Soliciting Contribution

14. On April 29, 2008, Respondent filed and signed a Statement of Organization Form for Candidate Committee, in which she identified herself, Brenda K. Sanders, as candidate for the position of 36th District Judge, as well as Treasurer and Designated Record Keeper.

15. On the form Respondent listed her own phone number, fax number, e-mail address, mailing and street address as the contacts for her committee.

16. On September 5, 2008, Respondent filed an Amended Schedule 1A — Itemized Contributions Form and Post Primary Campaign Finance Statements, which continued to list her as the Treasurer and Designated Record Keeper of her own campaign.

17. On her website, www.brendaksanders.com, Respondent solicited donations to her campaign of which she was manager and treasurer "Please send donations to The Committee to Elect Brenda K. Sanders," by check, PayPal or "Email Funds to Brendak1233@yahoo.com."

18. s a judicial candidate, Respondent knew or should have known that Canon 7B(2) of the Michigan Code of Judicial Conduct prohibits a candidate for judicial office from acting as treasurer or personally soliciting or accepting campaign funds.

19. As a judicial candidate, and as stated in the Candidate Committee Manual, Respondent knew or should have known that a judicial candidate may not serve as a treasurer or record keeper of the candidate's committee.

20. As a judicial candidate, Respondent knew or should have known that the Bureau of Elections Campaign Financial Disclosure Information specifically provides that "Judicial Canons do not allow a judicial candidate to serve as their own treasurer."

We also adopt the Commission's conclusion that these facts demonstrate, by a preponderance of the evidence, that respondent breached the standards of judicial conduct and constituted misconduct in office, as defined by 1963 Mich Const, art 6, § 30, and MCR 9.205:

1. conduct in violation of 1963 Mich Const, art 6, § 21, which provides that a judge of a court of record shall be ineligible to be nominated for or elected to an elective office other than a judicial office during the period of his service and for one year thereafter;

2. failure to resign judicial office before becoming a candidate either in a party primary or in a general election for non-judicial office, in violation of Canon 7A(3);

3. failure to establish, maintain, enforce and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to Canon 1;

4. making speeches on behalf of a non-judicial candidate (herself) or publicly endorsing a candidate for non-judicial office, in violation of Canon 7A(1)(b);

5. personal solicitation of campaign funds, in violation of Canon 7B(2)(a);

6. conduct involving impropriety and the appearance of impropriety, in violation of Canon 2A, which erodes public confidence in the judiciary;

7. conduct prejudicial to the administration of justice, in violation of MCR 9.104(A)(1);

8. conduct that exposes the legal profession or courts to obloquy, contempt, censure or reproach, contrary to MCR 9.104(A)(2); and

9. conduct that violates the Michigan Rules of Professional Conduct, contrary to MCR 9.104(A)(4).

After reviewing the recommendation of the Judicial Tenure Commission, the settlement agreement, the standards set forth in *Brown*, and the above

findings of fact and conclusions of law, we accept the recommendation of the Commission and order that Honorable Brenda K. Sanders be publicly censured and suspended without pay for 21 days, effective 21 days after the date of this order. This order stands as our public censure.

In re NEBEL, No. 140203. On order of the Court, the Judicial Tenure Commission has issued a Decision and Recommendation for Discipline, and the Honorable Charles C. Nebel has consented to the Commission's findings of fact, conclusions of law, and recommendation of a public censure and a 90-day suspension without pay.

As we conduct our de novo review of this matter, we are mindful of the standards set forth in *In re Brown*, 461 Mich 1291, 1292-1293 (2000):

> [E]verything else being equal:
>
> (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
>
> (2) misconduct on the bench is usually more serious than the same misconduct off the bench;
>
> (3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;
>
> (4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;
>
> (5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;
>
> (6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery;
>
> (7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.

In this case those standards are being applied to the following findings of fact of the Judicial Tenure Commission, which had adopted the admissions contained in the settlement agreement, and which we adopt as our own:

> On July 24, 2009, Respondent consumed at least four sixteen-ounce glasses of beer at the Mackinac Grill in St. Ignace, Michigan, between approximately 4:45 p.m. and 7:00 p.m. Respondent then left the Mackinac Grill to travel to his home in Munising, Michigan. Respondent traveled northbound on I-75, continued on M-123, and then went west on M-28. While driving on M-28, Respondent's speed registered on a Mackinac County Deputy's radar device at 105 miles per hour. Several witnesses also reported that Respondent had passed them on M-28 traveling at speeds around or in excess of 100 miles per hour. A Michigan State Police unit effectuated a traffic stop of Respondent's vehicle near the Schoolcraft County/Alger County line at or around 9:05 p.m.

> During the traffic stop Respondent acted in a confused and disoriented manner. An odor of intoxicants emanated from his body and his eyes were bloodshot and glassy. Respondent admitted to having consumed "four — maybe five — Oberon draft beers." The Michigan State Police detained Respondent and took him to the Schoolcraft County Jail. While in jail, Respondent took two breath tests which revealed that his bodily alcohol content was 0.09 per 210 liters of breath.
>
> Under MCL 257.625(1)(b), it is illegal for a person with a 0.09 blood-alcohol content to operate a motor vehicle on a highway open to the general public. Respond[ent] was charged with a violation of MCL 257.625(1)(b) in the 93rd District Court. On September 9, 2009, Respondent pled guilty to a lesser charge of operating a motor vehicle while impaired, in contravention of MCL 257.625(3).

The standards set forth in *Brown* are also being applied to the following conclusions of the Judicial Tenure Commission, which we adopt as our own:

> The facts established by the parties' stipulation in this matter show, by a preponderance of the evidence, that Respondent breached the standards of judicial conduct in the following ways:
>
> (a) Failure to establish, maintain, enforce and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, in violation of Canon 1 of the Michigan Code of Judicial Conduct ("MCJC");
>
> (b) Irresponsible or improper conduct which erodes public confidence in the judiciary, in violation of MJCJ, Canon 2A;
>
> (c) Conduct involving the appearance of impropriety, in violation of MJCJ, Canon 2A;
>
> (d) Failure to conduct oneself at all times in a manner which would enhance the public's confidence in the integrity of the judiciary, contrary to MJCJ, Canon 2B; and
>
> (e) Conduct which exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(A)(2).
>
> Respondent has pleaded guilty to the commission of a misdemeanor designed to promote public safety. The commission of a crime by a judge erodes public confidence in the judiciary, which is prejudicial to the administration of justice.

After review of the recommendation of the Judicial Tenure Commission, the settlement agreement, the standards set forth in *Brown*, and the above findings and conclusions, we order that the Honorable Charles C. Nebel be publicly censured and suspended without pay for 90 days, effective 21 days from the date of this order. This order stands as our public censure.

Leave to Appeal Granted January 27, 2010:

PEOPLE v MCMULLAN, No. 139209; reported below: 248 Mich App 149. On order of the Court, the application for leave to appeal the June 2, 2009, judgment of the Court of Appeals is considered, and it is granted,

limited to the issue whether a rational juror could conclude that defendant acted with a "lesser mens rea of gross negligence or an intent to injure, and not malice," *People v Holtschlag*, 471 Mich 1, 21-22 (2004), thus warranting an instruction on involuntary manslaughter.

We further order the Genesee Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint Patrick K. Ehlmann, if feasible, to represent the defendant in this Court. If this appointment is not feasible, the trial court shall, within the same time frame, appoint other counsel to represent the defendant in this Court.

The Criminal Defense Attorneys of Michigan, the Prosecuting Attorneys Association of Michigan, and the Criminal Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

CORRIGAN, J., (*concurring*). In particular, I would direct the parties to address whether, even crediting defendant's version of events, the facts inescapably show that he acted with malice because, at a minimum, he "inten[ded] to do an act in wanton and wilful disregard of the likelihood that the natural tendency of [his] behavior is to cause death or great bodily harm." *People v Goecke,* 457 Mich 442, 464 (1998). Defendant admitted that, after a physical altercation with the victim, defendant left to obtain a loaded gun in order to threaten or scare the victim. He further testified that after he returned, the victim was shot in the chest when he and the victim again began to struggle. He does not dispute that the gun was in his hand when it was cocked and then fired, and the evidence further established that this firearm had to be specifically cocked in order to fire. Under these circumstances, I would ask the parties to address whether, as a matter of law, defendant's assertion that he did not actually intend to kill the victim could preclude a finding of malice.

YOUNG, J., joined the statement of CORRIGAN, J.

2000 BAUM FAMILY TRUST v BABEL, No. 139617; reported below: 284 Mich App 544. On order of the Court, the application for leave to appeal the June 23, 2009, judgment of the Court of Appeals is considered, and it is granted. The parties are to discuss (1) whether the fee title resulting from the dedication of land for public uses in a plat under the 1887 Plat Act in land that runs along the shore of a lake conveys the riparian rights to the lake to the County or whether the conveyance is limited to public uses of the road as a road; and (2) whether the deeds of the front tier lot owners have to have specific language granting riparian rights; and whether case law that states that front tier lots adjacent to a road running along a water way have riparian rights unless such rights are expressly excluded is still valid.

The motion to file brief amicus curiae is granted. The Michigan Association of Counties is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied January 27, 2010:

SAULT STE MARIE TRIBE OF CHIPPEWA INDIANS v BOUSCHOR, No. 137986; Court of Appeals No. 276712.

SAULT STE MARIE TRIBE OF CHIPPEWA INDIANS v BOUSCHOR, No. 137992; Court of Appeals No. 276712.

PEOPLE v KENYATTA DAVIS, No. 138830; Court of Appeals No. 281505.

FRANK v STATE EMPLOYEES RETIREMENT SYSTEM, No. 138977; Court of Appeals No. 289961.

PEOPLE v MITZ, No. 138992; Court of Appeals No. 290678.

PEOPLE v EUGENE ALEXANDER, No. 139013; Court of Appeals No. 281667.

CLARK v SWARTZ CREEK COMMUNITY SCHOOLS, No. 139063; Court of Appeals No. 290191.

KARRIP v HAMILTON MORTGAGE COMPANY, No. 139613; Court of Appeals No. 283867.

HUTCHINSON v HUTCHINSON, No. 139615; Court of Appeals No. 284259.

AKERS v BANKERS LIFE & CASUALTY COMPANY, No. 139632; Court of Appeals No. 283771.

SMOTER v LOCKHART, No. 139646; Court of Appeals No. 283986.

PEOPLE v CHARLES JONES, No. 139729; Court of Appeals No. 292801.

PEOPLE v DEREK HARRIS, No. 139732; Court of Appeals No. 284312.

PEOPLE v DERONE HARRIS, No. 139734; Court of Appeals No. 284645.

LANGSTON v GENERAL MOTORS, No. 139755; Court of Appeals No. 291873.

PEOPLE v BURKS, No. 139786; Court of Appeals No. 284486.

AUTO CLUB INSURANCE ASSOCIATION v DEPARTMENT OF TREASURY, No. 139813; Court of Appeals No. 286600.

PEOPLE v NOURI, No. 139908; Court of Appeals No. 290178.

CLARK v SWARTZ CREEK COMMUNITY SCHOOLS, No. 139993; Court of Appeals No. 292901.

Reconsideration Denied January 27, 2010:

EBY v LABO (*In re* HANDORF), No. 139742; reported below: 285 Mich App 384. On order of the Court, the motion to file brief amicus curiae is granted. The motion for reconsideration of this Court's October 30, 2009, order is considered, and it is denied, because it does not appear that the order was entered erroneously. Further, we wish to respond to a concern raised by petitioners and their amicus, the American Academy of Adoption Attorneys, that, in contravention of relevant provisions of the Adoption Code, the Court of Appeals' decision stands for the proposition that guardians cannot consent to adoption. Specifically, petitioners and their amicus argue that the decision ignores MCL 710.28(1)(a)(*ii*) and

MCL 710.43(1)(a)(*iii*), which provide that a parent shall execute a release of rights or consent for adoption *except* when a guardian has been appointed. However, these provisions place a limit on a parent's right to consent to adoption after a guardian has been appointed; they do not provide an affirmative authorization for a guardian to unilaterally consent to adoption in the absence of a termination of parental rights. Consistent with the overall statutory scheme, a guardian may consent to adoption once she has "first obtained authority to execute the consent from the court that appointed the guardian," MCL 710.43(5), if (a) the parents' rights have already been terminated, MCL 710.41(1); (b) the parents consent to an adoption, MCL 710.26(1)(a); or (c) the parents have released their rights to the child and do not intend to exercise any parental rights over that child. MCL 710.44(6). The Court of Appeals' decision does nothing to alter the authority of a guardian, acting in loco parentis, to consent to a child's adoption in these situations.

Statement Denying Motion to Disqualify January 28, 2010:

PELLEGRINO v AMPCO SYSTEMS PARKING, No. 137111; Court of Appeals No.274743.

STATEMENT OF JUSTICE MARKMAN
DENYING PLAINTIFF'S MOTION TO DISQUALIFY INTRODUCTION

After 175 years of operation of a procedure on the Michigan Supreme Court in which individual justices have decided disqualification motions made against themselves, and in which the applicable standard focused upon whether a justice was "actually biased" against a party, this Court has now adopted a procedure wherein each justice votes upon the disqualification motion of the others, and in which the applicable standard is the considerably more vague and uncertain "appearance of impropriety." Thus, a procedure, and a standard, that have served this Court well since the inception of our statehood in ensuring an honest and honorable Michigan Supreme Court, and that continue to serve well the United States Supreme Court and the supreme courts of the majority of states of this Union, have been replaced with a procedure, and a standard, that, in my judgment, will: (a) incentivize disqualification motions and thereby produce a considerable increase in the number of such motions and in the amount of time and effort devoted by this Court to addressing disqualification motions; and (b) introduce an unprecedented degree of gamesmanship and politicization into the judicial process by allowing attorneys to influence which duly-appointed justices will be allowed to participate in deciding their own cases and controversies. It is frequently popular to proclaim "reform," but I fear that time will demonstrate that wisdom here would have been better served by

regard for the judgment of all the previous generations of jurists who have served on this Court for what is now approaching two centuries. However, in order to participate in this case under our new rules, and thereby carry out the judicial responsibilities conferred upon me by the people of Michigan in accordance with their constitution, I offer the following statement.

MARKMAN, J. Plaintiff's counsel, Geoffrey Fieger, has filed a motion asking that I be disqualified from participation in this case on the grounds that I am "biased and prejudiced" against him. He has moved for the disqualification of Justices CORRIGAN and YOUNG on the same grounds, as he has also previously moved for the disqualification of former Chief Justice TAYLOR. I decide this motion under our revised disqualification procedure set forth in MCR 2.003, and deny.

First, after having carefully considered the instant motion, just as I have carefully considered each of counsel's fourteen previous motions for my disqualification, I am personally convinced that I can fairly and impartially consider the present appeal, just as in the past I have fairly and impartially considered appeals in which counsel has been a party or in which he or his law firm have represented other parties.

Second, as I stated in *Grievance Administrator v Fieger*, 476 Mich 231, 281 (2006) (separate opinion of TAYLOR, CORRIGAN, YOUNG and MARKMAN, JJ.), I have sought in every case coming before this Court to give faithful meaning to the law, to decide disputes fairly and impartially, and to judge matters without bias or prejudice. I remain committed to these propositions and would never confer upon any attorney or party anything other than equal and even-handed treatment under the law as I understood it.

Third, counsel has prevailed in those cases in which, in my judgment, the law was on his side, and he has not prevailed in those cases in which, in my judgment, the law was not on his side, and I have set forth my analyses in the opinions of this Court with a thoroughness equivalent to that of other justices. Although I do not believe that votes that I have cast in counsel's favor dispositively evidence lack of bias and prejudice any more than do votes cast in opposition evidence bias or prejudice—for impartiality is not determined by a judge's 'batting average' in cases involving particular attorneys or parties—it does seem highly relevant that I have ruled in counsel's favor in cases in which he represented others, in cases in which he himself was a malpractice defendant, and in cases in which he himself was the subject of an attorney grievance investigation. See, e.g., *Beaudrie v Henderson*, 465 Mich 124 (2001) (reversing Court of Appeals and reinstating lawsuit filed by counsel's client); *Dietrich & Associates v Rogers and Fieger*, 474 Mich 898 (2005) (upholding Court of Appeals ruling that plaintiff's lawsuit against counsel was barred on res judicata grounds); *Lawsuit Financial, LLC v Curry and Fieger*, 471 Mich 885 (2004) (upholding Court of Appeals ruling that plaintiff's conversion and tortious interference claims against counsel were properly dismissed); and *Grievance Administrator v Fieger*, 469 Mich 1241 (2003) (upholding Attorney Discipline Board's dismissal of

Grievance Administrator's complaint of misconduct against Mr. Fieger after he accused a prosecutor of "covering up a murder").

Fourth, counsel and his law firm, of which he is a named partner, have also prevailed in other cases. See, e.g., *Zunich v Family Med Associates of Midland, PC*, 485 Mich 940 (2009); *Wilson v Keim*, 483 Mich 900 (2009), *Conn v Asplundh Tree Expert Co*, 478 Mich 930 (2007); *Cauff v Fieger, Fieger, Kenney & Johnson, PC*, 483 Mich 1021 (2009); *LaBarge v Walgreen Co*, 480 Mich 1136 (2008); *Am Axle & Mfg Holdings, Inc v Nat'l Union Fire Ins Co*, 481 Mich 868 (2008); *LaBarge v Walgreen Co*, 482 Mich 976 (2008); *Wilcox v Munger*, 482 Mich 1049 (2008); *Short v Antonini*, 480 Mich 991 (2007); *Briggs v Oakland County,* 480 Mich 1006 (2007); *State Auto Mut Ins Co v Fieger*, 477 Mich 1068 (2007); *Hallman v Holy Cross Hosp of Detroit*, 475 Mich 874 (2006); *Janusz v Sterling Millwork Inc,* 476 Mich 859 (2006); *Laporte v William Beaumont Hosp*, 472 Mich 892 (2005); *Savitskie v Gagnon*, 474 Mich 852 (2005); *Sinacola v Leland Twp*, 472 Mich 886 (2005); *Parr v Dutt*, 469 Mich 1016 (2004); and *Scott v Kolk*, 468 Mich 896 (2003). I enumerate these cases only because I do not know what showing satisfies the Court's new 'appearance of impropriety' standard, and, once again, it seemed highly relevant that counsel has sometimes prevailed in his arguments before me and he has sometimes not.

Fifth, I note that I did disqualify myself from participation in *Fieger v Cox*, 480 Mich 874 (2007), a case in which counsel was the named plaintiff, because that case pertained to an Attorney General's investigation of counsel's financial conduct undertaken in connection with my judicial reelection campaign in 2004. Moreover, I have regularly disqualified myself in other cases over ten years on this Court, and four years on the Court of Appeals, in which I believed my participation would have been contrary to the law or to the highest ethical standards.

Sixth, I note that plaintiffs' counsel has appealed my participation in a case on at least three occasions to the United States Supreme Court, but after consideration that court has denied certiorari in each of these. *Graves v Warner Bros,* cert den 542 US 920 (2004), *Gilbert v Daimler Chrysler Corp*, cert den 546 US 821 (2005), *Grievance Administrator v Fieger*, cert den 549 US 1205 (2007).

Seventh, I note that plaintiff's counsel does not cite anything in support of his motion to disqualify me that has occurred within the past nine years. He mistakenly attributes to 2002 several matters that are supported by exhibits as having occurred during 2000. While, properly, there may be no statute of limitations to claims of bias or prejudice, the staleness of a complaint must at least constitute one factor in assessing the "appearance of propriety" of a justice's current participation in a case.

Eighth, counsel raises several matters that occurred during my election campaign in 2000: (a) the underlying context of that campaign as it pertains to counsel has been previously characterized by four Justices as follows, "In 1998, Mr. Fieger ran for Governor of Michigan on the Democrat ticket. As such, in 2000, he was the most visible member and the titular head of the Michigan Democrat Party, which was then channeling millions of dollars in opposition to our election campaigns.

Mr. Fieger was outspoken, particularly about his views of our state's legal and judicial systems, and his statements received a great deal of exposure through both the media and opposition campaign communications. In addition, Mr. Fieger himself contributed substantial amounts of money in opposition to our campaigns while also being highly vocal in his political opposition . . . . A highly visible and outspoken public figure, who is an integral part of the political opposition to a judicial candidate, cannot be insulated from mention, or even criticism, in a judicial campaign because he also happens to be a lawyer." *Grievance Administrator v Fieger*, 476 Mich 231, 269-270 (2006) (opinion by TAYLOR, C.J., and CORRIGAN, YOUNG, and MARKMAN, JJ.); (b) counsel cites instances in which organizations altogether unconnected with my judicial campaign negatively invoked his name. Even if counsel's assertions are accurate, I had no connection with these statements; I did not produce them, I did not approve them, and I was not responsible for them. Indeed, it would have been unlawful for me to have been involved in the campaign activities of these organizations, and I was not; (c) counsel cites a speech that I gave to the Michigan Medical Society to which he takes offense because of a reference to "trial lawyers." However, what is significant is that such speech does not refer to counsel in any way, and the objected-to reference is separated from its surrounding context in which I assert that I am "not pro-any interest group or anti-any interest group . . . or pro-medical profession or anti-medical profession, or pro-hospital or anti-hospital because "that is not how judges should approach their responsibility," and further observe that "[the Michigan Supreme Court] has upheld medical malpractice reform, [not] because it is pro-medical malpractice reform or anti-medical malpractice reform, but because elected representatives are allowed in a free and self-governing society to undertake these kind of decisions;" I also later make an attempt at humor, the lesson of which is that in contributing financially to my judicial campaign, one receives absolutely nothing tangible in return; (d) counsel cites a joint radio advertisement from Justices TAYLOR, YOUNG, and myself which states that counsel supported the three candidates who were running in opposition. Apart from the fact that such advertisement was clearly constitutionally-protected campaign speech, *Minnesota v White*, 536 US 765 (2002), it was accurate, relevant, and, I believe, fair and reasonable commentary on one aspect of the judicial election, constituting an effort to better define the consequences of that election for a public which had recently been made extremely well aware of counsel's perspectives on legal and judicial issues; and (e) apart from this single reference to counsel, and to the best of my imperfect recollection, I cannot recall having mentioned his name during many hundreds of campaign speeches in running for the Court of Appeals in 1996 and 1998, the Supreme Court in 2000 and 2004, or in any other public speech, and certainly did not do so on any regular or even sporadic basis.

Ninth, that counsel has repeatedly sought my disqualification on numerous past occasions, does not afford an independent ground for my disqualification. "[I]t cannot be that a judge can be required to disqualify himself or herself on the basis of 'abuse' that he has allegedly received from an attorney or litigant. To allow such conduct to constitute a basis for disqualification would simply be to incentivize such conduct on the part of any attorney or litigant desirous of excluding a disfavored judge from participation in his or her case." *Grievance Administrator v Fieger*,

475 Mich 1211, 1212-1213 (2006); *Grievance Administrator v Fieger*, 476 Mich 231, 274 (2006). A judge does not become improperly "enmeshed" with counsel on this basis.

Finally, in deciding more than 40,000 judicial cases and controversies since I have served as a judge, I have decided countless such matters in favor of parties, causes and attorneys for which I had limited personal regard, and I have decided countless such matters in opposition to parties, causes and attorneys for which I had considerable personal regard. In my many public statements concerning the judicial role, I have regularly invoked the observation of former United States Supreme Court Justice Felix Frankfurter that "the highest example of judicial duty is to subordinate one's personal will and one's private views to the law." I have always attempted to live up to this standard in my judicial decisions.

Therefore, after considering the instant motion for disqualification, I deny the motion because: (1) I have examined my conscience, and believe that I am able to accord fair and impartial treatment to plaintiff's counsel and will, as I have always done, decide this case on its merits; (2) based on "objective and reasonable perceptions," I do not believe that my participation in this case will produce a "serious risk of actual bias impacting the due process rights of a party;" and (3) "based on objective and reasonable perceptions," I do not believe my participation in this case creates an "appearance of impropriety," a standard that must be assessed "in light of what can be gleaned from existing court rules and canons, historical practices and expectations, and common sense." *Adair v State of Michigan*, 474 Mich 1027, 1039 (2006).

Orders Denying Motions for Disqualification January 28, 2010:

PELLEGRINO v AMPCO SYSTEMS PARKING, No. 137111; Court of Appeals No. 275743.* On order of the Court, the motion for full-Court consideration of the motion for disqualification of Justice MARKMAN is considered, and it is granted. Upon full-Court consideration of the plaintiff's motion, we deny the plaintiff's motion to disqualify Justice MARKMAN.

KELLY, C.J. (*concurring*). I concur with granting the motion for consideration by the entire Court of the motion to disqualify Justice MARKMAN. The statements complained of were made ten years ago. It is not alleged that Justice MARKMAN has made subsequent public comments about attorney Geoffrey Fieger. Moreover, Justice MARKMAN's voting pattern over the past decade does not reflect bias against Mr. Fieger or the appearance of bias. For those reasons, I concur with the denial of the motion to disqualify.

Further statement to follow.

CAVANAGH, J. (*concurring*). I concur with granting the motion for full Court review of the denial of the motion for disqualification of Justice MARKMAN. Because of the staleness of the assertions here involved, and

* Additional statements of justices in connection with these orders were filed March 31, 2010. 485 Mich 1134—REPORTER.

because I am persuaded of his ability to render an impartial judgment in this matter, I concur with the denial of plaintiff's motion for disqualification of Justice MARKMAN.

WEAVER and HATHAWAY, JJ. (*concurring*). We concur with this Court's order denying plaintiff's motion to disqualify Justice MARKMAN. Plaintiff's motion for disqualification stems from statements made by Justice MARKMAN during his 2000 judicial campaign regarding plaintiff's attorney Geoffrey Fieger.[1]

Prior to this Court's November 25, 2009 amendments to MCR 2.003—Disqualification of Judge—the "appearance of impropriety" standard was not a ground for disqualification. In other words, even if it appeared to an objective individual that a justice was biased or prejudiced, a justice would not be disqualified on the basis of appearance alone.

Under our newly revised rule MCR 2.003, appearance of impropriety is a ground for judicial disqualification. The statements made by Justice MARKMAN were made before this Court adopted MCR 2.003 as amended. We will not apply the appearance-of-impropriety standard retroactively to statements made by a justice concerning a party or a party's attorney prior to the rule's amendment. However, we will apply the standard prospectively to statements made by a justice concerning a party or a party's attorney from the date that the order amending MCR 2.003 was entered**.** Accordingly, as the appearance-of-impropriety standard was not yet in effect, we will not apply the amended rule to the statements made by Justice MARKMAN.

A judicial candidate's First Amendment right to free speech is protected under *Minnesota v White*, 536 US 765 (2002); however, a justice does not have a protected right to decide a case in which he or she made campaign statements that create an appearance of impropriety. For example, if a judicial candidate distributes campaign literature that either specifically names an individual or if that individual can be reasonably identified by the candidate's campaign literature, and that literature gives rise to an appearance of bias or prejudice against that identified individual, that justice puts himself or herself at risk of not being able to participate in cases involving that individual under the appearance of impropriety standard. Consequently, in the future, for conduct or statements that occur after the effective date of MCR 2.003 as amended, we will apply the appearance of impropriety standard as a ground for disqualification.

CORRIGAN, J., not participating; statement to follow.

YOUNG, J., not participating; statement to follow.

On order of the Court, the motion for a full-Court decision on the motion to disqualify Justice CORRIGAN is considered, and it is denied. The plaintiff filed a motion to disqualify Justice CORRIGAN on October 9, 2009.[1] Justice CORRIGAN denied the motion under the preamendment version of

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[1] The statements were referenced in Justice WEAVER's dissenting statement in *Grievance Administrator v Fieger*, 476 Mich 231 (2006).

[1] Plaintiff's motion also sought disqualification of Justices YOUNG and MARKMAN.

MCR 2.003, releasing her decision on November 18, 2009.[2] Under the preamendment version of MCR 2.003, a motion for disqualification was not subject to a decision by the full Court. Therefore, the plaintiff is not entitled to full-Court consideration of the motion for her disqualification.

Statements to follow.

CORRIGAN, J., not participating; statement to follow.

YOUNG, J., not participating; statement to follow.

On order of the Court, the motion for a full-Court decision on the motion to disqualify Justice YOUNG is considered, and it is denied. The plaintiff filed a motion to disqualify Justice YOUNG on October 9, 2009.[1] Justice YOUNG denied the motion under the pre-amendment version of MCR 2.003, releasing his decision on November 18, 2009.[2] Under the pre-amendment version of MCR 2.003, a motion for disqualification was not subject to consideration by the full Court. Therefore, the plaintiff is not entitled to full-Court consideration of the motion for his disqualification.

Statements to follow.

CORRIGAN, J., not participating; statement to follow.

YOUNG, J., not participating; statement to follow.

Summary Disposition January 29, 2010:

PEOPLE v BARBARICH, No. 139060; Court of Appeals No. 290772. On January 12, 2010, the Court heard oral argument on the application for leave to appeal the June 3, 2009 order of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(H)(1). In lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We do not retain jurisdiction.

KELLY, C.J. and CAVANAGH, J., would deny leave to appeal.

PEOPLE v GEARY GILMORE, No. 139118; Court of Appeals No. 289841. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the trial court for a decision on the defendant's motion to disqualify Judge Prentis Edwards, for reconsideration of the defendant's successive motion for relief from judgment, and for any further proceedings not inconsistent with this order. Judge Edwards should not have

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[2] MCR 2.003 was amended on November 25, 2009. 485 Mich cxxx. The amendments took immediate effect.

[1] Plaintiff's motion also sought disqualification of Justices CORRIGAN and MARKMAN.

[2] MCR 2.003 was amended on November 25, 2009. 485 Mich cxxx. The amendments took immediate effect.

decided the defendant's successive motion for relief from judgment without first deciding the motion to disqualify. On remand, the trial court shall decide the motion to disqualify under MCR 2.003 before addressing the defendant's successive motion for relief from judgment. We do not retain jurisdiction.

PEOPLE V TERANCE HICKS, No. 139521; Court of Appeals No. 284462. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse only that part of the judgment of the Court of Appeals that remands this case to a different judge because we are not persuaded that the standards set forth in *People v Hill*, 221 Mich App 391, 398 (1997), require reassigning the case to a different judge. We do not disturb the Court of Appeals ruling that resentencing is required. Accordingly, we remand this case to the Wayne Circuit Court so that the resentencing ordered by the Court of Appeals can occur before the same judge. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

KELLY, C.J. (*concurring*). The Court of Appeals majority opinion, which was unpublished, persuasively explained its rationale for vacating and remanding this matter for resentencing. The Court said:

> [T]he trial court had a substantial and compelling reason to depart from the guidelines.
>
> Nonetheless, a minimum sentence must be proportionate, and, "[w]hen fashioning a proportionate minimum sentence that exceeds the guidelines recommendation, a trial court must justify why it chose the particular degree of departure." [*People v*] *Smith*, [482 Mich 292,] 318 [(2008)]. Here, the trial court offered no explanation for the extent of the departure independent of the reason it provided for exceeding the recommended minimum sentence range. The trial court's departure was a substantial departure. The imposed 10-year minimum sentence, which was the maximum-minimum sentence allowed under the two-thirds rule, see *People v Harper*, 479 Mich 599, 617; 739 NW2d 523 (2007), was more than three times longer than the recommended minimum sentence range of 19 to 38 months. In fact, a 10-year minimum sentence for any defendant convicted of a class C crime would constitute a departure from the recommended minimum sentence range. See MCL 777.64. The maximum-minimum sentence range provided by the guidelines for a defendant convicted of a class C crime is 114 months, and such a sentence may be given to a defendant whose [prior record variable] and [offense variable] scores correspond to the E-VI, F-V, or F-VI levels of the class C crime grid. *Id.* Thus, defendant received a sentence that would constitute a departure from the recommended minimum sentence range that the Legislature reserved for the most egregious class C offenses and the more recidivist criminals. See [*People v*] *Babcock*, [469 Mich 247,] 263 [(2003)]. The trial court departed from the recommended sentence range because the guidelines failed to take into account defendant's exploitation of his daughter's vulnerabilities, a factor that generally adds 10 points to a defendant's OV

> score. MCL 777.40(1)(b). If an additional ten points are added to defendant's OV score, his OV score is within the 75 points contemplated by the Legislature. MCL 777.64. Because defendant's OV score is not uncontemplated and because defendant had no criminal background, we cannot discern why the trial court believed that a minimum sentence that exceeded the highest maximum-minimum sentence for a class C crime was proportionate. [*People v Hicks*, unpublished opinion per curiam of the Court of Appeals, issued June 25, 2009 (Docket No. 284462) footnotes omitted.]

WEAVER, J. (*concurring in part and dissenting in part*). I dissent from the order's requiring any resentencing at all for the reasons set forth in Justice CORRIGAN's statement. In light of the fact that the order does remand this case for that purpose, I agree that the resentencing should not be done by a different judge.

CORRIGAN, J. (*concurring in part and dissenting in part*). I concur in the Court's order insofar as it concludes that the Court of Appeals erred in requiring a different judge to preside over sentencing on remand. But I would peremptorily reverse the entirety of the Court of Appeals opinion for the reasons stated by the Court of Appeals dissent and affirm the circuit court's sentence.

Defendant was charged with several counts of first and second degree criminal sexual conduct (CSC) based on allegations that he sexually abused his daughter—who was 13 years old at the time of trial—over a period of several years beginning when she was seven. A jury found him guilty of one count of second degree CSC. The statutory sentencing guidelines called for a minimum sentence of 29 to 57 months. The sentencing judge exceeded the guidelines, imposing the maximum sentence of 10 to 15 years in prison.

Defendant appealed and the Court of Appeals affirmed the conviction but remanded for resentencing. The court approved the sentencing judge's conclusion that offense variable (OV) 10 (exploitation of a vulnerable victim), MCL 777.40, inadequately accounted for the victim's vulnerabilities; the inadequacy of OV 10 was a proper basis for departing above the statutory minimum guidelines.[1] But the court concluded that the sentencing judge's other reasons for departing were not "substantial

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[1] A sentencing court may depart from the guidelines if it finds that an offense variable gives inadequate weight to a particular offense characteristic, MCL 769.34(3)(b). The Court of Appeals affirmed the trial court's conclusion that the maximum 15-point score under OV 10 for predatory conduct, MCL 777.40(1)(a), was inadequate where defendant *also* exploited his daughter's vulnerabilities and this latter conduct would independently justify 10 points under MCL 777.40(1)(b) (allowing a 10-point score for exploiting a victim's youth, a domestic relationship, or the offender's authority status). Only one score for OV 10 is permitted, so the trial court permissibly concluded that 15 points was inadequate to cover both predatory conduct under subsection (1)(a) and defendant's exploitation under subsection (1)(b).

and compelling," as required by MCL 769.34(3). The Court thus remanded for resentencing "because it is unclear whether the trial court would have departed to the same extent on the basis of the inadequate weight given to OV 10 alone." *People v Hicks,* unpublished opinion per curiam of the Court of Appeals, issued March 15, 2007 (Docket No. 266510) (*Hicks I*, at 5).

On remand, the sentencing judge departed upward and again imposed a 10- to 15-year prison sentence. Defendant appealed and the Court of Appeals majority remanded for resentencing before a different judge. *People v Hicks (After Remand),* unpublished opinion per curiam of the Court of Appeals, issued June 25, 2009 (Docket No. 284462) (*Hicks II*). The *Hicks II* majority concluded that resentencing was required because the sentencing judge still did not state sufficient substantial and compelling reasons to depart from the statutory guidelines range. The majority acknowledged that, in *Hicks I*, the Court of Appeals had affirmed the sentencing judge's conclusion that the score for OV 10 was inadequate and therefore was a proper basis for departure. But the *Hicks II* majority opined that this rationale was inadequate to support the extent of departure, stating: "[W]e cannot discern why the trial court believed that a minimum sentence that exceeded the highest maximum-minimum sentence for a class C crime was proportionate."[2]

Most significantly, the *Hicks II* majority conceded that the sentencing judge was "free to consider other CSC charges of which the defendant has been acquitted" in departing, *id*. at 3 n 2, citing *People v Compagnari,* 233 Mich App 233, 236 (1998) ("[T]he court in fashioning an appropriate sentence may consider the evidence offered at trial, including other criminal activities established even though the defendant was acquitted of the charges, and the effect of the crime on the victim.") (citations omitted). Yet the *Hicks II* majority inexplicably concluded that the judge "did not identify defendant's acquittal on other CSC charges as a basis for departure." *Hicks II*, *supra* at 3 n 2.

To the contrary, the sentencing judge exhaustively discussed defendant's numerous acts of sexual abuse against his daughter from the time

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[2] *Id*. at 3. The Court of Appeals in *Hicks II* also determined that the trial court erred in scoring 50 points for OV 11, MCL 777.41(1)(a), for two or more sexual penetrations because additional sexual penetrations did not arise out of the sentencing offense. Rather, the trial court should have scored zero points for OV 11, but could have accounted for the additional penetrations with a 25-point score under OV 13, MCL 777.43(1)(c), for a "pattern of felonious criminal activity involving 3 or more crimes against a person." The correct scores would have reduced the minimum guidelines range to 19 to 36 months. But the *Hicks II* majority opined, and I agree, that the trial court clearly conveyed that it would have imposed the same departure sentence even under the corrected guidelines. Under these circumstances, the scoring issue is moot and we review only to determine whether the trial court adequately supported the upward departure. See *People v Mutchie,* 468 Mich 50, 51-52 (2003).

she was seven and referred to the abusive atmosphere to which he subjected both his daughter and his young son for a period of years. The judge clearly rejected defendant's express argument that she could not rely, for sentencing purposes, on charges of which he was acquitted by the jury.[3] The judge acknowledged that the jury "found [defendant] not guilty of other counts," but she clearly expressed her conclusion that there was sufficient evidence of these acts for purposes of sentencing, noting that the "record speaks for itself" and shows that defendant "violated this young girl for years."[4]

In departing from the guidelines, the court specifically observed:

> [The complainant] had been molested by the Defendant who is her father since she was seven years old at various locations in Detroit.
>
> She stated on the first occasion she woke up with him rubbing his penis against her face. She state[d] that the Defendant apologized and promised not to do it anymore. She also stated the Defendant would gradually over time begin to fondle her buttocks and vagina.
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> She described another incident where she woke up with the Defendant rubbing her back and moving his hands down to her buttocks and squeezing them. At this point the Defendant rolled over and started to rub her vagina with his fingers.
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> . . . She stated further that on [sic] January of this year the Defendant attempted to penetrate her vagina with his penis and finger and that that last assault occurred in March of 2005 when the Defendant performed oral sex on her.
>
> The complainant and her younger brother had lived back and forth with her father and mother for most of their lives. The complainant told her mother, complained, too, of the assaults after learning her father was moving to an unknown location with her and her brother.
>
> The complainant feared that the situation would get worse.

The judge also reiterated that the 15-point score for OV 10 was inadequate.[5] Overall, the judge concluded that: "the record speaks for

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[3] As the Court of Appeals correctly recognized, for sentencing purposes a judge may rely on relevant facts found by the trial judge by a preponderance of the evidence. See *People v Drohan,* 475 Mich 140, 142-143 (2006).

[4] Indeed, because the "record sp[oke] for itself," the judge suggested that the jury may have been confused about the nature of the acquitted charges due to how the prosecutor worded those charges. The judge respectfully urged prosecutors, when charging multiple counts, to "be careful how they word these charges because it confuses the jury."

[5] In addition to the inadequacy of OV 10 with regard to the young victim, the prosecutor argued that the guidelines—in particular OV 10

itself and I think this is absolutely an example of where the guidelines are wholly, wholly inadequate." Specifically, she found inadequate the guidelines of "twenty-nine months to fifty-seven months for somebody who has over the course of a number of years sexually assaulted his own daughter at the age of seven."

Accordingly, the *Hicks II* majority clearly erred when it concluded that the sentencing judge did not identify defendant's other charged acts of abuse as a basis for departure; indeed, these acts were the *primary* basis for departure. The majority also erred by ordering, on the basis of its misreading of the sentencing transcript, that defendant must be resentenced before a different judge because "the trial judge will have substantial difficulty in putting aside her previously expressed views." Rather, the trial judge offered a cogent analysis of why the guidelines were inadequate and her substantial and compelling reasons were clearly supported by the record.

Finally, I agree with the trial judge and the dissenting Court of Appeals judge in *Hicks II* that defendant's years-long pattern of abuse justified this particular departure. In concluding that the departure was not an abuse of discretion, the *Hicks II* dissent aptly observed:

Defendant was charged with repeatedly sexually assaulting his own daughter. Although the jury ultimately convicted him of only one count of second-degree criminal sexual conduct, MCL 750.520c, the evidence showed that defendant preyed upon his daughter on multiple occasions. He took advantage of her unique vulnerabilities by violating the sacred parent-child relationship, and engaged in a continuous pattern of sexual abuse. Although a jury may conclude that certain facts were not proven beyond a reasonable doubt for purposes of conviction, "the same fact[s] may be found by a preponderance of the evidence for purposes of sentencing." *People v Ratkov (After Remand),* 201 Mich App 123, 126; 505 NW2d 886 (1993). [*Hicks II*, *supra* at 1 (JANSEN, P.J., dissenting).]

Accordingly, I would reverse the Court of Appeals for the reasons stated by the dissent and affirm the trial court's judgment of sentence.

DUSKIN v DEPARTMENT OF HUMAN SERVICES, No. 139335; reported below: 284 Mich App 400. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Ingham Circuit Court for reconsideration in light of *Henry v Dow Chemical*, 484 Mich 483 (2009), which was issued after the Court of Appeals decided this case. We do not retain jurisdiction.

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and OV 4 (psychological injury to a victim), MCL 777.34—did not account for the fact that the victim's "younger brother testified . . . that some of the sexual assaults took place in the very same bed in which the young boy was also sleeping. He and his sister would share a bed, share a bedroom and sometimes the Defendant would come in and sexually assault the girl in the presence of the boy." The court later agreed: "I also heard it from the young son, the young boy, who said—and the prosecutor is absolutely right about this, that there were times when you [defendant] would assault sexually his sister while he was in the same bed."

CORRIGAN, J. (*dissenting*). I dissent from the Court's unnecessary order of remand, which will result in a costly waste of scarce state resources—as well as a waste of plaintiffs' resources—in this clearly meritless class action. The Court of Appeals correctly reversed the erroneous order of former Ingham Circuit Court Judge Beverley Nettles-Nickerson granting class certification. The reasoning of the Court of Appeals is consistent with this Court's opinion in *Henry v Dow Chem Co,* 484 Mich 483 (2009), which was issued after the Court of Appeals decided this case.

Plaintiffs are males employed by defendant, the Department of Human Services (DHS). They alleged that they were each discriminated against on the basis of race, ethnicity and gender in promotions to supervisory and management positions, in violation of Michigan's Civil Rights Act, MCL 37.2101 *et seq*. To prove unlawful discrimination, a member of a protected class must show either direct evidence of bias against the protected class of which he is a member or that he was not appointed to a position for which he was qualified and the position was given to another person under circumstances giving rise to an inference of unlawful discrimination. *Hazle v Ford Motor Co,* 464 Mich 456, 463 (2001).

Plaintiffs clearly did not allege facts showing that defendant engaged in a common, discriminatory practice affecting each class member as would be necessary to support class certification. Certification is appropriate only if enumerated prerequisites listed in MCR 3.501(A)(1) are met. *Henry*, *supra* at 496, 500. The prerequisites are generally described as numerosity, commonality, typicality, adequacy and superiority. See MCR 3.501(A)(1). As we held in *Henry*, *supra* at 500, the "party seeking class certification must meet the burden of establishing each prerequisite before a suit may proceed as a class action." That party "is required to provide the certifying court with information sufficient to establish that each prerequisite . . . is in fact satisfied." *Id.* at 502. As is most relevant here, the commonality, typicality and superiority prerequisites require that common questions subject to generalized proof predominate over issues subject to individualized proof and that the representative plaintiffs' claims are typical of those of the class. See MCR 3.501(A)(1)(b), (c), and (e); *Tinman v Blue Cross & Blue Shield of Mich*, 264 Mich App 546, 563 (2004).

The Court of Appeals correctly concluded that plaintiffs have presented "no challenged policy or practice that affects all class members that, if discriminatory, and if remedied, could satisfactorily address plaintiffs' generalized complaints." *Duskin v Dep't of Human Services*, 284 Mich App 400, 426. Nor did they "identify an across-the-board practice or policy that negatively affects male racial and ethnic minorities, for example, in favor of female racial or ethnic minorities." *Id.* Rather, plaintiffs merely presented a memo prepared by defendant showing that a "disparity exists in minority males being promoted into upper management positions" and suggesting various ways to increase the likelihood of their promotion. But the memo did not establish that

minority males were the subjects of a discriminatory policy.[1] Nor did plaintiffs allege facts showing how many individual class members applied for and were denied management positions which were awarded to less qualified female or nonminority male candidates, as would be necessary to give rise to an inference of discrimination.[2] Plaintiffs largely relied on the subjective statements of minority male focus group members, who were quoted by the memo as expressing frustration and discouragement "with some of [defendant's] supervisory and management employees' discriminatory attitudes and practices involving racial and gender bias directed against minority males."

Accordingly, it appears that even the individual plaintiffs have not alleged facts showing either direct bias *or* that particular plaintiffs were denied positions under circumstances establishing an inference of discrimination. In any event, at a minimum there is no evidence that any discrimination by defendant is subject to generalized proof as the result of an organization-wide policy that in fact affected the individual class members. Rather, plaintiffs' claims, if any, are highly individualized. As the Court of Appeals noted:

> [T]he composition of the proposed class itself draws attention to the prospective factual and legal disparities among the individual claims. Plaintiffs' claims include allegations by male job applicants about promotions given to female candidates of the

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[1] As explained by the Court of Appeals:

> [N]othing in the memo suggests that the promotional procedures, even if imperfect, were racially biased, gender-biased, or were applied in a biased manner. Any number of nonminority or female employees might agree, for example, that job postings should be more prominent, that managers should not hire acquaintances, or that the DHS should provide additional interview training and encouragement. And, the alleged "perception" of a bias against minority males simply does not constitute a predominant, common question, particularly because proving such an assertion would require individualized proofs to connect that perception with particular employment decisions. [*Duskin*, *supra* at 418.]

[2] See *Duskin*, *supra* at 419:

> While plaintiffs *assert* that the class representatives applied for or were available for promotions, but were not chosen for discriminatory reasons, plaintiffs offer no information about the representatives' eligibility and qualifications, what positions they sought, what qualifications the positions required, and whether a less qualified, nonminority, or female candidate was promoted instead. And, importantly, plaintiffs fail to explain how the claims of the representative plaintiffs present a question common to the entire class of every minority male employee of the DHS.

> same race or ethnicity or another minority race or ethnicity, and claims by male job applicants about promotions given to Caucasian males, thus raising factual and legal issues relating to allegations of gender discrimination but not racial discrimination or racial discrimination but not gender discrimination, or both. Clearly, the proofs and law necessary to establish that the DHS discriminated against an Hispanic male candidate in favor of African-American female candidate would differ from those necessary to show that the DHS discriminated against an African-American male candidate in favor of an Arab female candidate. And the proofs and law necessary to establish that the DHS discriminated against an Asian male candidate in favor of a Caucasian male candidate would differ from those necessary to establish that the DHS discriminated against a male of Arab descent in favor of a Caucasian female. Simply stated, the law and the evidence necessary to prove and defend the myriad claims at issue differ significantly, making class treatment unsound. [*Duskin, supra* at 421-422.]

Because plaintiffs' allegations are insufficient to support class certification as a matter of law, I cannot join this Court's decision to order a futile remand that will simply drain resources and ultimately result in the same outcome as that reached by the Court of Appeals. Because I conclude that the Court of Appeals analysis was correct, I would deny leave to appeal.

YOUNG, J., joined the statement of CORRIGAN, J.

Leave to Appeal Granted January 29, 2010:

ANGLERS OF THE AUSABLE, INC v DEPARTMENT OF ENVIRONMENTAL QUALITY, Nos. 138863, 138864, 138865, and 138866; reported below: 238 Mich App 115. The parties shall include among the issues to be briefed: (1) whether defendant Merit Energy Company could be conveyed or granted the right to discharge water on land owned by the state; (2) what test should be applied to determine whether and the extent to which Merit may discharge water; (3) whether the plaintiffs have a cause of action under the Michigan Environmental Protection Act, MCL 324.1701(1), against defendant Department of Environmental Quality; and (4) whether *Michigan Citizens for Water Conservation v Nestlé Waters North American Inc*, 479 Mich 280 (2007), and *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 511 (2004), were correctly decided.

The motions for leave to file brief amicus curiae are granted. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

YOUNG, J. (*dissenting*). I respectfully dissent from the order granting leave in this case and instead would deny leave to appeal. The order directs the parties to discuss whether *Michigan Citizens for Water Conservation v Nestlé Waters North American Inc*[1]

[1] 479 Mich 280 (2007).

and *Preserve the Dunes, Inc v Dep't of Environmental Quality*[2] were correctly decided. I believe both cases were correctly decided. While it is certainly the prerogative of the Court to do so, this order is another instance where the majority seems to retreat from its previously stated fidelity to stare decisis.[3]

Since the shift in the Court's philosophical majority in January 2009, the majority has pointedly sought out precedents only recently decided[4]

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[2] 471 Mich 508 (2004).

[3] See, e.g., *Pohutski v City of Allen Park*, 465 Mich 675, 712 (2002) (KELLY, J., dissenting) ("[I]f each successive Court, believing its reading is correct and past readings wrong, rejects precedent, then the law will fluctuate from year to year, rendering our jurisprudence dangerously unstable."); *People v Hawkins*, 468 Mich 488, 517-518 (2003) (CAVANAGH, J., dissenting) ("We have overruled our precedents when the intervening development of the law has 'removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies.' . . . Absent those changes or compelling evidence bearing on Congress' original intent . . . our system demands that we adhere to our prior interpretations of statutes."), quoting *Patterson v McLean Credit Union*, 491 US 164, 173 (1989), and *Neal v United States,* 516 US 284, 295 (1996); *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 278 (2007) (CAVANAGH, J., dissenting) ('"Under the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction become precedent which should not be lightly departed.' "), quoting *People v Jamieson*, 436 Mich 61, 79 (1990); *Brown v Manistee Co Rd Comm*, 452 Mich 354, 365 (1996) ("[A]bsent the rarest circumstances, we should remain faithful to established precedent."); Todd C. Berg, *Hathaway attacks*, Michigan Lawyers Weekly, October 27, 2008 (" 'People need to know what the law is,' Hathaway said. 'I believe in stare decisis. Something must be drastically wrong for the court to overrule.' "); *Lawyers' election guide: Judge Diane Marie Hathaway*, Michigan Lawyers Weekly, October 30, 2006, in which Justice HATHAWAY, then running for a position on the Court of Appeals, was quoted as saying: "[t]oo many appellate decisions are being decided by judicial activists who are overturning precedent."

[4] See, e.g., *University of Michigan Regents v Titan Ins Co*, 484 Mich 852 (2009) (directing the parties to consider whether *Cameron v ACIA*, 476 Mich 55 [2006], was correctly decided); *McCormick v Carrier*, 485 Mich 851 (2009) (granting leave to consider the plaintiff's request to overrule *Kreiner v Fischer*, 471 Mich 109 [2004]); *Lenawee Co Bd of Rd Comm'rs v State Auto Prop & Cas Ins Co*, 485 Mich 853 (2009) (directing the parties to consider whether *Miller v Chapman Contracting*, 477 Mich 102 [2007], was correctly decided); *Edry*

and has failed to give effect to other recent precedents of this Court.[5] Today, the Court again orders reconsideration of two cases that were decided just three and six years ago. Nothing in the law of this state or the rationale of those decisions has changed in this short time. Accordingly, as I have in other similar orders,[6] I respectfully dissent from this order.

CORRIGAN, J., joined the statement of YOUNG, J.

PRIORITY HEALTH v COMMISSIONER OFFICE OF FINANCIAL AND INSURANCE SERVICES, No. 139189; reported below: 284 Mich App 40. The parties shall address: (1) whether, as part of a plan under the small employer group health coverage act, MCL 500.3701 *et seq.*, an insurer or licensed health maintenance organization can require an employer to pay a specific percentage of the premium charged for each employee; and (2) whether MCL 500.3711(2) limits the provisions that can be included in such policies.

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v Adelman, 485 Mich 901 (2009) (directing the parties to consider whether *Wickens v Oakwood Healthcare Sys*, 465 Mich 53 [2001], was correctly decided); *Hoover v Michigan Mut Ins Co*, 485 Mich 881 (2009) (directing the parties to consider whether *Griffith v State Farm Mut Automobile Ins Co,* 472 Mich 521 [2005], was correctly decided); *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 485 Mich 966 (2009) (directing the parties to consider whether *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726 [2001], was correctly decided).

[5] See, e.g., *Hardacre v Saginaw Vascular Services*, 483 Mich 918 (2009), where the majority failed to follow *Boodt v Borgess Med Ctr*, 481 Mich 558 (2008); *Sazima v Shepherd Bar & Restaurant*, 483 Mich 924 (2009), where it failed to follow *Chrysler v Blue Arrow Transport Lines*, 295 Mich 606 (1940), and *Camburn v Northwest School Dist*, 459 Mich 471 (1999); *Vanslembrouck v Halperin*, 483 Mich 965 (2009), where it failed to follow *Vega v Lakeland Hosps*, 479 Mich 243, 244 (2007); *Juarez v Holbrook*, 483 Mich 970 (2009), where it failed to follow *Smith v Khouri*, 481 Mich 519 (2008); *Beasley v Michigan*, 483 Mich 1025 (2009), *Chambers v Wayne Co Airport Auth*, 483 Mich 1081 (2009), and *Ward v Michigan State Univ*, 485 Mich 917 (2009), where it failed to follow *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007); and *Scott v State Farm Automobile Ins Co*, 483 Mich 1032 (2009), where it failed to follow *Thornton v Allstate Ins Co*, 425 Mich 643 (1986), and *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626 [1997]).

[6] See, e.g., *Univ of Michigan Regents*, *supra*, 484 Mich at 853; *Lenawee Co Bd of Rd Comm'rs*, *supra*, 485 Mich at 855; *Hoover*, *supra*, 485 Mich at 882; *Lansing Schools Ed Ass'n*, *supra*, 485 Mich at 966.

The motion for leave to file brief amicus curiae is granted. The Michigan Chamber of Commerce and the Small Business Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

COLAIANNI V STUART FRANKEL DEVELOPMENT CORPORATION, No. 139350; Court of Appeals No. 282587. The parties shall address whether *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378 (2007), was correctly decided. The application for leave to appeal as cross-appellants remains pending.

The Negligence Section of the State Bar of Michigan and the Michigan Defense Trial Counsel, Inc. are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

YOUNG, J. (*dissenting*). I respectfully dissent from the order granting leave in this case and instead would deny leave to appeal. The majority has accepted plaintiff's request to consider whether *Trentadue v Buckler Automatic Lawn Sprinkler Co*[1] was correctly decided. I believe that case was correctly decided. While it is certainly the prerogative of the Court to reconsider this case, this order is another instance where the majority seems to retreat from its previously stated fidelity to stare decisis.[2]

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[1] 479 Mich 378 (2007).

[2] See, e.g., *Pohutski v City of Allen Park*, 465 Mich 675, 712 (2002) (KELLY, J., dissenting) ("[I]f each successive Court, believing its reading is correct and past readings wrong, rejects precedent, then the law will fluctuate from year to year, rendering our jurisprudence dangerously unstable."); *People v Hawkins*, 468 Mich 488, 517-518 (2003) (CAVANAGH, J., dissenting) ("We have overruled our precedents when the intervening development of the law has 'removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies.' . . . Absent those changes or compelling evidence bearing on Congress' original intent . . . our system demands that we adhere to our prior interpretations of statutes."), quoting *Patterson v McLean Credit Union*, 491 US 164, 173 (1989), and *Neal v United States*, 516 US 284, 295 (1996); *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 278 (2007) (CAVANAGH, J., dissenting) ('"Under the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction become precedent which should not be lightly departed.' "), quoting *People v Jamieson*, 436 Mich 61, 79 (1990); *Brown v Manistee Co Rd Comm*, 452 Mich 354, 365 (1996) ("[A]bsent the rarest circumstances, we should remain faithful to established precedent."); Todd C. Berg, *Hathaway attacks*, Michigan Lawyers Weekly, October 27, 2008 (" 'People need to know what the law is,' Hathaway said. 'I believe

Since the shift in the Court's philosophical majority in January 2009, the majority has pointedly sought out precedents only recently decided[3] and has failed to give effect to other recent precedents of this Court.[4]

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in stare decisis. Something must be drastically wrong for the court to overrule.' "); *Lawyers' election guide: Judge Diane Marie Hathaway*, Michigan Lawyers Weekly, October 30, 2006, in which Justice HATHAWAY, then running for a position on the Court of Appeals, was quoted as saying: "[t]oo many appellate decisions are being decided by judicial activists who are overturning precedent."

[3] See, e.g., *Univ of Michigan Regents v Titan Ins Co*, 484 Mich 852 (2009) (directing the parties to consider whether *Cameron v ACIA*, 476 Mich 55 (2006), was correctly decided); *McCormick v Carrier*, 485 Mich 851 (2009) (granting leave to consider the plaintiff's request to overrule *Kreiner v Fischer*, 471 Mich 109 [2004], was correctly decided); *Lenawee Co Bd of Rd Comm'rs v State Auto Prop & Cas Ins Co*, 485 Mich 853 (2009) (directing the parties to consider whether *Miller v Chapman Contracting*, 477 Mich 102 [2007], was correctly decided); *Edry v Adelman*, 485 Mich 901 (2009) (directing the parties to consider whether *Wickens v Oakwood Healthcare Sys*, 465 Mich 53 [2001], was correctly decided); *Hoover v Michigan Mut Ins Co*, 485 Mich 881 (2009) (directing the parties to consider whether *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521 [2005], was correctly decided); *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 485 Mich 966 (2009) (directing the parties to consider whether *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726 [2001], was correctly decided); *Anglers of the AuSable v Dep't of Environmental Quality*, 485 Mich 1067 (2010) (directing the parties to consider whether *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280 [2007], and *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508 [2004], were correctly decided).

[4] See, e.g., *Hardacre v Saginaw Vascular Services*, 483 Mich 918 (2009), where the majority failed to follow *Boodt v Borgess Med Ctr*, 481 Mich 558 (2008); *Sazima v Shepherd Bar & Restaurant*, 483 Mich 924 (2009), where it failed to follow *Chrysler v Blue Arrow Transport Lines*, 295 Mich 606 (1940), and *Camburn v Northwest School Dist*, 459 Mich 471 (1999); *Vanslembrouck v Halperin*, 483 Mich 965 (2009), where it failed to follow *Vega v Lakeland Hosps*, 479 Mich 243, 244 (2007*); Juarez v Holbrook*, 483 Mich 970 (2009), where it failed to follow *Smith v Khouri*, 481 Mich 519 (2008); *Beasley v Michigan*, 483 Mich 1025 (2009), *Chambers v Wayne Co Airport Auth*, 483 Mich 1081 (2009), and *Ward v Michigan State Univ*, 485 Mich 917 (2009),

Today, the Court again orders reconsideration of a case that was decided less than three years ago. Nothing in the law of this State or the rationale of that decision has changed in this short time. Accordingly, as I have in other similar orders,[5] I respectfully dissent from this order.

CORRIGAN, J., joined the statement of YOUNG, J.

Reconsideration Granted January 29, 2010:

SHEMBER v UNIVERSITY OF MICHIGAN MEDICAL CENTER, No. 137409; reported below: 280 Mich App 309. On order of the Court, the motion for reconsideration of this Court's October 21, 2009 order is considered, and it is granted. On reconsideration, we modify our order dated October 21, 2009, so as to clarify that it vacates the part of the Court of Appeals opinion that affirms the February 5, 2007, order of the Washtenaw Circuit Court granting summary disposition to defendants Bradford, Ekbom, Freer, and DeFlorio and vacates that order of the circuit court. In all other respects, this Court's order of October 21, 2009, remains in effect.

Reconsideration Denied January 29, 2010:

MILLER v MALIK, No. 137905. Summary disposition at 485 Mich 915. Reported below: 280 Mich App 687.

ELLIS v HATCHEW, No. 138083. Leave to appeal denied at 485 Mich 1132. Court of Appeals No. 279930.

LAJOICE v NORTHERN MICHIGAN HOSPITALS, INC, No. 138101. Summary disposition at 485 Mich 915. Court of Appeals No. 277587.

THORN v MERCY MEMORIAL HOSPITAL CORPORATION, No. 138116. Leave to appeal denied at 483 Mich 1122. Reported below: 281 Mich App 644.

PEOPLE v GASPER, No. 138237. Leave to appeal denied at 485 Mich 861. Court of Appeals No. 287708.

PEOPLE v QUATRINE, No. 138539. Leave to appeal denied at 485 Mich 925. Court of Appeals No. 287572.

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where it failed to follow *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007); and *Scott v State Farm Automobile Ins Co*, 483 Mich 1032 (2009), where it failed to follow *Thornton v Allstate Ins Co*, 425 Mich 643 (1986), and *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626 [1997]).

[5] See, e.g., *Univ of Michigan Regents*, 484 Mich at 853; *Lenawee Co Bd of Rd Comm'rs*, 485 Mich at 855; *Hoover*, 485 Mich at 882; *Lansing Schools Ed Ass'n*, 485 Mich at 966.

PEOPLE v PARHAM, No. 138544. Leave to appeal denied at 485 Mich 892. Court of Appeals No. 289236.

BURISE v CITY OF PONTIAC, No. 138722. Leave to appeal denied at 485 Mich 894. Reported below: 282 Mich App 646.

PEOPLE v PAUL DAVIS, No. 138762. Leave to appeal denied at 485 Mich 926. Court of Appeals No. 288056.

CANTLEY v GENESEE COUNTY ROAD COMMISSION, No. 138799. Leave to appeal denied at 485 Mich 911. Court of Appeals No. 288800.

PEOPLE v LAURY, No. 139003. Leave to appeal denied at 485 Mich 927. Court of Appeals No. 290810.

LAKETON TOWNSHIP v ADVANSE, INC, No. 139040. Summary disposition at 485 Mich 933. Court of Appeals No. 276986.

PEOPLE v AIELLO, No. 139185. Leave to appeal denied at 485 Mich 928. Court of Appeals No. 283241.

PEOPLE v STITT, No. 139215. Leave to appeal denied at 485 Mich 928. Court of Appeals No. 284097.

PEOPLE v SHANE BROWNING, No. 139231. Leave to appeal denied at 485 Mich 928. Court of Appeals No. 282689.

In re CLARK ESTATE, No. 139286. Leave to appeal denied at 485 Mich 929. Court of Appeals No. 282000.

PEOPLE v WATT, No. 139334. Leave to appeal denied at 485 Mich 929. Court of Appeals No. 284227.

WELSING v ATTORNEY GRIEVANCE COMMISSION, No. 139381. Superintending control denied at 485 Mich 932.

JOHNS v ABC BEVERAGE MANAGEMENT, INC, No. 139405. Leave to appeal denied at 485 Mich 930. Court of Appeals No. 291243.

PEOPLE v MOSLIMANI, No. 139421. Leave to appeal denied at 485 Mich 930. Court of Appeals No. 290644.

PEOPLE v MICHAEL WARD, No. 139449. Leave to appeal denied at 485 Mich 891. Court of Appeals No. 292079.

PEOPLE v TIMOTHY BROWN, No. 139694. Leave to appeal denied at 485 Mich 980. Court of Appeals No. 283433.

Leave to Appeal Denied January 29, 2010:

PEOPLE v CRAIG BROWN, No. 137028; reported below: 279 Mich App 116.

PEOPLE v WEEMS, No. 138975; Court of Appeals No. 288717. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v SCOTT ANDERSON, No. 138997; Court of Appeals No. 290058. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v ROSE, No. 139021; Court of Appeals No. 290008.

PEOPLE v CHAD CUMMINGS, No. 139033; Court of Appeals No. 281545.

PEOPLE v BEACH, No. 139080; Court of Appeals No. 287697. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v CLARENCE MYLES, No. 139093; Court of Appeals No. 288315. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v CARSWELL, No. 139116; Court of Appeals No. 289850. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v KOLLER, No. 139117; Court of Appeals No. 290955. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v DAVID HUDSON, No. 139122; Court of Appeals No. 288872. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v SZYMANSKI, No. 139125; Court of Appeals No. 289940. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v LOREN GREENE, No. 139126; Court of Appeals No. 290080. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v SPURBECK, No. 139139; Court of Appeals No. 289794.

PEOPLE v JUAN JOHNSON, No. 139143; Court of Appeals No. 291121. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v WILLIAM BERRY, No. 139156; Court of Appeals No. 289851. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v SAMS, No. 139192; Court of Appeals No. 289586. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v MARK WALKER, No. 139195; Court of Appeals No. 290118.

PEOPLE v ANTHONY MATTISON, No. 139229; Court of Appeals No. 283212.

PEOPLE v BERNARD ALLEN, No. 139245; Court of Appeals No. 278735.

PEOPLE v KEITH GREENE, No. 291282. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v PUGH, No. 139277; Court of Appeals No. 290870.

PEOPLE v CHRISTOPHER THOMPSON, No. 139353; Court of Appeals No. 289555. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v DARNELL MITCHELL, No. 139360; Court of Appeals No. 289735. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

ZEICHMAN v ZEICHMAN MANUFACTURING, INC, No. 139367; Court of Appeals No. 281772.

PEOPLE v WINFIELD, No. 139371; Court of Appeals No. 289636. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

ROOSENBERG v ZERRENNER, No. 139393; Court of Appeals No. 280235.

PEOPLE v WEATHERSPOON, No. 139408; Court of Appeals No. 291627. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v FABIAN, No. 139415; Court of Appeals No. 291769. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v LOUIS MOORE, No. 139417; Court of Appeals No. 290730. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v LAIER, No. 139419; Court of Appeals No. 292337. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v TYRONE KEYS, No. 139423; Court of Appeals No. 290928. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v ROUTLEY, No. 139441; Court of Appeals No. 283062. In his application, defendant, for the first time, raises a double jeopardy challenge, relying on *People v Meshell*, 265 Mich App 616 (2005). The defendant in *Meshell* was convicted of operating or maintaining a laboratory for the manufacture of a controlled substance, MCL 333.7401c(2)(a), and committing this violation near a residence, MCL 333.7401c(2)(d), with the Court of Appeals holding that multiple punishments under these provisions constituted a violation of constitutional protections against double jeopardy. *Meshell* correctly relied, in part, on the "same-elements" test that was later adopted by this Court in *People v Bobby Smith*, 478 Mich 292 (2007), and provides that a double jeopardy violation does not occur "if each offense requires proof of a fact that the other does not." However, the Legislature has since amended MCL 333.7401c and defendant was convicted and sentenced under the newly enacted MCL 333.7401c(2)(f).

In this case, even if defendant's double jeopardy challenge had been preserved, we would conclude that each offense requires proof that the

other does not. Here, § 7401c(2)(f) requires proof that the laboratory involved "the manufacture of a substance described in section 7214(c)(*ii*)," which specifically proscribes only methamphetamine and "its salts, stereoisomers, and salts of stereoisomers," and § 7401c(2)(d) does not; and § 7401c(2)(d) requires proof that the laboratory was "within 500 feet of a residence," and § 7401c(2)(f) does not.

KELLY, C.J. (*dissenting*). I dissent from the majority's disposition of defendant's application for leave to appeal. I would grant the application to consider whether defendant can show that he is entitled to relief despite having apparently forfeited his double jeopardy argument.[1] If it appears that he can, his double jeopardy argument should be considered on its merits.

Finally, I object to the breadth of the denial order. Without the benefit of briefing, oral argument, or specific consideration of the question, the order effectively gives lower courts the authority to reject double jeopardy challenges to MCL 333.7401c. I believe that *People v Bobby Smith*[2] is not clearly dispositive on the matter of double jeopardy challenges to the statute. In order to clarify this point of law, the Court should grant leave to appeal and allow full briefing and oral argument.

Court of Appeals decisions handed down since *Bobby Smith* have reached conflicting conclusions about whether multiple convictions under MCL 333.7401c violate double jeopardy principles.[3] By resolving this appeal as it has, the Court leaves open the likelihood of confusion. The better course of action would be to grant leave to appeal.

CAVANAGH, J., would remand this case to the Court of Appeals for plenary consideration of the issue, which the defendant raised for the first time in this Court, of whether his convictions pursuant to MCL 333.7401c(2)(c), MCL 333.7401c(2)(d), and MCL 333.7401c(2)(f), constituted multiple punishments for the same offense and thus violated constitutional protections against double jeopardy.

PEOPLE V CLINTON, No. 139458; Court of Appeals No. 291183. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

KNIGHT V RHOADES AVIATION, No. 139472; Court of Appeals No. 282410.

PEOPLE V LUCKETT, No. 139481; Court of Appeals No. 291967.

YOUNG, J. (*concurring*). I concur in the order denying leave to appeal and write separately only to address Chief Justice KELLY's dissenting statement. Contrary to the implication Chief Justice KELLY raises, the activity underlying a juvenile adjudication is criminal in nature because it amounts to a violation of a criminal statute, even though that violation

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[1] *People v Carines*, 460 Mich 750 (1999).

[2] 478 Mich 292 (2007).

[3] Compare *People v Ryans*, unpublished opinion *per curiam* of the Court of Appeals, issued January 15, 2009 (Docket No. 280419), with *People v Bradford*, unpublished opinion *per curiam* of the Court of Appeals, issued December 13, 2007 (Docket No. 273540).

is not resolved in a "criminal proceeding." Accordingly, under the plain language of MCL 777.43, a defendant's criminal activity, including criminal activity undertaken as a juvenile, that occurred within five years of the sentencing offense is properly considered when scoring offense variable (OV) 13 (continuing pattern of criminal behavior).

While a juvenile adjudication is not a "criminal proceeding"[1] and does not result in a criminal conviction, that fact is irrelevant under the plain language of MCL 777.43.[2] OV 13 considers "criminal *behavior*" and "criminal *activity*," not criminal *convictions*. Every instance of "criminal behavior" or "criminal activity" within five years of the sentencing offense may be counted "regardless of whether the offense resulted in a conviction." The focus of OV 13 is on the *nature of the act*, not the legal disposition of the defendant's culpability.

Further, the Juvenile Code does *not* state that juvenile offenses are not criminal in nature.[3] MCL 712A.1(2) merely states that proceedings against juveniles "are not criminal proceedings" and does not alter the legal characterization of the underlying conduct. The family division of the circuit court has jurisdiction over a juvenile who "has violated any . . . law of the state or of the United States,"[4] including the provisions of the penal code. Accordingly, the conduct bringing the juvenile under the court's jurisdiction is certainly criminal in nature. The focus of MCL

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[1] MCL 712A.1(2).

[2] MCL 777.43 governs the scoring of OV 13, in relevant part, as follows:

> (1) Offense variable 13 is continuing pattern of criminal *behavior*. Score offense variable 13 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (c) The offense was part of a pattern of felonious *criminal activity* involving 3 or more crimes against a person ..... 25 points
>
> * * *
>
> (2) All of the following apply to scoring offense variable 13:
>
> (a) For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted *regardless of whether the offense resulted in a conviction*. [Emphasis added.]

[3] In fact, we have defined an "offense by a juvenile" within our court rules as "an act that violates a *criminal* statute, a *criminal* ordinance, a traffic law, or a provision of MCL 712A.2(a) or (d)." MCR 3.903(B)(3) (emphasis added).

[4] MCL 712A.2(a)(1).

777.43 is on the nature of the act, not whether the act resulted in a criminal conviction. Accordingly, the sentencing court does not count civil adjudications against the defendant when scoring OV 13, only the underlying criminal conduct.

I further disagree with Chief Justice KELLY's suggestion that the express mention of "juvenile adjudications" in several prior record variables[5] is evidence that such adjudications cannot be considered under OV 13. Prior record variables serve a different purpose than offense variables. Prior record variables consider the defendant's prior criminal activity that has reached a resolution in the court system. Unlike OV 13, the prior record variables do not allow for consideration of conduct that does not result in a charge and ultimate resolution by conviction or juvenile adjudication.[6] Accordingly, the specific mention of juvenile adjudications in relation to certain prior record variables is irrelevant to whether the plain language of MCL 777.43 allows the scoring of the specific *conduct* at issue here.

CORRIGAN, J., joined the statement of YOUNG, J.

KELLY, C.J. (*dissenting*). I respectfully dissent from the Court's order denying defendant's application for leave to appeal. Because I question whether the trial court properly scored offense variable (OV) 13, I would grant leave to appeal.

The victim in this case was walking through his neighborhood when defendant's accomplice restrained him and took his money. The accomplice then pulled out a gun but the victim managed to escape unhurt. Defendant pled guilty to armed robbery in exchange for dismissal of a second habitual offender enhancement and two juvenile charges.[1] The trial court scored 25 points for OV 13. OV 13 is to be scored at 25 points if "[t]he offense was part of a pattern of felonious *criminal* activity involving 3 or more crimes against a person."[2] All crimes within five years of the sentencing offense "shall be counted regardless of whether the offense resulted in a conviction."[3]

Under the sentencing guidelines, only prior record variables 3,[4] 4,[5] and 5[6] consider juvenile conduct for scoring purposes. They assign points

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[5] MCL 777.53 (PRV 3 is scored for prior high severity juvenile adjudications); MCL 777.54 (PRV 4 is scored for prior low severity juvenile adjudications); MCL 777.55 (PRV 5 is scored for prior misdemeanor juvenile adjudications).

[6] See MCL 777.50 (directing the court to score the prior record variables based on convictions and juvenile adjudications).

[1] Those juvenile charges were possession of less than 50 grams of cocaine and failure to obey a lawful command of a police officer.

[2] MCL 777.43(1)(c) (emphasis added).

[3] MCL 777.43(2)(a).

[4] MCL 777.53.

[5] MCL 777.54.

[6] MCL 777.55.

where a defendant has "prior high severity juvenile adjudications," "prior low severity juvenile adjudications," or "prior misdemeanor juvenile adjudications." Here, the prosecutor maintained that the scoring of OV 13 could be based on any felonious criminal activity, citing an unpublished Court of Appeals opinion.[7]

I believe that we should grant leave to appeal to more fully consider the scoring of OV 13. OV 13 covers only "felonious *criminal* activity" committed within 5 years of the sentencing offense. In this case, the only previous offenses defendant committed are unquestionably *juvenile* offenses. Under MCL 712A.1(2), juvenile adjudications are not criminal in nature.[8] If the offenses underlying a juvenile adjudication cannot be scored under OV 13, defendant may be entitled to resentencing.

We should grant leave to appeal to consider whether defendant's juvenile offenses were properly considered under OV 13.

PEOPLE v BURCH, No. 139489; Court of Appeals No. 291227. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v BERNARD JONES, No. 139494; Court of Appeals No. 289874. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v CARLTON WEST, No. 139497; Court of Appeals No. 290929. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

KELLY, C.J., not participating because she served on the Court of Appeals panel that affirmed the defendant's conviction on direct appeal.

PEOPLE v CORDELL POWELL, No. 139503; Court of Appeals No. 291102. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

BRAVERMAN v SENTRY INSURANCE, No. 139514; Court of Appeals No. 291118

PEOPLE v RYAN BROWN, No. 139516; Court of Appeals No. 284568.

PEOPLE v BRYANT, No. 139518; Court of Appeals No. 291161. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

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[7] *People v Knott*, unpublished opinion per curiam of the Court of Appeals, issued July 15, 2008 (Docket No. 277105).

[8] Justice YOUNG concedes that a juvenile adjudication is not a "criminal proceeding" and does not result in a criminal conviction. Moreover, there is no statutory basis for Justice YOUNG's conclusion that "the focus of OV 13 is on the *nature of the act*, not the legal disposition of the defendant's culpability." It is entirely unclear from the language of the statute whether juvenile conduct may be labeled "criminal" solely by virtue of the underlying act as opposed to the nature of the adjudication.

PEOPLE v TOMLINSON, No. 139524; Court of Appeals No. 291771.

PEOPLE v SUSAN BROWN, No. 139529; Court of Appeals No. 290849. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v BOWMAN, No. 139531; Court of Appeals No. 291784.

PEOPLE v HOJNACK, No. 139535; Court of Appeals No. 291021. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v JOHNNY WALKER, No. 139573; Court of Appeals No. 283791.

PEOPLE v NICKERT, No. 139574; Court of Appeals No. 291391.

KELLY, C.J., and HATHAWAY, J., would remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v CROSS, No. 139584; Court of Appeals No. 292232.

PEOPLE v DONYA DAVIS, No. 139638; Court of Appeals No. 282081.

PEOPLE v ANTHONY ROBERT WILLIAMS, No. 139670; Court of Appeals No. 283568.

WALTON v DEPARTMENT OF CORRECTIONS, No. 139675; Court of Appeals No. 291458.

PEOPLE v PIVA, No. 139714; Court of Appeals No. 283570.

PEOPLE v FRANKLIN, No. 139720; Court of Appeals No. 291986.

PEOPLE v SPAGNOLA, No. 139731; Court of Appeals No. 250488.

PEOPLE v KIBLER, No. 139737; Court of Appeals No. 292828.

PEOPLE v JAMES NELSON, No. 139749; Court of Appeals No. 283567.

MOSER v CITY OF DETROIT, No. 139753; reported below: 284 Mich App 536.

VON OPEL v VON OPEL, No. 139756; Court of Appeals No. 292084.

PEOPLE v BOUGHNER, No. 139760; Court of Appeals No. 292834.

PEOPLE v DAILY, No. 139796; Court of Appeals No. 292561.

RAVINES LLC v BRINK, No. 139806; Court of Appeals No. 292651.

BURTON v ELKINS, Nos. 139811 and 139812; Court of Appeals Nos. 283807 and 284969.

PEOPLE v PALMORE, No. 139815; Court of Appeals No. 284220.

PEOPLE v RANDY SNYDER, No. 139824; Court of Appeals No. 284272.

PEOPLE v DARNALL, No. 139825; Court of Appeals No. 281999.

In re ARBIB ESTATE, No. 139827; Court of Appeals No. 282004.

NEUHAUS v PEPSI COLA METRO BOTTLING CO, No. 139834; Court of Appeals No. 274960.

PEOPLE v DANNY THOMPSON, No. 139836; Court of Appeals No. 284160.

PEOPLE v LEACH, No. 139839; Court of Appeals No. 293293.

PEOPLE v HARDEN, No. 139840; Court of Appeals No. 292744.

PEOPLE v DEMARIO SHELTON, No. 139844; Court of Appeals No. 293593.

PEOPLE v BRUGH, No. 139857; Court of Appeals No. 293030.

PEOPLE v RICHARD RODRIGUEZ, No. 139858; Court of Appeals No. 293424.

PEOPLE v KULKA, No. 139861; Court of Appeals No. 282017.

PEOPLE v CASPER BROWN, No. 139862; Court of Appeals No. 293371.

PEOPLE v BATES, No. 139865; Court of Appeals No. 285384.

PEOPLE v HUGH DIXON, No. 139866; Court of Appeals No. 293166.

PEOPLE v DAVID STEWART, No. 139868; Court of Appeals No. 293082.

PEOPLE v GONZALEZ, No. 139869; Court of Appeals No. 286414.

PEOPLE v DAVID STEWARD, No. 139870; Court of Appeals No. 293113.

PEOPLE v FLEXMAN, No. 139873; Court of Appeals No. 285439.

PEOPLE v VANDEZ WRIGHT, No. 139874; Court of Appeals No. 285174.

PEOPLE v AMDOROTHY WHITE, No. 139875; Court of Appeals No. 293413.

PEOPLE v CLEMONS, No. 139878; Court of Appeals No. 293336.

PEOPLE v RICO WILLIAMS, No. 139882; Court of Appeals No. 285872.

PEOPLE v DALTON, No. 139885; Court of Appeals No. 293337.

PEOPLE v MALLOY, No. 139886; Court of Appeals No. 293313.

PEOPLE v SADLER, No. 139887; Court of Appeals No. 292960.

PEOPLE v COVELL, No. 139892; Court of Appeals No. 284240.

SHANKSTER v FARM BUREAU MUTUAL INSURANCE COMPANY, No. 139895; Court of Appeals No. 284850.

VELTING v CASCADE TOWNSHIP, No. 139898; Court of Appeals No. 283638.

PEOPLE v ROSADO, No. 139899; Court of Appeals No. 287455.

PEOPLE v RAY THOMAS, No. 139902; Court of Appeals No. 293591.

SMITH v LUNDEEN, No. 139909; Court of Appeals No. 284911.

PEOPLE v CARL WILLIAMS, No. 139915; Court of Appeals No. 284981.

PAGANO v PONTIAC OSTEOPATHIC HOSPITAL, No. 139917; Court of Appeals No. 285100.

PEOPLE v ANTWAIN WILLIAMS, No. 139921; Court of Appeals No. 285214.

ALLIANCE OBSTETRICS & GYNECOLOGY PLC v DEPARTMENT OF TREASURY, No. 139923; reported below: 285 Mich App 284.

ORAM v ORAM, No. 139925; Court of Appeals No. 284576.

LINTON v ARENAC COUNTY ROAD COMMISSION, No. 139927; Court of Appeals No. 286635.

SAVESKI v FORD MOTOR COMPANY, No. 139929; Court of Appeals No. 287308.

PEOPLE v RENDAE WEST, No. 139931; Court of Appeals No. 284743.

PEOPLE v ANTHONY CARROLL, No. 139932; Court of Appeals No. 293539.

PEOPLE v LUQMAN, No. 139935; Court of Appeals No. 293464.

PEOPLE v BACHMAN, No. 139936; Court of Appeals No. 293207.

PEOPLE v ROOSEVELT WATTS, No. 139937; Court of Appeals No. 272369.

PEOPLE v DENARD, No. 139938; Court of Appeals No. 287472.

PEOPLE v CARTER GREEN, No. 139943; Court of Appeals No. 284463.

PEOPLE v JUAN MARTINEZ, No. 139946; Court of Appeals No. 293542.

PEOPLE v ALBERT TOWNSEND, No. 139950; Court of Appeals No. 284891.

PEOPLE v NEWSON, No. 139953; Court of Appeals No. 284226.

PEOPLE v JOVAN MORGAN, Nos. 139961 and 139962; Court of Appeals Nos. 287856 and 290125.

PEOPLE v GENTRY, No. 139964; Court of Appeals No. 278584.

STUMPO v DEPARTMENT OF TREASURY, No. 139982; Court of Appeals No. 283991.

PEOPLE v FREDDIE PARKER, No. 139985; Court of Appeals No. 283569.

PEOPLE v SWEET, No. 139986; Court of Appeals No. 292689.

PEOPLE v VANVELS, No. 139988; Court of Appeals No. 285138.

PEOPLE v PEARSON, No. 139989; Court of Appeals No. 284708.

PEOPLE v WALTER DAVIS, No. 139991; Court of Appeals No. 293627.

PEOPLE v SPANN, No. 139998; Court of Appeals No. 293232.

PEOPLE v PHILLIPS, No. 139999; Court of Appeals No. 284677.

PEOPLE v SANCHEZ, No. 140009; Court of Appeals No. 284987.

PEOPLE v MINKLER, No. 140024; Court of Appeals No. 293652.

PEOPLE v DANNY STOKES, No. 140027; Court of Appeals No. 281858.

ROSE v BRACISZEWSKI, No. 140031; Court of Appeals No. 285316.

MARTINELLI v OAKWOOD HOSPITAL & MEDICAL CENTER, No. 140033; Court of Appeals No. 283923.

BANK OF AMERICA v WEST COAST REALTY, INC, No. 140039; Court of Appeals No. 292026.

PEOPLE v AURI, No. 140047; Court of Appeals No. 287838.

PEOPLE v JIMMY GREEN, No. 140050; Court of Appeals No. 284301.

PEOPLE v BALLARD, No. 140064; Court of Appeals No. 294991.

PEOPLE v THOMAS WALLACE, No. 140082; Court of Appeals No. 292500. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v THOMPSON (*In re* THOMPSON), No. 140093; Court of Appeals No. 291580.

PEOPLE v BRIAN WARREN, No. 140116; Court of Appeals No. 294330. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

SANDERS v SANDERS, No. 140149; Court of Appeals No. 294086.

PEOPLE v DANNY DUNLAP, No. 140233; Court of Appeals No. 294407.

BONNER v BONNER, Nos. 140238 and 140239; Court of Appeals Nos. 288733 and 291202.

PEOPLE v RASHEEN BROWN, No. 140248; Court of Appeals No. 292699. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

In re ARMSTRONG, No. 140335; Court of Appeals No. 290414.

Superintending Control Denied January 29, 2010:

MALONE v ATTORNEY GRIEVANCE COMMISSION, No. 139916.

Summary Disposition February 2, 2010:

PEOPLE v SAMMIE BAILEY, No. 139276; Court of Appeals No. 278411. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that portion of the Court of Appeals judgment

addressing harmless error, and we remand this case to the Court of Appeals for reconsideration of its harmless error analysis for constitutional error under the holding in *Neder v United States*, 527 US 1, 15; 119 S Ct 1827; 144 L Ed 2d 35 (1999). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

KELLY, C.J. (*concurring*). The Court of Appeals opinion in this case, which was unpublished, persuasively explained in part II(A) and (B) its rationale for finding that the jury instructions were in error:

A. SELF-DEFENSE ELEMENTS

> Bailey asserts that the trial court's "erroneous, muddled, and confusing" self-defense instructions violated his right to due process by lessening the prosecutor's burden of proof.
>
> As a general rule, the killing of another person in self-defense by one who is free from fault is justifiable homicide if, under all the circumstances, he honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force. The necessity element of self-defense normally requires that the actor try to avoid the use of deadly force if he can safely and reasonably do so, for example by applying nondeadly force or by utilizing an obvious and safe avenue of retreat. [*People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002).]
>
> In addition to these general concepts, the Supreme Court emphasized in *Riddle* that "a person is *never* required to retreat from a sudden, fierce, and violent attack; nor is he required to retreat from an attacker who he reasonably believes is about to use a deadly weapon." *Id*. (emphasis in original). "[A]s long as he honestly and reasonably believes that it is necessary to exercise deadly force in self-defense, the actor's failure to retreat is never a consideration," and "he may stand his ground and meet force with force." *Id*.
>
> In contrast, when a defendant "is voluntarily engaged in mutual, nondeadly combat that escalates into sudden deadly violence," the defendant must retreat. *Riddle*, *supra* at 131-132. The Supreme Court in *Riddle* explained further the following situation in which an affirmative obligation to retreat exists:
>
> One who was the aggressor in a chance-medley (an ordinary fist fight, or other nondeadly encounter), or who culpably entered into such an engagement, finds that his adversary has suddenly and unexpectedly changed the nature of the contest and is resorting to deadly force. *This . . . is the only type of situation which requires 'retreat to the wall.'* Such a defender, not being entirely free from fault, must not resort to deadly force if there is any other reasonable method of saving himself. Hence if a reasonable avenue of escape is available to him he must take it *unless he is in his 'castle'* at the time. [*Id*. at 133 (citation omitted, emphasis in original).]

"Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v Elkhoja*, 251 Mich App 417, 443; 651 NW2d 408 (2002), vac'd in part on other grounds 467 Mich 916 (2003).

Bailey submits that the following instructions of the trial court regarding the concept of an aggressor effectively eliminated his claim of self-defense:

Nor can a person claim self-defense if they provoked the other person into using deadly force. They deliberately provoke them into using deadly force, and then say, Well, now that they are, I can respond to it.

Nor can a person claim self-defense if what they do is confront someone, intending, by their mere presence, to provoke that person into doing something, and then take advantage of it. That is all making the person who is claiming self-defense the aggressor. You have to be without fault. Without fault means that you can't be the first one to use, and you can't provoke the other person into doing it, and you can't set up a situation where what you mean for them to do is to take the first step so that you are then claiming to take the second step. [Emphasis supplied.]

In *People v Heflin*, 434 Mich 482, 509 (opinion by RILEY, C.J.); 456 NW2d 10 (1990), the Supreme Court explained that "an act committed in self-defense but with excessive force or in which defendant was the initial aggressor does not meet the elements of lawful self-defense." In *People v Van Horn (On Remand)*, 64 Mich App 112, 115; 235 NW2d 80 (1975), this Court quoted with approval from *Wharton's Criminal Law & Procedure* (Anderson ed), § 229, p 501: "It is generally held that the aggressor is the one who first does acts of such nature as would ordinarily lead to a deadly combat or as would put the other person involved in fear of death or serious bodily injury."

We find that the trial court improperly stated the law regarding the concept of an "aggressor," particularly as to defendant Bailey, when he instructed the jury in this regard. No legal authority in Michigan supports that one becomes an aggressor merely by presenting oneself to the victim on a public street, even if armed. In *People v Bright*, 50 Mich App 401, 405; 213 NW2d 279 (1973), this Court held that "merely possessing a loaded weapon does not take away the claim of self-defense from an individual." In *People v Townes*, 391 Mich 578, 586-592; 218 NW2d 136 (1974), our Supreme Court rejected the notion that the defendant's trespass at a tire store and his attempted provocation of a store employee precluded him from arguing self-defense. Although the defendant shared some degree of "fault" for the encounter, he was nevertheless entitled to claim self-defense.

Similarly, in *Riddle*, the Supreme Court explained that even one who is "an aggressor in a chance-medley" may be entitled to use deadly force, depending on the circumstances. *Riddle*, *supra* at 133. The Supreme Court stated that "where a defendant 'invites trouble' or meets nonimminent force with deadly force, his failure to

pursue an available, safe avenue of escape might properly be brought to the attention of the factfinder as a factor in determining whether the defendant acted in reasonable self-defense." *Id*. at 127. "Inviting trouble," according to *Riddle*, includes "voluntarily participating in mutual nondeadly combat." *Id*. at 142. Further, it is generally accepted that

> [o]ne may, without forfeiting his right to defend himself against attack, seek an interview with another in a peaceable manner, for the purpose of demanding an explanation of offensive words or conduct or demanding the settlement of a claim, and according to many decisions, he need not go in a friendly spirit. He may, it seems, assert self-defense as excuse or justification, even though he arms himself before seeking the interview. [26 Am Jur, Homicide, § 131.]

Standing alone, Bailey's armed presence on the street does not amount to either fault or provocation. Contrary to the trial court's charge, "confront[ing] someone, intending, by their mere presence" to provoke an affray does not eliminate one's potential opportunity to invoke a self-defense. Rather, Bailey's actions amount to conduct that a jury must evaluate, along with the totality of the surrounding circumstances, in deciding whether he "started an assault . . . with deadly force [or] with a dangerous or deadly weapon." CJI2d 7.18. The trial court's "mere presence" instruction additionally contradicts CJI2d 7.19, "Nondeadly Aggressor Assaulted with Deadly Force":

> 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 with deadly force, the defendant may act in self-defense, but only if he retreats if it is safe to do so.

Furthermore, no record evidence supports that Bailey "intended by his mere presence" to incite or provoke the victim. Construed in the light most favorable to the prosecution, the record reveals that Bailey did not know the victim, and agreed to accompany Lambeth so that Lambeth could confront the victim. Contrary to the trial court's instruction, Bailey's mere presence at this confrontation, without more, did not automatically render him an "aggressor," and did not eliminate his ability to claim self-defense.

B. SELF-DEFENSE BURDEN OF PROOF

Bailey avers that the trial court's instructions "lowered the prosecution's burden of disproving self defense and defense of another" because the court repeatedly referred to self-defense as a "limited" defense and failed to specifically instruct the jury that the prosecution bore the burden of proving that Bailey and Lambeth did not act in self-defense.

The trial court's instructions regarding the prosecutor's burden of disproving self-defense appear in the following excerpt:

> The first thing you have to keep in mind is that the lack of justification has to be proven here. The defendant doesn't have to prove justification. The evidence has to establish the lack of justification. Now, that's an awkward way of saying things. It is talking about proving a negative, which is technically correct, but hard to talk about. Let's turn it around and talk about it positively.
>
> Since it has got to be proven beyond a reasonable doubt, just like you contributed to the murder, that a person did not kill with justification, I'm going to state it this way: If there is a realistic possibility, based upon the evidence presented here, that one or both of the defendants acted in either self-defense or defense of another person, then we don't have a murder, if there was a realistic possibility. If, on the other hand, it's not a realistic possibility, no possibility at all, or even just a mere possibility, just a possibility, not a realistic possibility, then murder is back on the table, because then the thing which would eliminate it; justification, doesn't exist.
>
> We conclude that the trial court erred by failing to properly instruct the jury regarding the applicable burden of proof. The trial court's instruction that "[t]he defendant doesn't have to prove justification" is correct. Had the trial court followed this statement with language similar to that contained in CJI2d 7.20, the jury would have been more completely and properly instructed. Instead, the trial court continued, "The evidence has to establish the lack of justification. Now, that's an awkward way of saying things. It is talking about proving a negative, which is technically correct, but hard to talk about." During the trial court's ensuing effort to clarify the law, the court entirely neglected to inform the jurors that the prosecutor bore the burden to disprove Bailey's and Lambeth's self-defense claims. [*People v Bailey*, unpublished opinion per curiam of the Court of Appeals (on reconsideration), issued May 21, 2009 (Docket No. 278411).]

YOUNG, J. (*dissenting*). I dissent from the order in this case and instead would affirm the decision of the Court of Appeals. The jury instructions properly set forth the correct standards for self-defense and provocation, and I would affirm the defendant's convictions on that basis.

Defendant shot and killed Keith Hoffman, a local drug dealer who had recently stolen money and jewelry from defendant. At issue during trial was whether defendant acted in self-defense. After a jury convicted defendant of second-degree murder and felony-firearm, defendant appealed, claiming that his jury instructions were constitutionally deficient. The Court of Appeals agreed that the jury instructions were erroneous, but concluded that any error was harmless because it "f[ound] it clear beyond a reasonable doubt that a properly instructed jury would have rendered the same verdict."[1]

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[1] *People v Bailey*, unpublished opinion per curiam of the Court of Appeals, May 21, 2009 (Docket No. 278411).

The challenged instructions, when considered in their entirety,[2] are not erroneous. The Court of Appeals determined that the jury instructions failed on two grounds: in providing erroneous instructions on provocation as negating self-defense and in lowering the prosecution's burden of proof on self defense. I will consider each of these claims of error seriatim.

PROVOCATION

In *People v Riddle*, this Court articulated when provocation precludes asserting the justification of self-defense: "the cardinal rule, applicable to all claims of self-defense, is that the killing of another person is justifiable homicide if, under all the circumstances, the defendant honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force."[3] In discussing the rule, this Court expressly addressed provocation: "For example, where a defendant 'invites trouble'. . . his failure to pursue an available, safe avenue of escape might properly be brought to the attention of the factfinder as a factor in determining whether the defendant acted in reasonable self-defense."[4]

Here, the trial court instructed the jury that "a person forfeits self-defense, even if they'd otherwise have it, have that right to it, if they were the first to use deadly force. . . . Nor can a person claim self-defense if they provoked the other person into using deadly force." The trial court continued:

> Nor can a person claim self-defense if what they do is confront someone, intending, by their mere presence, to provoke that person into doing something, and then take advantage of it. You have to be without fault. Without fault means that you can't be the first one to use, and you can't provoke the other person into doing it, and you can't set up a situation where what you mean for them to do is to take the first step so that you are then claiming to take the second step.

The Court of Appeals claims that the trial court's instructions were erroneous: "Contrary to the trial court's charge, 'confront[ing] someone, intending, by their mere presence' to provoke an affray does not eliminate one's potential opportunity to invoke a self-defense."

However, the trial court concluded its discussion of self-defense by indicating that the defendant

> must fear, actually fear and reasonably fear, that then and there you are about to be killed or seriously injured, or that

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[2] See *People v Dye*, 356 Mich 271, 279 (1959).

[3] *People v Riddle*, 467 Mich 116, 142 (2002).

[4] *Id*. at 127.

> someone else is. You've got to actually and reasonably believe that the use of deadly force in response, is the only way to fend off that imminent threat. . . . And, the defendant, to have the benefit of the defense, cannot have been the aggressor, which means the first to use deadly force, a person who provoked it, or one who did something to set up a situation where deadly force ends up getting used, and then they in turn get to respond to it and bootstrap into a claim of defense.

When considered in their entirety, the trial court's instructions to the jury indicated that provocation negates a claim of self-defense. The phrase "by their mere presence" specifically refers to a person "confront-[ing] someone" with the intention of "provok[ing]" violence. In some circumstances, a person's mere presence *may* be sufficiently provocative to eliminate a claim of self-defense. However, the trial court's instruction did not, as the Court of Appeals suggests, indicate that a person's "mere presence" *necessarily* "eliminate[s] one's potential opportunity to invoke a self-defense." Ultimately, the trial court's instruction, when considered in its entirety, correctly identified the appropriate legal standard.

BURDEN OF PROOF

The Court of Appeals also determined that the trial court erred in articulating the burden of proof associated with a claim of self-defense. This Court's precedent holds that "once the issue of self-defense is injected and evidentially supported, '[t]he burden of proof to exclude the possibility that the killing was done in self-defense, rests on the prosecution.' "[5]

Here, the trial court instructed the jury as follows:

> The first thing you have to keep in mind is that the *lack of justification has to be proven here*. The defendant doesn't have to prove justification. The evidence has to establish the lack of justification. Now, that's an awkward way of saying things. It is talking about proving a negative, which is technically correct, but hard to talk about. Let's turn it around and talk about it positively.
>
> Since it has got to be proven *beyond a reasonable doubt*, just like you contributed to the murder, *that a person did not kill with justification*, I'm going to state it this way: If there is a realistic possibility, based upon the evidence presented here, that one or both of the defendants acted in either self-defense or defense of another, then we don't have a murder, if there was a realistic possibility. If, on the other hand, it's not a realistic possibility, no possibility at all, or even just a mere possibility, just a possibility,

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[5] *People v Jackson*, 390 Mich 621, 626 (1973), quoting *People v Stallworth*, 364 Mich 528, 535 (1961).

> not a realistic possibility, then murder is back on the table, because then the thing which would eliminate it[,] justification, doesn't exist.[6]

The trial court's instructions made it clear that the *lack* of justification needs to be proven beyond a reasonable doubt, which is the correct burden of proof. While the trial court's attempt at "turn[ing] it around and talk[ing] about [justification] positively" was inartful, it did not do anything but equate the presence of a "realistic possibility" of justification with the failure to prove lack of justification beyond a reasonable doubt. Accordingly, the trial court correctly stated that the prosecutor bears the burden of disproving justification beyond a reasonable doubt.

CONCLUSION

The trial court did not err in instructing the jury on self defense. Accordingly, the Court of Appeals need not have engaged in a harmless error analysis. Therefore, I would affirm the result of the Court of Appeals on the alternative grounds that no error occurred.

WEAVER, J., joined the statement of YOUNG, J.

SALT V GILLESPIE, BOLANOWSKI V GILLESPIE, and ANCONA V GILLESPIE, Nos. 139319 through 139321 and 139328 through 139333; Court of Appeals Nos. 277391 through 277393, 277400, 277402, 277404, and 277434 through 277436. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals granting summary disposition to Bennigan's for the reasons stated in the Court of Appeals dissenting opinion. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

KELLY, C.J. (*concurring*). The opinion in the Court of Appeals by Judge DOUGLAS SHAPIRO, concurring in part and dissenting in part, persuasively explained the rationale for the trial court's grant of summary disposition with regard to defendant Bennigan's. He wrote:

> I dissent, however, from the majority's acceptance of the trial court's conclusion that a fact-finder could not reasonably conclude that Gillespie was served at Bennigan's when he was visibly intoxicated. To find such a reasonable conclusion would require a question of material fact (created by evidence or reasonable inferences derived therefrom) that: (a) Gillespie was present at Bennigan's; (b) while there he was visibly intoxicated; and (c) he was served a drink while in that state. Based on the record, I would conclude that such a reasonable conclusion exists.
>
> The first requirement, i.e., that there be a reasonable question of material fact that Gillespie was present at Bennigan's that evening, is straightforward. Although the majority attempts to cast doubt on the issue, there is clearly a question of fact. First,

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[6] Emphasis added.

Bennigan's conceded, for purposes of its motion for summary disposition and for this appeal, that there is a reasonable question of material fact on this issue. Even if this were not the case, Gillespie's testimony clearly creates such a question. Gillespie testified in his deposition that he specifically recalled walking in the front door of Bennigan's after he stopped at the Quality Dairy and that he recalled sitting on a stool at the bar in Bennigan's, remaining there for as much as two hours, ordering at least one drink while there and being told while there that he was being too loud. The majority seems to equivocate on this issue, noting that his presence at Bennigan's is inconsistent with the chronology constructed by Bennigan's counsel and characterizing his testimony as "vague." However, the chronologies put forward by other parties allow for Gillespie's presence at Bennigan's and the majority's view of the relevant testimony as "vague" is both incorrect and irrelevant. Gillespie's recollection of being at Bennigan's is clear. More important, it is not for this Court to determine the credibility of a witness. The "vagueness" of testimony, unless it is devoid of foundation, goes to the weight, not the admissibility of the testimony and it is not for this Court to determine what weight to give it. That is the most essential role of the finder of fact. For a court to grant summary disposition because it does not find a particular witness convincing undercuts the core role of the fact-finder. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002) ("It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences."). In any event, as already noted, Bennigan's has conceded, at least at this time, that there is a reasonable basis for a jury to find that Gillespie was there that night.

The second requirement, i.e., that there be a reasonable question of material fact that Gillespie was visibly intoxicated while at Bennigan's, is also straightforward. As noted by the majority in its discussion concerning Quality Dairy, a reasonable trier of fact could conclude that Gillespie was visibly intoxicated following his alcohol consumption at the Mason Jar. This would include the time at which he is alleged to have been at Bennigan's. In addition, the Bennigan's stop is alleged to have occurred after the consumption of at least some of the Quality Dairy liquor. Finally, Gillespie testified that while at Bennigan's he was told that he was being too loud and to quiet down. Thus, there is a question of fact whether Gillespie was visibly intoxicated at the time he claimed to have been at Bennigan's.

The last requirement, i.e., that there be a reasonable question of material fact that Gillespie was served alcohol at Bennigan's, is also met. First, defendant Bennigan's concedes for purposes of its summary disposition motion that Gillespie did order a drink. Second, Gillespie testified that he ordered a drink and when asked if the bartender served him he answered, "Yeah, he would have given it to me." He was also asked whether it was true that "he

have no recollection of consuming alcohol at Bennigan's," to which he responded that it was not true. He was then asked by counsel for Bennigan's if it was possible that, given that he was loud, the bartender might have refused him service and he answered, "I don't think so." When asked the same question again, he did concede that such a scenario was possible.

If a fact-finder chose to believe Gillespie's testimony, it could conclude, based on direct evidence that he was served at Bennigan's. Moreover, even if a jury doubted some of Gillespie's testimony, it could reasonably infer that an individual who sits at a bar and orders a drink will be served. There certainly is no evidence to suggest that anyone at Bennigan's that evening was denied service at the bar. None of the Bennigan's employees testified to such an event and Bennigan's manager conceded that such an "out of the ordinary occurrence" would typically be noted in the shift log and that no such notation was made. If a jury accepts Gillespie's testimony that he ordered a drink at Bennigan's and there is no evidence that anyone was refused a drink that evening, it is a reasonable inference that Gillespie was served.

This is not to say that plaintiffs should or will prevail against Bennigan's at trial. There are sharp questions of fact, which a jury may very well resolve in favor of Bennigan's, and there are good reasons to question whether a jury will accept Gillespie's testimony. However, the role of this Court, and of the trial court in a (C)(10) motion, is clearly circumscribed.

Under MCR 2.116(C)(10), plaintiffs, as the nonmoving party, are not only entitled to have all conflicting evidence viewed in their favor, but also "reasonable inferences" as well. *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 488; 618 NW2d 1 (2000). I believe that the majority has wrongly blurred the line between a "reasonable inference" and "mere speculation or conjecture." It would have been mere conjecture and Bennigan's would have been entitled to summary disposition if Gillespie had testified simply that it was "possible" that he went Bennigan's and consumed alcohol there. But that is not his testimony. He testified that he went to Bennigan's, that he sat at the bar, that he ordered a drink, and that he remained there for two hours. Moreover, there is no evidence that anyone was refused service that evening at Bennigan's. A conclusion that he was served is not mere speculation or conjecture but instead "a reasonable inference" based upon the evidence taken in light most favorable to plaintiff.

The majority seems to suggest that absent someone actually witnessing the service, no reasonable juror could find it occurred. In my view, this negates the principle that reasonable inferences as well as disputed evidence is to be taken in the light most favorable to the non-moving party. Ironically, the majority appears to rely on Gillespie's testimony that being refused service was something that "could [have] happen[ed]," ignoring his immediately preceding statement that he did not think that was what actually happened. Relying on a statement that something "could have

happened" is exactly the type of speculation and conjecture which the majority criticizes, yet it is what it relies upon here. [*Salt v Gillespie,* unpublished opinion per curiam of the Court of Appeals (SHAPIRO, J., concurring in part and dissenting in part), issued April 21, 2009 (Docket No. 277391), pp 5-8.]

MARKMAN, J. (*concurring in part and dissenting in part*). In this dramshop action, plaintiffs sued three businesses—Mason Jar Pub, Quality Dairy, and Bennigan's—following a fatal automobile accident caused by an intoxicated driver, Andrew Gillespie. The trial court denied all defendants' motions for summary disposition. The Court of Appeals then reversed as to Mason Jar Pub and Bennigan's, but affirmed as to Quality Dairy. This Court now denies leave to appeal regarding Mason Jar Pub and Quality Dairy, but reinstates the action against Bennigan's. I concur in the order with reference to Mason Jar Pub, but dissent with reference to Quality Dairy and Bennigan's.

When a defendant, as here, files a motion for summary disposition under MCR 2.116(C)(10), the trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 120 (1999). But "where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id*. Moreover, a party opposing a motion for summary disposition must present more than conjecture and speculation to establish that a genuine issue of material fact exists. *Karbel v Comerica Bank*, 247 Mich App 90, 97 (2001).

In order to establish a prima facie dramshop action, a plaintiff must show that a business sold alcohol to a patron; while the patron was visibly intoxicated and that the selling of the alcohol constituted a proximate cause of the plaintiff's injury. MCL 436.1801(3); *Reed v Breton*, 475 Mich 531 (2006). To establish "visible intoxication" under MCL 436.1801(3), a plaintiff must present evidence of "*actual* visible intoxication." *Id.* at 534 (emphasis added). Moreover, pursuant to MCL 436.1801(8), there is a rebuttable presumption that a business, other than that which last sold the alcohol, has not committed any act giving rise to a cause of action. A plaintiff rebuts this presumption by showing not only the evidence required for a prima facie case, but also clear and convincing evidence to rebut the presumption. *Id*. at 533.

I initially note that Gillespie testified that he did "not recall," but that he "had been told" that he had even been at Mason Jar Pub, Quality Dairy and Bennigan's to purchase or consume alcohol the day of the accident. This is explained perhaps by the facts that Gillespie had taken two mood-enhancing prescription drugs that day before consuming alcohol; he himself had been injured in the fatal car crash when his head went through the windshield; and he only woke up five days later in the hospital. No other witness positively placed Gillespie at Quality Dairy or Bennigan's on the evening in question. While Gillespie did testify as if speaking from personal knowledge at other points in his deposition, I question the value of such testimony in discerning a genuine issue of material fact when that same witness had testified he was only repeating

what others had told him. Just as a party may not create a factual dispute by submitting an affidavit that contradicts his sworn testimony, *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 396 (2006), I see no principled basis for determining that a genuine issue of material fact exists for ignoring a witness' testimony that he had no recollection of the night in question, and then relying on other of his testimony that he did possess some personal knowledge of the evening in question. See also *United States v 1980 Red Ferrari*, 827 F2d 477, 480 n 3 (CA 9, 1987) (holding that internally contradictory deposition testimony created no issue of material fact).

Quality Dairy was the second-to-last business (after Mason Jar Pub) to sell Gillespie an alcoholic beverage—assuming it did sell him such a beverage. Gillespie testified that he purchased half a pint of Popov vodka at Quality Dairy, but computer records indicate that Quality Dairy did not sell a half pint of Popov vodka near the time in question. Assuming, however, that Gillespie did purchase an alcoholic beverage from Quality Dairy, plaintiffs still had to establish a genuine issue of material fact that they could prove by clear and convincing evidence that Gillespie was actually visibly intoxicated at the time Quality Dairy sold him an alcoholic beverage. The only conceivable evidence of this was testimony from a patron of Mason Jar Pub that Gillespie's eyes were slightly red as he left Mason Jar Pub at some indeterminate earlier time, and that as he was leaving, he stumbled slightly as he was sliding sideways to get between two tables on his way out. Gillespie himself also said his intoxication must have been obvious because he had been loud and boisterous at Mason Jar Pub, although there was no other evidence to this effect and, as already noted, Gillespie testified at one point that he could not even recall *being* at Mason Jar Pub. In my judgment, this evidence, even when viewed in a light most favorable to plaintiffs, is insufficient to create a genuine issue of material fact by clear and convincing evidence that Gillespie was *actually visibly intoxicated* when he allegedly purchased an alcoholic beverage at Quality Dairy.

Bennigan's was the last retail establishment that served Gillespie an alcoholic beverage before the accident—assuming, again, that it did sell him such a beverage. Thus, Bennigan's is not entitled to the rebuttable presumption that it did not commit any act giving rise to a cause of action. As the Court of Appeals explained in some detail, the sequence of events on the night of the accident makes it unlikely that Gillespie was ever at Bennigan's that night. Nevertheless, once again on the assumption Gillespie was at Bennigan's, in order to defeat its motion for summary disposition, plaintiffs had to establish as part of a prima facie case that Gillespie was actually visibly intoxicated when Bennigan's sold him an alcoholic beverage after he left Mason Jar Pub and Quality Dairy. Here again, the only evidence of actual visible intoxication was Gillespie's own testimony that he had been loud and boisterous at Mason Jar Pub, and the Mason Jar Pub patron's testimony that Gillespie had slightly red eyes and that he slightly stumbled navigating between tables as he left at some indeterminate time before he went to Quality Dairy and well before he went to Bennigan's. Gillespie himself also testified, despite not recalling being at Bennigan's, that "the only thing I remember from

Bennigan's is someone telling me I was being loud," and that he purchased a vodka and orange juice while at Bennigan's, although computer records showed that Bennigan's did not sell a vodka and orange juice to any customer during the day of the accident and no else testified about this incident. Gillespie also testified that he did not recall being served a drink at Bennigan's nor did he recall consuming a drink at Bennigan's. In my judgment, this evidence, even when viewed in the light most favorable to plaintiffs, is insufficient to create a genuine issue of material fact that Gillespie was *actually visibly intoxicated* when he allegedly purchased an alcoholic beverage at Bennigan's.

The perpetrator of the horrendous crime underlying this case was Andrew Gillespie and he is deservedly serving 15 to 30 years' imprisonment on two counts of second-degree murder. However, in my judgment, there is insufficient evidence that the servers and sales clerks of Mason Jar Pub, Quality Dairy, and Bennigan's—even if it can be demonstrated that they all did, in fact, sell alcohol to Gillespie—should reasonably have observed that he was *actually visibly intoxicated*. Under these circumstances, I do not believe that defendants should be required to stand trial for complicity in Gillespie's crime.

CORRIGAN, J., joined the statement of MARKMAN, J.

Superintending Control Denied February 2, 2010:

HEOS v BOARD OF LAW EXAMINERS, No. 130469.

Summary Disposition February 17, 2010:

GRIESBACH v ROSS, No. 136731; Court of Appeals No. 275826. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals, and we remand this case to the Oakland Circuit Court for reconsideration of defendant's motions in light of *Bush v Shabahang*, 484 Mich 156 (2009), and *Potter* v *McLeary*, 484 Mich 397 (2009).

HATHAWAY, J. (*concurring*). The record reveals disputed facts regarding whether the notice of intent provided sufficient and timely notice to defendant Ross. Given the factual dispute, it is necessary to remand this case to the trial court for consideration of these issues in light of our decisions in *Bush v Shabahang*, 484 Mich 156 (2009), and *Potter v McLeary*, 484 Mich 397 (2009).

YOUNG, J. (*dissenting*). I dissent from the order vacating the Court of Appeals judgment and remanding to the trial court for proceedings consistent with *Bush v Shabahang*[1] and *Potter v McLeary*.[2] First and foremost, plaintiff did not meet the requirements plainly described in MCL 600.2912b(3). Therefore, he is not entitled to the additional notice period provided in that statute. Moreover, the current case is factually

[1] 484 Mich 156 (2009).

[2] 484 Mich 397 (2009).

inapposite to *Bush* and *Potter* and is based on an altogether different statutory provision. Accordingly, the standards provided in *Bush* and *Potter* are inapplicable to this case and cannot save plaintiff's claims. This remand represents another effort of the new majority to deconstruct the medical malpractice tort reform statutes.

Plaintiff filed a medical malpractice action against Dr. Frank L. Fenton and Walled Lake Medical Center, P.C. based on their alleged failure to diagnose a bone infection. The only health care professional to examine plaintiff during his two visits at the medical center was a physician's assistant named Robert Ross. *Although plaintiff concedes that he knew the identity of the treating physician's assistant, he chose neither to serve a notice of intent (NOI) on Ross, as required by MCL 600.2912b(1), nor to name Ross as a defendant in the subsequently filed complaint.* Given plaintiff's failure to serve an NOI on a *known* potential defendant, the statute of limitations applicable to plaintiff's claim against Ross is not subject to tolling under MCL 600.5856(c).[3] Plaintiff waited until the named defendants filed a notice of nonparty at fault identifying Ross before attempting to serve an NOI on Ross or amending the complaint to add Ross as a named defendant. The statute of limitations had expired by that time.

In general, a plaintiff who "discovers" the identity of a defendant through a notice of nonparty at fault after the expiration of the statute of limitations is entitled to file an amended complaint within 91 days of receiving the notice.[4] MCL 600.2912b(3) more specifically addresses the addition of defendants in medical malpractice actions, and it allows for the addition of a defendant only under the following circumstances:

> The 182-day notice period required in subsection (1) is shortened to 91 days if all of the following conditions exist:
>
> (a) The claimant has previously filed the 182-day notice required in subsection (1) against other health professionals or health facilities involved in the claim.
>
> (b) The 182-day notice period has expired as to the health professionals or health facilities described in subdivision (a).

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[3] This provision states:

> The statutes of limitations or repose are tolled in any of the following circumstances:
>
> * * *
>
> (c) At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given. [MCL 600.5856.]

[4] MCR 2.112(K)(4).

> (c) The claimant has filed a complaint and commenced an action alleging medical malpractice against 1 or more of the health professionals or health facilities described in subdivision (a).
>
> (d) The claimant *did not identify, and could not reasonably have identified* a health professional or health facility to which notice must be sent under subsection (1) as a potential party to the action before filing the complaint.[5]

Plaintiff claims that he could not reasonably have identified Ross as a party entitled to notice before receiving the notice of nonparty at fault. Given plaintiff's own admissions, this claim is absurdly false. Plaintiff concedes that he *actually knew* the identity of the treating physician's assistant before serving his NOIs on the other defendants and before filing his complaint. Accordingly, plaintiff has not met, and cannot meet, the plain and unambiguous requirements to be entitled to the additional notice period provided in MCL 600.2912b(3). Thus, MCR 2.112(K)(4) is inapplicable to the instant case.

Moreover, although I continue to believe that *Bush* and *Potter* were wrongly decided, the standards described in those cases are clearly irrelevant and inapplicable under the circumstances. The *Bush* majority held that the amendments to MCL 600.5856(c) provide that the statute of limitations for a medical malpractice action is tolled even if an NOI is substantively defective, and the NOI may thereafter be amended as provided by MCL 600.2301.[6] The majority based this holding on the introductory phrase in subsection (c): "At the time notice is given in compliance with the *applicable notice period* under section 2912b." In *Bush*, that notice period was provided in the general 182-day provision—MCL 600.2912b(1).

The *Bush* majority then relied on MCL 600.2301, which allows amendments to pleadings "for the furtherance of justice" if the amendment will not affect the "substantial rights" of the other party.[7] The majority concluded that it would not be in the furtherance of justice to dismiss a plaintiff's complaint when he "has made a *good-faith attempt* to comply with the *content requirements*"[8] of MCL 600.2912b(4). Such good-faith attempt to comply with the requirements of the statute is *admittedly* absent here. The majority conveniently ignores this fact.

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[5] Emphasis added.

[6] This provision states:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

[7] *Bush*, *supra* at 177.

[8] *Id.* at 180 (emphasis added).

In *Potter*, the issues raised do not have even marginal relevance to the facts now before us. *Potter* involved whether a professional corporation is entitled to service of an NOI when the plaintiff alleges vicarious liability for the conduct of a servant health professional. *Potter* also implicated questions regarding the adequacy of the content of an NOI under MCL 600.2912b(4) when the NOI omits the standard for vicarious liability or fails to specifically identify the relationship between the professional corporation and the servant doctor.

The notice provided in this case did not comply with the *applicable notice period* under section 2912b. As stated, MCL 600.2912b(3) provides an additional 91-day notice period to add an individual as a named defendant when that person could not be "reasonably identified" beforehand. Plaintiff's failure to serve an NOI on Ross along with the original named defendants cannot be considered a "good-faith attempt to comply" with the statutes under *Bush*. First, the failure to name Ross as a defendant does not implicate the *content* provision of MCL 600.2912b(4). The failure to serve an NOI on a required party goes straight to the heart of the "notice period"; it does not implicate concerns regarding the adequacy of the notice actually provided. Nothing in MCL 600.5856(c), *Bush*, or *Potter* excuses a plaintiff who fails to meet the time limitation for providing notice.

And centrally, as noted above, plaintiff *admitted* that he knew the identity of the treating health care professional *before* filing his complaint and that person was physician's assistant Ross. In the face of this admission, even if the "good-faith attempt" standard could apply to these circumstances, plaintiff cannot honestly argue that he "did not identify, and could not reasonably have identified" Ross as required by MCL 600.2912b(3)(d).

Because *Bush* and *Potter* have absolutely no relevance to this case, by invoking them in its remand order, the new majority is essentially using them as a code whose meaning should be lost on no one: We no longer enforce the medical malpractice reform statute. The remand of this case can not be otherwise justified.

This court should not waste judicial resources by forcing the trial court to reconsider a case involving such a blatant disregard of this medical malpractice statute. I cannot make the statement any plainer: plaintiff acknowledges that he knew the identity of the treating medical professional from the outset of these proceedings. Even so, plaintiff chose not to serve an NOI on that individual—the *only* known treating medical professional. In light of plaintiff's admission, the suggestion that there are questions of fact remaining in this case is both preposterous and false, and the new majority's refusal to uphold the dismissal of this suit is indicative of the new majority's resistance to enforcing our laws as written. Plaintiff's failure to include Ross as a named defendant from the outset of the proceedings defies all logic and reason. If plaintiff has lost a viable claim against Ross because of this error, his recourse is against his attorney.

Accordingly, I vigorously dissent from the majority's chosen course of action, which allows plaintiff to completely ignore the medical malprac-

tice notice and limitations periods and proceed with his cause of action anyway. However, as stated, I think that this is precisely the new majority's goal.

CORRIGAN, J., joined the statement of YOUNG, J.

MARKMAN, J. (*dissenting*). I concur in Justice YOUNG's legal analysis concerning the irrelevance of *Bush v Shabahang,* 484 Mich 156 (2009), and *Potter v McLeary*, 484 Mich 397 (2009), to the instant case, and therefore dissent. The majority's decision to vacate the Court of Appeals and remand to the trial court for reconsideration in light of our completely inapposite decisions in *Bush* and *Potter*, as well as its decision in ADM 2009-13 to revise court rules pertaining to affidavits of merits in a manner inconsistent both with this Court's opinion in *Kirkaldy v Rim,* 478 Mich 581 (2007), and with the constitution's apportionment of legislative and judicial responsibilities, is indicative of an attitude toward tort and medical malpractice reform that ought to be deeply troubling to citizens of this state concerned about representative self-government. My objections are elaborated upon in dissents in *Bush*, *Potter*, and ADM 2009-13.

Summary Disposition February 26, 2010:

PEOPLE v FETTE, No. 140023; Court of Appeals No. 293598. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the Court of Appeals October 7, 2009, order. A remand to the Oakland Circuit Court for correction of the July 22, 2009, Order to Remit Prisoner Funds for Fines, Costs and Assessments is unnecessary, because the order accurately provides that the defendant owes a total of $1,080 in costs and assessments, including $180 in state minimum costs, $60 for a crime victim's assessment fee, and $840 in court-appointed attorney fees. We do not retain jurisdiction.

PEOPLE v COLEMAN, No. 140250; Court of Appeals No. 286017. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that part of the judgment that affirmed the amount of restitution challenged by the defendant, and we remand this case to the Wayne Circuit Court for a hearing and determination as provided for by MCL 780.767(4). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

Leave to Appeal Denied February 26, 2010:

ANDRES v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 138070; Court of Appeals No. 279608.

PEOPLE v WOOLSEY, No. 138153; Court of Appeals No. 288666.

YPSILANTI CHARTER TOWNSHIP v WASHTENAW COUNTY, No. 138499; Court of Appeals No. 281498.

PEOPLE v DAVID STUCKEY, No. 138603; Court of Appeals No. 281764.

CITIZENS INSURANCE COMPANY OF AMERICA v ALLEN, No. 139140; Court of Appeals No. 290024.

In re STANLEY BEDNARZ TRUST (SMIGIELSKI v GLANTY), No. 139379; Court of Appeals No. 283699.

PEOPLE v ANDREWS, No. 139384; Court of Appeals No. 291115. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v MCINTEE, No. 139388; Court of Appeals No. 290499. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v RALSTON, No. 139402; Court of Appeals No. 290004.

PEOPLE v RICHARD CARTER, No. 139426; Court of Appeals No. 291607. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v KENDRICK LEE, No. 139427; Court of Appeals No. 291832. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v LAWRENCE AND ANTHONY GADOMSKI, Nos. 139439 and 139440; Court of Appeals Nos. 290676 and 291064.

PEOPLE v MCGORE, No. 139450; Court of Appeals No. 292249.

PEOPLE v LANSKI, No. 139452; Court of Appeals No. 289563. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v GREGORY MYLES, No. 139454; Court of Appeals No. 289425. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v ADRIAN, No. 139473; Court of Appeals No. 290922. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v LEE POWELL, No. 139479; Court of Appeals No. 290141. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v ANIBAL MARTINEZ, No. 139508; Court of Appeals No. 292338. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v ROSS, No. 139572; Court of Appeals No. 291321. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v BOOKER, No. 139578; Court of Appeals No. 283490.

PEOPLE v AARON ATKINS, No. 139579; Court of Appeals No. 290364. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v LUCIER, No. 139580; Court of Appeals No. 292089. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v MARTINNEZE MOORE, No. 139634; Court of Appeals No. 291204. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v DOMACO SIMS, No. 139639; Court of Appeals No. 292260. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v LOWE, No. 139656; Court of Appeals No. 292342. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v ATTRICE SINGLETON, No. 139663; Court of Appeals No. 285477.

PEOPLE v ARTHUR BELL, No. 139667; Court of Appeals No. 292248. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v PITTMAN, No. 139683; Court of Appeals No. 291022. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v JEFFREY MOORE, No. 139687; Court of Appeals No. 290212. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v GARY PATTERSON, No. 139695; Court of Appeals No. 290163. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v PAUL YOUNG, No. 139696; Court of Appeals No. 290450. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v LEON DOUGLAS, No. 139698; Court of Appeals No. 292994. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v FAIRLEY, No. 139716; Court of Appeals No. 291602. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v ERIC ANDERSON, No. 139718; Court of Appeals No. 292466. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v ELLIOTT, No. 139722; Court of Appeals No. 283910.

YOUNG-EL v DEPARTMENT OF CORRECTIONS, No. 139740; Court of Appeals No. 292386.

PEOPLE v PATTISON, No. 139804; Court of Appeals No. 284652.

PEOPLE v STEPHEN CAMPBELL, No. 139818; Court of Appeals No. 293016.

PEOPLE v LUTHER WILLIAMS, No. 139821; Court of Appeals No. 280437.

PEOPLE v ANDRE ROBINSON, No. 139829; Court of Appeals No. 293047.

PEOPLE v MARCUS MOORE, No. 139831; Court of Appeals No. 280599.

ALLISON v PAROLE BOARD, No. 139859; Court of Appeals No. 292166.

DF LAND DEVELOPMENT LLC v ANN ARBOR TOWNSHIP, No. 139863; Court of Appeals No. 287400.

PEOPLE v TODD HARDIN, No. 139867; Court of Appeals No. 285639.

PEOPLE v ARTHUR JOHNSON, No. 139876; Court of Appeals No. 285172.

PORTER v DEPARTMENT OF CORRECTIONS, No. 139901; Court of Appeals No. 293349.

HODGES v COLLINS EINHORN FARRELL & ULANOFF, No. 139922; Court of Appeals No. 292640.

BOONE v RIETH-RILEY CONSTRUCTION COMPANY, No. 139928; Court of Appeals No. 285276.

PEOPLE v TERRELL BISHOP, No. 139948; Court of Appeals No. 285483.

PEOPLE v HOUGAS, No. 139951; Court of Appeals No. 293399.

PEOPLE v JAMES WADDELL WILLIAMS, No. 139952; Court of Appeals No. 293318.

DEWARD v PUBLIC SERVICE COMMISSION, No. 139955; Court of Appeals No. 283927.

LANDMARK CONTRACTING COMPANY v ATLANTIS DEVELOPMENT COMPANY, No. 139958; Court of Appeals No. 285779.

RENNY v DEPARTMENT OF TRANSPORTATION, No. 139967; Court of Appeals No. 285039.

PEOPLE v MCCULLUM, No. 139976; Court of Appeals No. 284634.

FORNER v ROBINSON TOWNSHIP BOARD, No. 139977; Court of Appeals No. 287384.

PEOPLE v DAVID EDMUND WALTERS, No. 139981; Court of Appeals No. 292846.

FAVORS v DEPARTMENT OF CORRECTIONS, No. 139992; Court of Appeals No. 292245.

PEOPLE v CHARLES SMELLEY, No. 139995; Court of Appeals No. 293300.

PEOPLE v SHANNON BLACK, No. 140003; Court of Appeals No. 292698.

PEOPLE v LEVITT, No. 140016; Court of Appeals No. 284879.

LASHLEY v F G CHENEY LIMESTONE COMPANY, No. 140026; Court of Appeals No. 292015.

PEOPLE v CARD, No. 140028; Court of Appeals No. 293641.

PEOPLE v CHESTER PATTERSON, No. 140029; Court of Appeals No. 292760. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v MCINTYRE-RODEN, No. 140030; Court of Appeals No. 293731.

PEOPLE v ANTHONY RODRIGUEZ, No. 140034; Court of Appeals No. 286732.

PEOPLE v STEVENSON, No. 140041; Court of Appeals No. 287182.

PEOPLE v BRIAN BROOKS, No. 140043; Court of Appeals No. 293858.

PEOPLE v DHAESE, No. 140048; Court of Appeals No. 284768.
KELLY, C.J., would grant leave to appeal for the reasons set forth in her dissenting statement in *People v Xiong*, 483 Mich 951 (2009).

PEOPLE v BRANDON, No. 140052; Court of Appeals No. 282941.

PEOPLE v ADRIAN BROWN, No. 140053; Court of Appeals No. 293685.

HART v DEPARTMENT OF CORRECTIONS, No. 140059; Court of Appeals No. 286879.

BENNETT v DEPARTMENT OF CORRECTIONS, No. 140063; Court of Appeals No. 294605.

PEOPLE v PATRICK BASKIN, No. 140066; Court of Appeals No. 286878.

PEOPLE v MOOMEY, No. 140067; Court of Appeals No. 293913.

PEOPLE v VANN, No. 140069; Court of Appeals No. 284714.

CHILDRESS v GENERAL MOTORS CORPORATION, No. 140077; Court of Appeals No. 292821.

SUMNER v TENDERCARE MICHIGAN INC, No. 140078; Court of Appeals No. 292883.

PEOPLE v HAROLD THOMAS, No. 140083; Court of Appeals No. 287382.

PEOPLE v CURTIS, No. 140086; Court of Appeals No. 293407.

PEOPLE v MICHAEL WARD, No. 140090; Court of Appeals No. 293296.

PEOPLE v MOORING, No. 140092; Court of Appeals No. 285562.

PEOPLE v MADDIX, Nos. 140094, 140095, and 140096; Court of Appeals Nos. 293918, 293919, and 293920.

PEOPLE v RUTHERFORD, No. 140098; Court of Appeals No. 286330.

PEOPLE v BELTON, No. 140102; Court of Appeals No. 287276.

MARSHALL v SOUTHGATE APARTMENTS LLC, No. 140103; Court of Appeals No. 291480.

CITY OF MACKINAC ISLAND v WEBSTER, No. 140105; Court of Appeals No. 289059.

PEOPLE v MICHAEL DAVIS, No. 140107; Court of Appeals No. 283762.

PEOPLE v KEITH LOMAX, No. 140110; Court of Appeals No. 285954.

PEOPLE v KABIR, No. 140113; Court of Appeals No. 292884.

PEOPLE v GERARD SWAIN, No. 140114; Court of Appeals No. 293572.

PEOPLE v HUSBAND, No. 140119; Court of Appeals No. 293882.

PEOPLE v MARCUS BARNES, No. 140122; Court of Appeals No. 294304.

PEOPLE v JAMES SHELFUANT WILLIAMS, No. 140125; Court of Appeals No. 293653.

PEOPLE v DELMONT, No. 140126; Court of Appeals No. 293761.

PEOPLE v BERGQUIST, No. 140131; Court of Appeals No. 293683.

PEOPLE v DEON DAVIS, No. 140134; Court of Appeals No. 294119.

PEOPLE v JOHNATHAN BROWN, No. 140141; Court of Appeals No. 285830.

MOSHER DOLAN CATALDO & KELLY, INC v FEINBLOOM, No. 140151; Court of Appeals No. 285445.

PEOPLE v BEMER, No. 140152; reported below: 286 Mich App 26.

PEOPLE v FREDERICK DIXON, No. 140155; Court of Appeals No. 285637.

PEOPLE v BRYAN BURRELL, No. 140160; Court of Appeals No. 286009.

PEOPLE v JAKESHA DAVIS, No. 140170; Court of Appeals No. 294060.

PEOPLE v PINGILLEY, No. 140182; Court of Appeals No. 294767.

TRAMMEL v CONSUMERS ENERGY COMPANY, No. 140183; Court of Appeals No. 292912.

SMILES v DEPARTMENT OF CORRECTIONS, No. 140213; Court of Appeals No.293427.

STEVENS v WATTS, No. 140282; Court of Appeals No. 287017.

GALLAGHER-MCCARTHY v MCCARTHY, No. 140306; Court of Appeals No. 292514.

In re SACKETT, Nos. 140372 and 140373; Court of Appeals Nos. 291676 and 291678.

PEOPLE v LYONS, No. 140436; Court of Appeals No. 293161. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

In re FOSTER, Nos. 140443 and 140444; Court of Appeals Nos. 291004 and 291005.

Superintending Control Denied February 26, 2010:

GOLDEN v BOARD OF LAW EXAMINERS, No. 139550.

FINK v ATTORNEY GRIEVANCE COMMISSION, No. 139965.

Reconsideration Denied February 26, 2010:

PEOPLE v BOES, No. 138882; Court of Appeals No. 290345. Leave to appeal denied at 485 Mich 974.

PEOPLE v KITTKA, No. 138890; Court of Appeals No. 290445. Leave to appeal denied at 485 Mich 974.

AUTOALLIANCE INTERNATIONAL, INC v DEPARTMENT OF TREASURY, No. 138929; reported below: 282 Mich App 471. Leave to appeal denied at 485 Mich 866.

PEOPLE v DEANTE HAWKINS, No. 139045; Court of Appeals No. 282483. Leave to appeal denied at 485 Mich 897.

HINZ v ALMY and HINZ v MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES, Nos. 139083 and 139084; Court of Appeals Nos. 285125 and 285126. Leave to appeal denied at 485 Mich 968.

PEOPLE v JOHNICAN, No. 139174; Court of Appeals No. 283952. Leave to appeal denied at 485 Mich 976.

PEOPLE v VICTOR, No. 139364; Court of Appeals No. 291450. Leave to appeal denied at 485 Mich 977.

Leave to Appeal Denied March 5, 2010:

RAAB v RIVER RIDGE-SALINE LLC, No. 139255; Court of Appeals No. 280335.

KELLY, C.J., and HATHAWAY, J., would grant leave to appeal.

PEOPLE v BUIE, No. 139712; Court of Appeals No. 278732. We note, however, that the Court of Appeals relied on an incomplete statement by defense counsel to support its conclusion that defendant did not consent to the use of two-way interactive video testimony under MCR 6.006(C)(2). *People v Buie*, 285 Mich App 401, 417 (2009). Before the first witness testified via video-conferencing, defense counsel stated in full, "I

understand this is this particular courtroom's first attempt at this type of technological proceeding, and my client has—wanted to question the veracity of these proceedings, so I'll leave that to the Court's discretion." Defense counsel made no other statement indicating that defendant objected to the video-conferencing procedure. Because of the nature of the attorney's statement and because the trial court failed to make any findings regarding good cause under MCR 6.006(C), the applications for leave to appeal are denied and the proceedings ordered by the Court of Appeals should take place. In addition to determining whether the use of two-way interactive video technology was necessary to further an important public policy or state interest as ordered by the Court of Appeals, the trial court shall make findings regarding good cause and consent pursuant to MCR 6.006(C).

CORRIGAN, J. (*concurring in part and dissenting in part*). I concur in this Court's order insofar as it clarifies the existing record regarding a statement made by defense counsel, which the Court of Appeals twice mischaracterized in a published opinion. I dissent, however, from the implication that "the nature" of defense counsel's complete statement did not amount to consent under MCR 6.006(C)(2). Because defense counsel plainly consented to the taking of testimony using two-way interactive video technology, I would not expend further judicial resources analyzing the issue during the proceedings on remand.

A jury convicted defendant of two counts of first degree criminal sexual conduct involving a victim under the age of 13,[1] three counts of first degree criminal sexual conduct involving the use of a weapon,[2] and possession of a firearm during the commission of a felony.[3] Defendant appealed, arguing in part that the trial court violated defendant's constitutional right to confront the witnesses against him when it permitted two witnesses, Dr. Vincent Palusci and Dr. Rodney Wolfarth, to testify using two-way interactive video technology. Concluding that the issue was one of first impression, the Court of Appeals remanded the case for an evidentiary hearing to determine whether defendant's Sixth Amendment right to confrontation was violated when the trial court permitted Dr. Palusci and Dr. Wolfarth to testify using two-way interactive video technology as opposed to physically appearing in court.

I concur with this Court's order to the extent that it illuminates the careless mischaracterization of the record by the Court of Appeals. Specifically, the Court of Appeals omitted the complete transcript of defense counsel's statement when it concluded that "[d]efense counsel's statement does not qualify as agreement, approval, or permission; in fact, it indicates that defendant objected to the videoconferencing procedure."[4] I have scrutinized the record. This statement is false. The Court of Appeals twice quoted defense counsel as stating "my client has—

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[1] MCL 750.520b(1)(a).

[2] MCL 750.520b(1)(e).

[3] MCL 750.227b.

[4] *People v Buie*, 285 Mich App 401, 417 (2009).

wanted to question the veracity of these proceedings."[5] However, defense counsel stated, in full, that "I understand this is this particular courtroom's first attempt at this type of technological proceeding, and my client has—wanted to question the veracity of these proceedings, *so I'll leave that to the Court's discretion*." A review of the record reveals that defense counsel never objected to the use of two-way interactive video technology for the taking of Dr. Palusci's and Dr. Wolfarth's testimony.

In light of defense counsel's complete statement, I cannot conclude that "the nature" of that statement manifested anything other than consent. As a threshold matter, the complete statement of defense counsel is "consent" under the Court of Appeals own analysis of the dictionary definition of the term.[6] When defense counsel stated "I'll leave that to the Court's discretion," defendant essentially acquiesced to the taking of testimony using two-way interactive video technology. Defense counsel cannot acquiesce to the court's handling of a matter at trial, only to later raise the issue as an error on appeal.[7] A contrary result would run afoul of the well-established legal principle that a defendant must "raise objections at a time when the trial court has an opportunity to correct the error"[8] and cannot "harbor error as an appellate parachute."[9] Because defense counsel assented to the trial court's use of two-way interactive video technology, I would conclude that defendant plainly consented under MCR 6.006(C)(2) and would foreclose the issue on remand.

Accordingly, I concur in part and dissent in part from this Court's order.

CAUDILL v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 140130; Court of Appeals No. 294951.

KELLY, C.J. (*concurring*). I oncur in the Court's order denying defendant's interlocutory application for leave to appeal. This case involves a lengthy and contentious dispute over discovery. Defendant argues that the trial judge lacked any authority to appoint a master to help manage discovery. A master was appointed in March 2009. In a later order, the judge stated that the master's purpose was to "assist and promote a mutually acceptable settlement of discovery disputes" and made clear that the master had "no authoritative decision making power." The master was merely to make recommendations to the trial court.

Defendant filed a motion for clarification on April 22, 2009. It questioned how the discovery master would be compensated and by what

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[5] *Buie,* 285 Mich App at 407, 417.

[6] As the Court of Appeals acknowledged, MCR 6.006 does not define the term "consent," but Black's Law Dictionary (8th ed) defines the term as "[a]greement, approval, or permission as to some act or purpose, esp. given voluntarily by a competent person; legally effective assent." *Buie,* 285 Mich App at 417.

[7] See *People v Fetterley*, 229 Mich App 511, 520 (1998).

[8] *People v Grant*, 445 Mich 535, 551 (1994).

[9] *People v Carter*, 462 Mich 206, 214 (2000).

authority the master was appointed. A hearing on the motion was scheduled for July 15, 2009, but no oral argument was placed on the record. Instead, the parties agreed to the entry of an order stating that defendant would produce a chart or grid listing certain documents that plaintiff had requested. The order specified that it would be entered under a protective order of the trial court and was for use by plaintiff only. Defendant did not push for a resolution of its motion regarding the authority for appointment of the master. Instead, over the next months, defendant conducted active discovery and behaved as if it had accepted the master's appointment. It scheduled twenty-nine depositions, started sixteen, and completed fifteen.

In the meantime, defendant never produced the grid as agreed. When this was brought to the trial judge's attention on August 12, 2009, the judge entered an order requiring defendant to produce the grid within 21 days. Defendant did not produce the grid within 21 days. Instead, it sent plaintiff's attorney a letter and a proposed protective order governing the production of the grid. Plaintiff's counsel refused to sign it because, he asserted, the July 15, 2009, order was a protective order.

The matter went before the trial judge once again on September 30, 2009. The judge agreed with plaintiff that a protective order was already in place and again ordered defendant to produce the grid. Defendant failed to produce it. On October 7, 2009, plaintiff filed a motion for entry of a default based on defendant's failure to produce documents, including the grid, as ordered by the court. At that time, defendant filed a renewed motion for clarification and/or to strike the order appointing the discovery master.

The trial judge seemed displeased with defendant's delays in making discovery and with its repeated violations of the court's orders. In an October 27, 2009, order, the judge found that defendant had "blatantly ignored" three discovery orders and assessed costs and sanctions against it in the amount of $1,500. Finding it "noteworthy that Defendant's request for clarification and/or to strike comes nearly six months following the appointment of a discovery master[,]" the court denied defendant's motion.

I concur in this Court's decision to deny defendant's interlocutory application for appeal. Defendant seems intent on obstructing the discovery process. It waited nearly six months after the appointment of the discovery master to ask the trial court to resolve whether it had authority to appoint the master. That occurred only after it grew dissatisfied with the way discovery was proceeding. Thus, it appears that defendant waived its objection to the trial court's authority to make the appointment. This Court properly declines to allow defendant to harbor the alleged error until after it became dissatisfied with an adverse ruling.[1]

CORRIGAN, J. (*dissenting*). I dissent from the Court's order denying defendant's application for leave to appeal in what should be a routine first-party no-fault case. Plaintiff apparently engaged in abusive discovery tactics that the trial court did not control. Instead, the trial court

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[1] See *Mitan v New World Television, Inc*, 469 Mich 898 (2003).

delegated its judicial power to a discovery master to review a request for 77,000 pages of documents and make recommendations to the court. The trial court lacked this authority. *Carson Fischer Potts and Hyman v Hyman*, 220 Mich App 116 (1996). Moreover, defendant's objection to the appointment of the master was timely. Finally, the wrongful appointment of a discovery master cannot be corrected after final judgment. Accordingly, I would remand to the Court of Appeals for consideration as on leave granted.

Plaintiff filed this first-party no-fault claim against defendant State Farm, his no-fault insurer, after he was injured in an automobile accident on March 23, 1994. During discovery, plaintiff asked defendant to produce its ACE (Advanced Claims Excellence) program documents. The parties do not describe in detail what types of documents this includes, but the requested material amounts to approximately 77,000 pages of documents. After defendant failed to timely produce the documents, plaintiff moved to compel production of the documents. Defendant responded by moving to strike and seeking a protective order. It objected to the lack of any limitation on the request for production of the ACE documents, and to plaintiff's request for the production of defendant's general claims memos, Auto Claims Manual, and for the personnel files of its employees. On March 18, 2009, after a hearing, the trial court entered a handwritten order stating, "Mark Frankel is hereby appointed special discovery master in this case." On March 30, 2009, the court entered a more detailed order appointing Mark Frankel discovery master, directing him to review the disputed documents *in camera*, and then report to the court with recommendations.

On April 22, 2009, defendant moved for clarification of the trial court's authority to appoint a discovery master. Defendant also pointed out that the order omitted any direction that the discovery master must keep the documents confidential. A hearing on the motion was scheduled for July 15, 2009, but the parties instead agreed to the following order:

> The Court defers hearing on the motion, and because of the volume of the records, Defendant shall produce a chart or grid of potential Michigan ACE documents for Plaintiff's review; and the chart or grid shall be issued under the protective order of this Court, only by and for use of this Plaintiff, only, and not to be revealed to any other parties; and the parties will discuss and present the documents generated to the Court, if agreement cannot be reached.

The parties' attorneys disagree about the nature of the discussions surrounding agreement on this order. Defense counsel claims that the parties discussed the need for a separate protective order. Plaintiff's counsel claims that defense counsel drafted the July 15, 2009, order and said that defendant would produce the grid in about a week.

At an August 12, 2009, hearing on other discovery matters, the trial court learned that defendant had not yet produced the grid. An order entered on that date requiring defendant to produce the grid within 21 days. Instead of producing the grid, defense counsel submitted a proposed protective order concerning production of the grid to plaintiff's counsel.

Plaintiff's attorneys contended that the July 15, 2009, order was a protective order and refused to sign defendant's proposed protective order.

On September 15, 2009, defendant moved for clarification regarding whether the court's previous orders contemplated a separate protective order. After a hearing on September 30, 2009, the court ordered that "[t]he order previously entered as a result of State Farm's earlier Motion for Clarification shall be the protective order" but "with the following addition:" that all documents and any copies were to be returned to defendant within 60 days of the termination of the action, along with an affidavit of plaintiff indicating compliance with the protective order.

On October 7, 2009, plaintiff moved for entry of a default on the basis of defendant's failure to comply with the court's orders to produce documents including the ACE grid. Defendant filed a renewed motion for clarification on the same day, arguing that the trial court lacked the authority to appoint a discovery master. On October 27, 2009, the trial court denied plaintiff's motion for entry of a default, denied defendant's motion to strike the order appointing the discovery master, and assessed $1500 in sanctions against defendant. The court also ordered the parties to share the costs of the discovery master on a pro rata basis.

On November 3, 2009, defendant produced the ACE grid. The grid is a 31-page list of 930 documents consisting of over 77,000 pages.

On November 6, 2009, defendant applied for leave to appeal in the Court of Appeals, which was denied for failure to persuade the court of the need for immediate appellate review. After defendant sought leave to appeal in this Court, the trial court stayed the trial court proceedings while this application for leave to appeal is pending, but the trial court also scheduled a status conference for January 29, 2010, in order to reconsider the stay order.

In an introductory section of its application entitled "The Setup," defendant claims that plaintiff's request for documents is part of a plan that "involves using the discovery process primarily as a vehicle for discrediting one's opponent, and possibly obtaining a default so as to avoid having to try a weak case." Defendant claims that this tactic was used against it in a federal case by a law firm with whom plaintiff's attorneys share office space. Defendant also contends that three prior cases were filed in Oakland Circuit Court on behalf of plaintiff by the same law firm or its predecessors.[1] According to defendant, plaintiff's claims file is approximately 8,600 pages.

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[1] A review of Oakland County Circuit Court records confirms that plaintiff filed three prior no-fault cases against defendant in that court and that the same attorney represented plaintiff in all three lawsuits. 1994-478680-NF, 1996-522795-NI, 1998-007489-NF. In all three lawsuits, plaintiff claimed that defendant failed to pay the full amount of no-fault benefits to which he was entitled under his policy with defendant for injuries arising out of the same March 23, 1994, automobile accident. In one motion filed in the 1998 lawsuit, plaintiff claimed, "Defendant has at all times failed and refused to pay attendant care benefits for all hours

I dissent from this Court's decision to deny defendant's interlocutory application for leave to appeal. First, controlling case law supports defendant's argument that the trial court had no power to appoint a discovery master. In *Carson*, 220 Mich App at 121, the trial court authorized an expert witness to "make findings of fact, conclusions of law and a final recommendation and proposed judgment as to the disposition of this matter . . . ." The Court of Appeals concluded that the trial court's delegation of power violated the Michigan Constitution:

> The judicial branch is provided for in article 6 of our state constitution. Const. 1963, art. 6, § 1 provides:
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> The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.
>
> Further, Const. 1963, art. 6, § 27 provides:
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> The supreme court, the court of appeals, the circuit court, or any justices or judges thereof, shall not exercise any power of appointment to public office except as provided in this constitution.
>
> In Michigan, judicial power is vested in the courts under our state constitution. *Johnson v Kramer Bros Freight Lines, Inc*, 357 Mich. 254, 258; 98 NW2d 586 (1959). Although the Supreme Court is empowered by the Michigan Constitution to authorize persons who have been elected and have served as judges to perform judicial duties for limited periods or specific assignments, Const. 1963, art. 6, § 23, there are no constitutional or statutory authorities permitting a circuit court judge the power to appoint a retired judge or any other person to sit as a court in a civil action. *Brockman v Brockman*, 113 Mich App 233, 237; 317 NW2d 327 (1982). Rather, Const. 1963, art. 6, § 27 specifically prohibits such action. In *Brockman*, this Court held that a Wayne Circuit Court judge was without constitutional or statutory authority to appoint a former circuit court judge to sit as the court and try the matter. *Id*., p 237. [*Carson*, 220 Mich App at 119-120.]

Thus, the Court of Appeals "agree[d] with [the] defendant that there is no constitutional authority for the trial court to delegate specific judicial functions to an 'expert witness.' " *Id*. at 121.

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required by Plaintiff at reasonable market rates, requiring Plaintiff to bring suit against Defendant on three separate occasions, including the current litigation, all terminating in the past in Defendant's ultimate payment of additional attendant care benefits on the eve of trial." Each of the three lawsuits was resolved by stipulation of the parties to orders of dismissal without prejudice pursuant to three separate release agreements.

In *Galba v Macomb Co Circuit Judge*, unpublished opinion per curiam of the Court of Appeals, issued February 14, 1997 (Docket No. 194185), the Court of Appeals panel followed *Carson* and held that the trial court lacked the authority to appoint a special master to decide a discovery dispute.

The Court of Appeals also followed *Carson* in *Oakland Co Prosecutor v Beckwith*, 242 Mich App 579 (2000). The *Beckwith* court noted that neither MRE 706, cited by the trial court in *Carson*, nor MCR 1.105, cited by the trial court in *Beckwith*, expressly authorizes the appointment of a special master. *Id*. at 584. In addition, in both cases, the special master's findings and conclusions were to be *recommendations* to the trial court. *Id*. The *Beckwith* court noted, however, that were it not bound by MCR 7.215(H) to follow *Carson*, it "would hold [that] the circuit court possesses the requisite, albeit implicit, authority to appoint a special master as long as the assigned duties do not unduly intrude on the exclusive domain of the court to perform judicial functions." *Id*. See also *Lindhout v Ingersoll*, 58 Mich App 446, 453 (1975) ("The repeal of the general statute and court rule [authorizing a court to appoint a referee in certain cases] and the specific inclusion of the power in other statutes lead this Court to the conclusion that a referee may be appointed in actions at law only where there is specific statutory authority therefor.")

In *Mitan v New World Television, Inc*., 469 Mich 898 (2003), this Court reversed an unpublished Court of Appeals decision following *Carson*, but we limited our order to the circumstances of that case, where the plaintiffs "requested the appointment of a special master to make recommendations on discovery issues," and failed to "raise[] issues regarding the appropriateness of that procedure in the circuit court," yet raised several claims of error regarding the appointment of the special master in the Court of Appeals.

Second, the trial court provided no express authority for its order appointing a discovery master. MCR 2.401(C)(1) provides a non-comprehensive list of matters that the court and the attorneys for the parties "may consider" at a pretrial conference. MCR 2.410(A)(1) simply states that all civil cases are subject to alternative dispute resolution processes. MCR 2.410(C), which the court did not cite, provides that "[a]t any time, *after consultation with the parties*, the court may order that *a case be submitted to an appropriate ADR process*." MCR 2.410(A)(2), which the court also did not acknowledge, provides that "[f]or the purposes of this rule, alternative dispute resolution (ADR) means any process designed to resolve a legal dispute *in the place of court adjudication* . . . ." (Emphasis added.) The trial court's appointment of a discovery master does not fall under these court rules. The trial court did not "submit[]" the "case" to an ADR process "after consultation with the parties," and the appointment of the discovery master to make recommendations was not "designed to resolve a legal dispute in the place of court adjudication." And although the court's opinion characterized the discovery master's intended role as one of facilitator or mediator, nothing its March 30, 2009, order appointing the discovery master suggested such a role. Instead, that order described the "task/mission" of the discovery master as "conducting an in camera review"

of several specific documents and "report[ing] back to the Court with his recommendations regarding Defendant's production of said documents to Plaintiff's counsel."

Third, in 1999, this Court considered and declined to publish for public comment a proposed court rule that would have authorized the use of discovery masters in trial courts. Administrative File No. 97-56. In a letter dated June 19, 1998, the Michigan Judges Association commented on the proposal as follows:

> The reasons for the opposition are we think that this shifts a judicial function from judicial officers to attorneys. The proposal as submitted has a de novo review standard in it so that it appears there is a high potential for duplicative efforts. There are concerns with equal justice, that is this might be utilized by individuals who are more financially capable of using the process than others, thus creating the potential for an appearance of two standards of justice. There are enough remedies available in the court rules to resolve discovery disputes. Many judges feel that by resolving these discovery disputes they have a better feel for the case as it progresses through the docket and helps them to manage the flow of the cases on their docket. The entire process seems to be duplicative of that which is available to litigants.

Fourth, this matter is appropriate for appellate review because, unlike the objecting party in *Mitan*, *supra*, defendant raised and preserved its objection to the appointment of the discovery master in the trial court, and the court addressed defendant's argument in its October 27, 2009, opinion. Defendant preserved its objection to the appointment of the special master by seeking clarification of the trial court's authority to appoint the special master in its motion of April 22, 2009. The court's July 15, 2009, order deferred hearing on defendant's motion, and apparently on any role for the discovery master, pending an attempt by the parties' attorneys to reach an agreement on the ACE documents. After delays in the production of the ACE grid stemming at least in part from disputes over the need for a protective order, defendant renewed its motion for clarification and moved to strike the order appointing the discovery master. Under the circumstances, defendant adequately preserved its objection to the appointment of the special master. The trial court considered the objection sufficiently preserved and addressed defendant's argument that the court lacked the authority to appoint a discovery master in its October 27, 2009, opinion. Moreover, there is no reason to defer appellate review of this issue until the trial court renders its final judgment. An error in the appointment of the discovery master cannot be corrected after discovery is complete.

Fifth, I question the appropriateness of the trial court's decision to assess $1500 in sanctions against defendant. The trial court concluded in its October 27, 2009, opinion that defendant was "subject to a full spectrum of sanctions per the Michigan Court Rules" because it had "blatantly ignored" the court's orders entered on July 15, 2009, August 12, 2009, and September 30, 2009. I agree with defendant that this is an inaccurate description of what occurred. As previously discussed, there

was disagreement over whether the July 15, 2009, order contemplated a separate protective order. And while defendant did not produce the grid within the 21 days required by the August 12, 2009, order, it did send plaintiff's attorneys a proposed protective order within that time frame.

The trial court also mischaracterized the September 30, 2009, hearing and order in its October 27, 2009, opinion:

> During the September 30, 2009 hearing date, the Court stated from the bench that Defendant must immediately turn over the ACE grid documents to Plaintiff's counsel. The September 30, 2009 order also reflected that the ACE grid documents must be turned over forthwith.

As defendant correctly points out, the September 30, 2009, hearing and order merely clarified that, despite defendant's request for one, no separate protective order would be entered. Moreover, given the apparently proprietary nature of the requested information, defendant's insistence on a more detailed protective order seems reasonable. Defendant produced the grid only after the trial court entered the October 27, 2009, opinion and order, which threatened additional sanctions including entry of a default judgment if defendant did not produce the ACE grid within 7 days.

Finally, plaintiff has apparently engaged in abusive discovery tactics in this case. The grid defendant has now produced shows that the materials plaintiff has requested in this routine no-fault case amount to approximately 77,000 pages of documents—and this accounts only for the Michigan ACE documents. Plaintiff apparently initially requested defendant's *nationwide* ACE documents, the personnel files of defendant's employees, all of defendant's general claim memos, and defendant's Auto Claims Manual. The relevance of these documents in a routine no-fault case is unclear. The trial court's attempt to control discovery by appointing a discovery master was both inadequate and contrary to binding Court of Appeals case law.[2] By denying defendant's application for leave to appeal, this Court allows the trial court's abuse of discretion to stand and plaintiff's unacceptable discovery tactics to continue.

YOUNG and MARKMAN, JJ., joined the statement of CORRIGAN, J.

Superintending Control Denied March 5, 2010:

COLBERT-OSAMUEDE v ATTORNEY GRIEVANCE COMMISSION, No. 140622.

Summary Disposition March 11, 2010:

NEWELL v ALLAN, No. 139766; Court of Appeals No. 285086. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse

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[2] I also question whether it was appropriate for the trial court to order the parties to share the cost of the discovery master when it was plaintiff's massive discovery request that generated the perceived need for the discovery master.

part of the judgment of the Court of Appeals that reversed in part the summary disposition order of the Oakland Circuit Court. There was sufficient information in the search warrant affidavit to establish probable cause to issue the warrant even if the allegedly false statements are excluded. Because the warrant was therefore valid, see *Franks v Delaware,* 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978), and *People v Reid,* 420 Mich 326; 362 NW2d 655 (1984), in this case, the Court of Appeals erred in reversing the trial court's dismissal of the false arrest/false imprisonment claim against defendant Allan.

PEOPLE v GRUBBS, No. 139828; Court of Appeals No. 293169. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for correction of the judgment of sentence to reflect 33 days' sentence credit for the defendant's manslaughter sentence. The circuit court shall forward a copy of the amended judgment of sentence to the Department of Corrections.

Leave to Appeal Denied March 11, 2010:

PEOPLE v KNIGHT, No. 139057; Court of Appeals No. 289334. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

THOMPSON v CARROLTON TOWNSHIP POLICE DEPARTMENT, Nos. 139261 and 139262; Court of Appeals Nos. 283772 and 283785.

KELLY, C.J. and HATHAWAY, J., would grant leave to appeal.

PEOPLE v CRUMP, No. 139322; Court of Appeals No. 290369. Defendant's motion for relief from judgment is a successive motion that is prohibited by MCR 6.502(G). We note, however, that the Court of Appeals erred in dismissing the defendant's application for leave to appeal for failure to file a transcript of jury instructions because the defendant waived his right to a jury trial and was tried before a circuit judge.

PEOPLE v BUGGS, No. 139429; Court of Appeals No. 279550.

KELLY, C.J., would grant leave to appeal.

PEOPLE v JERRY WALKER, No. 139588; Court of Appeals No. 279715.

KELLY, C.J., would grant leave to appeal.

PEOPLE v PINKNEY, No. 139614; Court of Appeals No. 282144.

PEOPLE v ERIC BROOKS, No. 139773; Court of Appeals No. 282355.

PEOPLE v BRIAN YOUNG, No. 139779; Court of Appeals No. 293106.

Summary Disposition March 12, 2010:

BERKEYPILE v WESTFIELD INSURANCE COMPANY, No. 137353; reported below: 280 Mich App 172. Pursuant to MCR 7.302(H)(1), in lieu of

granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the Jackson Circuit Court's order granting summary disposition to defendant Westfield Insurance Company. The Court of Appeals erred by not considering paragraph E(1)(a) of the policy's uninsured motorist coverage, which provides that "[i]f there is other applicable insurance available under one or more policies or provisions of coverage . . . [t]he maximum recovery under all coverage forms or policies combined may equal but not exceed the highest applicable limit for any one vehicle under any coverage form or policy providing coverage on either a primary or excess basis." This provision limits the insured's maximum recovery to the highest policy limit of any single policy available. In the instant case, the highest policy limit of any single policy available was $300,000, the limit of both the Parshall and the Westfield policies. Because plaintiff recovered a total of $332,500 in settlements with the underinsured drivers, an amount higher than the highest policy limit of any single policy available, plaintiff is not entitled to additional recovery under the Westfield policy's uninsured motorist coverage. Furthermore, the Court of Appeals erred by ruling that paragraph A(2) of the policy does not apply to this case. Paragraph A(2) of the policy applies whenever there is an "accident" with an "underinsured motor vehicle," as that term is defined in paragraph F(3)(b) of the policy, even if, as in this case, there are multiple uninsured and underinsured vehicles involved and the insured asserts claims against the drivers of the uninsured and underinsured vehicles in separate actions. Because the accident in this case involved underinsured motor vehicles included in the definition of uninsured vehicles under paragraph F(3)(b) of the policy, paragraph A(2) applies here.

KELLY, C.J., and HATHAWAY, J., would deny leave to appeal.

WEAVER, J., would grant leave to appeal.

Request to Answer Certified Question Granted March 12, 2010:

In re CERTIFIED QUESTION (WAESCHLE V OAKLAND COUNTY MEDICAL EXAMINER), No. 140263. The question certified by the United States District Court for the Eastern District of Michigan is considered, and the request to answer the question is granted. If the parties wish to file further briefs, they must be prepared in conformity with MCR 7.306 through 7.309.

The motion for leave to file a brief amicus curiae is granted. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

WEAVER, J. (*dissenting*). I dissent from the order granting the request of the United States District Court for the Eastern District of Michigan for an answer to the question, because I continue to question this Court's constitutional authority to hear questions certified by other courts.[1]

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[1] See, e.g., *In re Certified Questions (Melson v Prime Ins Syndicate, Inc)*, 472 Mich 1225 (2005) (WEAVER, J., concurring); *In re Certified Question (Wayne Co v Philip Morris Inc)*, 622 NW2d 518 (2001) (WEAVER,

Justice YOUNG[2] and Justice LEVIN[3] have also questioned this Court's authority to answer certified questions. Therefore, I would decline to answer the question in this case.

YOUNG, J. (*dissenting*). I would decline to answer the certified question. I continue to adhere to my stated position in *In re Certified Question (Wayne Co v Philip Morris Inc)*, 622 NW2d 518 (Mich, 2001), that this Court lacks the authority under state law to answer certified questions. However, this position has failed to carry the day. See Proposed Amendment of MCR 7.305, 462 Mich 1208 (2000). As the final arbiter of state law, this Court has concluded that it has the authority to answer certified questions. Accordingly, while this Court may exercise that authority, I will exercise careful discretion before answering any certified question. I would decline to answer the question in this instance.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal March 12, 2010:

PEOPLE v GAYHEART, No. 139664; reported below: 285 Mich App 202. At oral argument, the parties shall address whether the defendant preserved the issue regarding jurisdiction, in light of the proceedings in the trial court on October 11, 2007, during which the defendant, in the presence of his counsel, agreed to the jurisdiction of the trial court to hear this case. The parties may file supplemental briefs within 42 days of the appointment of appellate defense counsel, but they should not submit mere restatements of their application papers.

PEOPLE v CAMP, No. 139984; Court of Appeals No. 285101. At oral argument, the parties shall address whether the Court of Appeals was correct in ruling that the defendant did not consent to the mistrial and that the mistrial was not supported by manifest necessity. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v SZALMA, No. 140021; Court of Appeals No. 285632.

J., dissenting); Proposed Amendment of MCR 7.305, 462 Mich 1208 (2000) (WEAVER, C.J., dissenting); *In re Certified Question (Kenneth Henes Special Projects Procurement, Marketing & Consulting Corp v Continental Biomass Industries, Inc)*, 468 Mich 109, 121 (2003) (WEAVER, J., concurring).

[2] See *In re Certified Question* (*Wayne Co v Philip Morris Inc*), 622 NW2d 518 (2001) (YOUNG, J., concurring).

[3] See *In re Certified Question* (*Bankey v Storer Broadcasting Co*), 432 Mich 438, 462-471 (1989) (separate opinion by LEVIN, J.).

Application for Leave to Appeal Dismissed on Stipulation March 12, 2010:

ALLEN v BLOOMFIELD HILLS SCHOOL DISTRICT, No. 137607; reported below: 281 Mich App 49. On order of the Chief Justice, a stipulation signed by counsel for the parties agreeing to the dismissal of this application for leave to appeal is considered, and the application for leave to appeal is dismissed with prejudice and without costs.

Summary Disposition March 19, 2010:

PEOPLE v HERCULES-LOPEZ, No. 139537; Court of Appeals No. 280887. On March 10, 2010, the Court heard oral argument on the application for leave to appeal the June 30, 2009, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we remand this case to the Court of Appeals for consideration of the issues raised by the defendant but not addressed by that court during its initial review of this case. The application for leave to appeal as cross-appellant is denied, because we are not persuaded that the question presented should be reviewed by this Court.

KELLY, C.J., and CAVANAGH, J., would deny the application for leave to appeal.

Summary Disposition March 24, 2010:

PEOPLE v HAIRSTON, No. 139845; Court of Appeals No. 291906. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

KELLY, C.J., would grant leave to appeal.

Leave to Appeal Granted March 24, 2010:

ABAY v DAIMLERCHRYSLER INSURANCE COMPANY, No. 139725; Court of Appeals No. 283624. The parties shall include among the issues to be briefed: (1) whether the insurance policy issued by DaimlerChrysler Insurance Company is ambiguous, and (2) whether the insurance policy violates any provisions of the no-fault act, MCL 500.3101 *et seq*. The motion for leave to file brief amicus curiae is granted.

SINGER v SREENIVASAN, No. 139799; Court of Appeals No. 284575. The parties shall include among the issues to be briefed: (1) whether the Court of Appeals erred when it upheld the trial court's award of a "reasonable attorney fee" under MCR 2.403(O)(6) that was based on an hourly rate that was higher than the rate that the defendants were actually billed; (2) whether the Court of Appeals erred when it held that the reference to "costs" in the second sentence of MCR 2.403(O)(1) relates to the "actual costs" that are referred to in the first sentence of that subrule and that are defined in MCR 2.403(O)(6)(b) as including a

"reasonable attorney fee"; and (3) whether, in light of the analysis of the second issue, the plaintiff was entitled to costs under MCR 2.625.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal March 24, 2010:

JANSON v SAJEWSKI FUNERAL HOME, INC, No. 140071; reported below: 285 Mich App 396. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

Leave to Appeal Denied March 24, 2010:

SCHAENDORF v CONSUMERS ENERGY COMPANY, No. 138673; Court of Appeals No. 281001.

PEOPLE v VANCAMP, No. 138761; Court of Appeals No. 281739.

KELLY, C.J., would grant leave to appeal.

PEOPLE v GOODMAN, No. 139076; Court of Appeals No. 290120. The defendant's attorney acknowledges that the delay in filing the defendant's May 23, 2005, application for leave to appeal in COA No. 262929 was due to the attorney's erroneous calculation of the appellate filing deadline, and he admits his sole responsibility for the error. Accordingly, the defendant had been deprived of his direct appeal as a result of constitutionally ineffective assistance of counsel. See *Roe v Flores-Ortega*, 528 US 470, 477; 120 S Ct 1029; 145 L Ed 2d 985 (2000); *Peguero v United States*, 526 US 23, 28; 119 S Ct 961; 143 L Ed 2d 18 (1999). For purposes of MCR 6.502(G)(1), the Court notes that the defendant's January 30, 2009, application for leave to appeal was properly denied under the standard applicable to direct appeals.

Costs are imposed against attorney Joseph L. Stewart, only, in the amount of $250, to be paid to the clerk of this Court.

VUSHAJ v FARM BUREAU GENERAL INSURANCE CO, No. 139099; reported below: 284 Mich App 513.

PEOPLE v JOSEPH PATTON, No. 139684; reported below: 285 Mich App 229.

CHAPA v CITY OF DETROIT, No. 139763; Court of Appeals No. 293079.

PEOPLE v EGE, No. 139810; Court of Appeals No. 284096.

CITIZENS INSURANCE COMPANY OF AMERICA v RIPPY, No. 139888; Court of Appeals No. 284510.

TYSON v UNIVERSITY OF MICHIGAN REGENTS, No. 139897; Court of Appeals No. 285068.

KELLY, C.J., and HATHAWAY, J., would grant leave to appeal.

PEOPLE v MALONE, No. 139910; Court of Appeals No. 289151.

MANESS v CARLETON PHARMACY, No. 139994; Court of Appeals No. 287486.

KELLY, C.J., would grant leave to appeal.

PEOPLE v RANDY ADAMS, No. 140042; Court of Appeals No. 293405.

In re CV (CUNNINGHAM v DEPARTMENT OF HUMAN SERVICES), No. 140216; Court of Appeals No. 290439.

KELLY, C.J., would grant leave to appeal.

Reconsideration Denied March 24, 2010:

MYERS v MUFFLER MAN SUPPLY COMPANY, No. 137608. Leave to Appeal denied at 485 Mich 1015. Court of Appeals No. 277542.

Summary Disposition March 26, 2010:

PEOPLE v KELLER, No. 139133; Court of Appeals No. 289973. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration of the defendant's January 20, 2009, application for leave to appeal under the standard applicable to direct appeals. The defendant's former appellate counsel acknowledges that he failed to file an application for leave to appeal from the defendant's plea-based conviction. Accordingly, the defendant was deprived of his direct appeal as a result of constitutionally ineffective assistance of counsel. See *Roe v Flores-Ortega*, 528 US 470, 477; 120 S Ct 1029; 145 L Ed 2d 985 (2000); *Peguero v United States*, 526 US 23, 28; 119 S Ct 961; 143 L Ed 2d 18 (1999).

Costs are imposed against the defendant's former appellate attorney, only, in the amount of $250, to be paid to the Clerk of this Court.

We do not retain jurisdiction.

CORRIGAN, J. (*concurring*). I concur in the order requiring the Court of Appeals to reconsider the defendant's application for leave to appeal because he was deprived of the effective assistance of appellate counsel. I would also refer his appellate attorney, David M. Hartsook, to the Attorney Grievance Commission to investigate Hartsook's failure to successfully pursue the appeal.

Leave to Appeal Denied March 26, 2010:

LIGHTHOUSE PLACE DEVELOPMENT LLC v MOORINGS ASSOCIATION, No. 139015; Court of Appeals No. 280863. Leave to Appeal Granted at 485 Mich 914. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of October 16, 2009. The application for leave to appeal the April 28, 2009, judgment of the Court of Appeals is denied, because we are

no longer persuaded that the questions presented should be reviewed by this Court. The motion for attorney fees in this Court is denied.

CORRIGAN, J. (*concurring in part and dissenting in part*). I agree with the denial of the plaintiff's motion for attorney fees in this Court. I respectfully dissent, however, from the Court's decision to vacate its prior order granting leave and to deny the defendant's application for leave to appeal altogether. For the reasons stated in the Court of Appeals dissenting opinion, I would reverse that part of the Court of Appeals judgment affirming the Berrien Circuit Court's judgment and award of $146,550 to the plaintiff as special damages for attorney fees related to the litigation of its slander of title claim.

LEE v DETROIT MEDICAL CENTER, Nos. 139807 and 139814; reported below: 285 Mich App 51.

CORRIGAN, J. (*dissenting*). I would grant leave to appeal the jurisprudentially significant Court of Appeals opinion in this case. First, as Justice MARKMAN observes, the Court of Appeals majority concluded that a hospital may be held vicariously liable for a doctor's failure to report suspected abuse or neglect under the Child Protection Law, MCL 722.623 and MCL 722.633. Because MCL 722.623 created a new statutory duty to report suspected abuse or neglect, defendants make a good argument that the Child Protection Law provides exclusive remedies for violation of the duty. See e.g. *Monroe Beverage Co v Stroh Brewery Co, Inc,* 454 Mich 41, 45 (1997), quoting *Lafayette Transfer & Storage Co v Public Utilities Comm,* 287 Mich 488, 491 (1939) (" '[W]here a statute gives new rights and prescribes new remedies, such remedies must be strictly pursued; and a party seeking a remedy under the act is confined to the remedy conferred thereby and to that only.' "). Under the Child Protection Law, only individuals, not institutions, are required to report. MCL 722.623(1). And only a "person who is required . . . to report an instance of suspected child abuse or neglect and who fails to do so" is liable for resulting civil damages, MCL 722.633(1).[1] Accordingly, I question whether an institution may be held liable for a reporting violation.

Second, the Court of Appeals held that a complaint against physicians for alleged failure to report abuse sounds in ordinary negligence rather than medical malpractice. But, as the dissenting Court of Appeals judge aptly explained, doctors use medical judgment to determine whether a child has been abused and, therefore, whether abuse should be reported. Accordingly, a doctor often will have "reasonable cause to suspect child abuse" that triggers the reporting requirement, MCL 722.623(1)(a), on the basis of different facts and knowledge than would a layperson who is required to report abuse pursuant to the statute. Thus, although laypersons may be held to ordinary negligence standards when they fail to report potential abuse, when a doctor fails to report his medical expertise is called directly into question.

This case illustrates the point well. Here, the subject child had marks on his skin that appeared to be *either* scars from a skin condition

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[1] Such a person is also guilty of a misdemeanor if he "knowingly" fails in his duty to report. MCL 722.633(2).

(eczema) *or* bruises. Thus, the defendant doctors were required to determine, based on their medical expertise, whether the marks resulted from a mere skin condition or might indicate bruising caused by abuse. Although such marks might appear to be bruises to a layperson who is not medically trained—thus creating a reasonable suspicion of abuse—a reasonable doctor might *not* expect abuse if, on the basis of his medical expertise, he concludes that the marks are eczema scars. Conversely, under other facts, a child might exhibit symptoms that would not cause a layperson to suspect abuse but that a doctor should recognize as the likely result of trauma.

Thus, this case involves jurisprudentially significant issues that present difficult questions of law, as is illustrated by the split decision in the Court of Appeals. Accordingly, I would grant leave to appeal in order to consider these issues with the aid of full briefing and oral arguments.

YOUNG, J., joined the statement of CORRIGAN, J.

MARKMAN, J. (*dissenting*). I respectfully dissent from the order denying defendants' application for leave to appeal. Because the issues presented are jurisprudentially significant, in my judgment, I would grant leave to appeal.

The Child Protection Law, MCL 722.623 requires individuals of various professions, including physicians, who have "reasonable cause to suspect child abuse or neglect" to report such abuse or neglect to the Family Independence Agency. MCL 722.633(1) imposes civil liability on any "person who is required . . . to report an instance of suspected child abuse or neglect and who fails to do so . . . ." Specifically at issue here is: (a) whether a claim against a physician based on a violation of the statute sounds in medical malpractice or ordinary negligence; and (b) whether a hospital may be subject to vicarious liability under the statute. In what are clearly thoughtful majority and dissenting opinions, the Court of Appeals held that a claim based on the Child Protection Law sounds in ordinary negligence and that vicarious liability is applicable.

CORRIGAN, J., joined the statement of MARKMAN, J.

In re DP, Nos. 140720 and 140721; Court of Appeals Nos. 293132 and 293133.

Summary Disposition March 29, 2010:

PEOPLE v FELICIANO, No. 139701; Court of Appeals No. 290956. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for entry of an amended judgment of sentence. The 15- to 20-year sentences for burning of personal property with a value of $20,000 or more, receiving and concealing stolen property, and disinterment or mutilation of a human body violate the two-thirds rule of *People v Tanner*, 387 Mich 683, 690 (1972); MCL 769.34(2)(b). The minimum term for an indeterminate sentence may not exceed two-thirds of the maximum, even for a third habitual offender. *People v Wright*, 432 Mich 84, 85-86, 88-90 (1989); MCL 769.34(2)(b). When a court imposes an indeterminate sentence that violates this rule, and the maximum sentence is otherwise valid, it is the minimum

sentence that must be adjusted because this is the portion of the sentence that is unlawful. *People v Thomas*, 447 Mich 390, 392-394 (1994). Because the statutory maximum, as elevated by the habitual offender statute, MCL 769.11(1)(b), for each of these three offenses is 20 years, the longest minimum sentence defendant could receive is 13 years 4 months. See MCL 750.74(1)(d)(*i*), MCL 750.535(2)(a), and MCL 750.160. The Judgment of Sentence is to be amended accordingly. In all other respects, leave to appeal is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). We do not retain jurisdiction.

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

PEOPLE v HIESTER, No. 139563; Court of Appeals No. 292127. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Muskegon Circuit Court to determine whether sentence credit should be granted under MCL 769.11b for the time that the defendant was incarcerated during the extradition process prior to his return to Michigan. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

Leave to Appeal Denied March 29, 2010:

PEOPLE v MASS, No. 137187; Court of Appeals No. 283678.

PEOPLE v MATHIS, No. 139142; Court of Appeals No. 290470. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v CLYDE JORDAN, No. 139210; Court of Appeals No. 289329. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v DAVID HARRISON, No. 139248; Court of Appeals No. 279614.

PEOPLE v SANTACRUZ, No. 139271; Court of Appeals No. 289932. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v MICHAEL SIMMONS, No. 139337; Court of Appeals No. 290973. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

MORRISON v JOHN CARLO, INC, No. 139462; Court of Appeals No. 282956.

PEOPLE v WOMACK, No. 139493; Court of Appeals No. 290293. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v ODOM, No. 139499; Court of Appeals No. 288656. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v ABRAHAM, No. 139509; Court of Appeals No. 290229. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v WATKINS, No. 139532; Court of Appeals No. 290943. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v BARTON ALLEN, No. 139534; Court of Appeals No. 290944. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v PENLEY, No. 139549; Court of Appeals No. 291198. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v GRIFFIN, No. 139555; Court of Appeals No. 290022. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v PICKETT, No. 139556; Court of Appeals No. 290317. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v BIRD, No. 139608; Court of Appeals No. 292935. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v BIRD, No. 139610; Court of Appeals No. 292936. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v HACKNEY, No. 139622; Court of Appeals No. 291098. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v PETER O'NON, No. 139627; Court of Appeals No. 291271. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v CALLOWAY, No. 139669; Court of Appeals No. 292358. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v CANTLEY, No. 139692; Court of Appeals No. 291337. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v REGGIE WELCH, No. 139703; Court of Appeals No. 291221. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v JEFFERY BARNES, No. 139704; Court of Appeals No. 293007. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v DERRICK BLACK, No. 139707; Court of Appeals No. 290558. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v KUE, No. 139715; Court of Appeals No. 291918. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v CHEATHAM, No. 139736; Court of Appeals No. 291310. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v KRUITHOF, No. 139738; Court of Appeals No. 292826. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v FENWICK, No. 139743; Court of Appeals No. 291674. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v BRUCE WILLIAMS, No. 139745; Court of Appeal No. 293499. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

PEOPLE v DEXTER, No. 139750; Court of Appeals No. 290647. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v KINCAID, No. 139752; Court of Appeals No. 290782. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v ASHMAN, No. 139758; Court of Appeals No. 291690. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v JURICH, No. 139762; Court of Appeals No. 293548. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v AKO GILMORE, No. 139765; Court of Appeals No. 285080.

PEOPLE v FRANK HAWTHORNE, No. 139780; Court of Appeals No. 291292. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v ERIC WILLIAMS, No. 139781; Court of Appeals No. 291308. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v HAZEN, No. 139782; Court of Appeals No. 292593. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v EATMAN, No. 139790; Court of Appeals No. 292913. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v REEVES, No. 139791; Court of Appeals No. 292690. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v DELMAREY MITCHELL, No. 139792; Court of Appeals No. 291870. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

PEOPLE v TEICHOW, No. 139793; Court of Appeals No. 291933. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v STAPLE, No. 139797; Court of Appeals No. 293449. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v SAWYER, No. 139802; Court of Appeals No. 291770. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v RICKY GROSS, No. 139803; Court of Appeals No. 291420. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v DEMOND GOINS, No. 139819; Court of Appeals No. 291096. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v WATERFORD, No. 139823; Court of Appeals No. 292859. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v BRIAN PRICE, No. 139826; Court of Appeals No. 291984. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v MOREY, No. 139835; Court of Appeals No. 293500. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v SAIN, No. 139837; Court of Appeals No. 292349. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v WORDELL, No. 139838; Court of Appeals No. 292662.

PEOPLE v JARROD COLLINS, No. 139842; Court of Appeals No. 290934. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v BOULDING, No. 139847; Court of Appeals No. 292777. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v HINTON, No. 139849; Court of Appeals No. 291500. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v HOSS, No. 139852; Court of Appeals No. 291425. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v WILLIS, No. 139864; Court of Appeals No. 292572. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

BARNARD MANUFACTURING CO, INC v GATES PERFORMANCE ENGINEERING, INC, No. 139871; reported below: 285 Mich App 362.

PEOPLE v JEREMY GIBSON, No. 139877; Court of Appeals No. 285486.

PEOPLE v TIMOTHY RODRIGUEZ, No. 139881; Court of Appeals No. 291400. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v SEARCY, No. 139890; Court of Appeals No. 293056. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v MESIK, No. 139894; reported below: 285 Mich App 535.

PEOPLE v JACK LOWN, No. 139900; Court of Appeals No. 291613. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v RONALD CHAPMAN, No. 139903; Court of Appeals No. 291707. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v SUEING, No. 139904; Court of Appeals No. 293460. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v DAVID WILSON, No. 139905; Court of Appeals No. 290854. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v ULLAH, No. 139912; Court of Appeals No. 292434. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v EDWARD HOWARD, No. 139913; Court of Appeals No. 293514. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

KING v ITT TECHNICAL INSTITUTE, No. 139918; Court of Appeals No. 287074.

ST FRANCIS HOSPITAL OF ESCANABA v HOME OWNERS INSURANCE COMPANY, No. 139919; Court of Appeals No. 292530.

CONSOER TOWNSEND ENVIRODYNE ENGINEERS, INC v GRAND RAPIDS, No. 139924; Court of Appeals No. 283563.

PEOPLE v STANLEY, No. 139930; Court of Appeals No. 292348. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v DEMANN, No. 139933; Court of Appeals No. 293126. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

SCHIMKE v LIQUID DUSTLAYER, INC, No. 139940; Court of Appeals No. 282421.

PEOPLE v WENDELL CRAWFORD, No. 139942; Court of Appeals No. 294264. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v DOTSON, No. 139971; Court of Appeals No. 285325.

GILLIE v GENESEE COUNTY TREASURER, No. 140002; Court of Appeals No. 287869.

LANSING PAVILLION LLC v EASTWOOD LLC, Nos. 140011, 140012, and 140013; Court of Appeals Nos. 281811, 282332, and 283071.

PEOPLE v BRADY, No. 140019; Court of Appeals No. 285640.

PEOPLE v JOHN DAVIS, No. 140085; Court of Appeals No. 292517.

PEOPLE v MESMAN, No. 140091; Court of Appeals No. 285487.

PEOPLE v GRANT, No. 140104; Court of Appeals No. 284100.

PEOPLE v DELANDRICK CLARK, No. 140127; Court of Appeals No. 286020.

PEOPLE v KING, No. 140128; Court of Appeals No. 285490.

PEOPLE v PARR, No. 140129; Court of Appeals No. 284715.

WAYNE COUNTY TREASURER v CASAB, No. 140132; Court of Appeals No. 285703.

PEOPLE v JOHN PRICE, No. 140136; Court of Appeals No. 284713.

PEOPLE v FUSE, No. 140146; Court of Appeals No. 285169.

LIEGHIO v LOVELAND INVESTMENTS, No. 140161; Court of Appeals No. 285393.

PEOPLE v JOHNATHON BAILEY, No. 140162; Court of Appeals No. 140162.

INVOLVED CITIZENS ENTERPRISES, INC v EAST BAY TOWNSHIP, No. 140163; Court of Appeals No. 284706.

PEOPLE v WEAVER, No. 140166; Court of Appeals No. 286265.

PEOPLE v DARRYL WASHINGTON, No. 140167; Court of Appeals No. 293914.

PEOPLE v THOMAS WASHINGTON, No. 140169; Court of Appeals No. 293986.

PEOPLE v DONALD GRAHAM, No. 140172; Court of Appeals No. 293985.

LIEGHIO v LOVELAND INVESTMENTS, Nos. 140173 and 140174; Court of Appeals Nos. 285393 and 285394.

PEOPLE v BEY, No. 140176; Court of Appeals No. 293796. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v BUCHANAN, No. 140178; Court of Appeals No. 286322.

PEOPLE v TERRELL DAVIS, No. 140180; Court of Appeals No. 294403.

PEOPLE v DOMINIQUE WILLIAMS, No. 140184; Court of Appeals No. 281196.

BUREK v HART, No. 140186; Court of Appeals No. 283729.

PEOPLE v ELLIOT JAMES, No. 140188; Court of Appeals No. 293024. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v COATS, No. 140189; Court of Appeals No. 286821.

PEOPLE v FLOWERS, No. 140192; Court of Appeals No. 285887.

PEOPLE v HOSTETTER, No. 140197; Court of Appeals No. 284799.

PEOPLE v EBELS, No. 140204; Court of Appeals No. 292618.

PEOPLE v EATMON, No. 140206; Court of Appeals No. 293780. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v MICHAEL JAMISON, No. 140208; Court of Appeals No. 294289.

PEOPLE v MCMAHON, No. 140210; Court of Appeals No. 294969.

MANTLE v MANTLE, No. 140214; Court of Appeals No. 293459.

PEOPLE v ARWOOD, No. 140217; Court of Appeals No. 285213.

PEOPLE v EDWARDS, No. 140218; Court of Appeals No. 288937.

PEOPLE v AARON STEPHENS, No. 140221; Court of Appeals No. 294502.

PEOPLE v LOURIS, No. 140226; Court of Appeals No. 294471.

PEOPLE v ELDER, No. 140227; Court of Appeals No. 293661.

PEOPLE v SAMPHERE, No. 140229; Court of Appeals No. 283711.

PEOPLE v SELLERS, No. 140230; Court of Appeals No. 285829.

PEOPLE v BIGGS, No. 140232; Court of Appeals No. 287088.

PEOPLE v WHITSEY, No. 140236; Court of Appeals No. 294041.

PEOPLE v BEYERLEIN, No. 140237; Court of Appeals 294384.

21 LONG LAKE HOLDINGS LLC v GROTEFELD & DENNENBERG LLC, No. 140240; Court of Appeals No. 293149.

PEOPLE v VEZIROVIC, No. 140242; Court of Appeals No. 293178.

PEOPLE v PORTIS, No. 140246; Court of Appeals No. 286423.

PEOPLE v LUCRETIA BISHOP, No. 140253; Court of Appeals No. 294118.

PEOPLE v BENJAMIN, No. 140254; Court of Appeals No. 294123.

PEOPLE v ANDRE FRAZIER, No. 140257; Court of Appeals No. 292668.

PEOPLE v JAMES SANDERS, No. 140260; Court of Appeals No. 294341.

PEOPLE v BOMAR, No. 140261; Court of Appeals No. 286966.

PEOPLE v MARCUS TAYLOR, No. 140266; Court of Appeals No. 287144.

PEOPLE v PATRICK WILSON, No. 140268; Court of Appeals No. 294243.

SCHUPAN & SONS INC v MILFORD TOWNSHIP, No. 140272; Court of Appeals No. 293344.

PEOPLE v GARZA, No. 140275; Court of Appeals No. 294540.

FARMERS INSURANCE EXCHANGE v HENDERSON and CARTER v FARMERS INSURANCE EXCHANGE, Nos. 140283 and 140284; Court of Appeals Nos. 284683 and 284684.

PEOPLE v ANTHONY JEROME WILLIAMS, No. 140286; Court of Appeals No. 285692.

JONASSEN v DEBOER BAUMANN & COMPANY, No 140304; Court of Appeals No. 286438.

PEOPLE v FAYE O'NON, No. 140305; Court of Appeals No. 280262.

PEOPLE v VANDENBERG, No. 140307; Court of Appeals No. 285309.

PEOPLE v BUTLER, No. 140308; Court of Appeals No. 294422.

PEOPLE v KEITH SMITH, No. 140309; Court of Appeals No. 286701.

PEOPLE v NATHAN WARD, No. 140312; Court of Appeals No. 284844.

PEOPLE v ZACHERY ROGERS, No. 140315; Court of Appeals No. 286329.

PEOPLE v LAMONT COOK, No. 140316; Court of Appeals No. 287735.

PEOPLE v VALDEZ, No. 140325; Court of Appeals No. 285962.

PEOPLE v THOMAS ATKINS, No. 140330; Court of Appeals No. 294428.

PEOPLE v JAMES WALLACE, No. 140333; Court of Appeals No. 287172.

PEOPLE v LARRY ANTHONY, No. 140339; Court of Appeals No. 294654.

PEOPLE v IATONDA TAYLOR, No. 140340; Court of Appeals No. 287419.

PEOPLE v PHILLIP ALEXANDER, No. 140346; Court of Appeals No. 286611.

PEOPLE v MARIA CARROLL, No. 140348; Court of Appeals No. 284622.

GOODWIN v NURSING CARE OPTIONS LLC, No. 140351; Court of Appeals No. 294758.

PEOPLE v ALLMON, No. 140353; Court of Appeals No. 287949.

PEOPLE v JESSE PRICE, No. 140361; Court of Appeals No. 285781.

Reconsideration Denied March 29, 2010:

PEOPLE v DRAIN, No. 138424; Court of Appeals No. 275327. Leave to appeal denied at 485 Mich 1043.

PEOPLE v BINSCHUS, No. 138749; Court of Appeals No. 283799. Leave to appeal denied at 485 Mich 877.

PEOPLE v FOX, No. 138792; Court of Appeals No. 289324. Leave to appeal denied at 485 Mich 974.

FRANK v STATE EMPLOYEES RETIREMENT SYSTEM, No. 138977; Court of Appeals No. 289961. Leave to appeal denied at 485 Mich 1052.

ROUSSEAU v MASUGA, Nos. 138983 and 138984; Court of Appeals Nos. 280441 and 281093. Summary disposition at 485 Mich 973.

PEOPLE v LOREN GREENE, No. 139126; Court of Appeals No. 290080. Leave to appeal denied at 485 Mich 1074.

PEOPLE v PAULS, No. 139222; Court of Appeals No. 276375. Leave to appeal denied at 485 Mich 1043.

PEOPLE v WINFIELD, No. 139371; Court of Appeals No. 289636. Leave to appeal denied at 485 Mich 1075.

PEOPLE v ALVIN FRAZIER, No. 139398; Court of Appeals No. 292085. Leave to appeal denied at 485 Mich 1044.

PEOPLE v HERBERT, No. 139403; Court of Appeals No. 284313. Leave to appeal denied at 485 Mich 1009.

PEOPLE v SUSAN BROWN, No. 139529; Court of Appeals No. 290849. Leave to appeal denied at 485 Mich 1080.

HOPSON v SELECT AUTO PARTS, INC, No. 139757; Court of Appeals No. 292482. Leave to appeal denied at 485 Mich 1012.

PEOPLE v RATLIFF, No. 139759; Court of Appeals No. 280521. Leave to appeal denied at 485 Mich 1012.

PEOPLE v MICHAEL WILLIAMS, No. 139774; Court of Appeals No. 285025. Leave to appeal denied at 485 Mich 1012.

PEOPLE v CASPER BROWN, No. 139862; Court of Appeals No. 293371. Leave to appeal denied at 485 Mich 1081.

PEOPLE v GONZALEZ, No. 139869; Court of Appeals No. 286414. Leave to appeal denied at 485 Mich 1081.

PEOPLE v FLEXMAN, No. 139873; Court of Appeals No. 285439. Leave to appeal denied at 485 Mich 1081.

PEOPLE v ROOSEVELT WATTS, No. 139937; Court of Appeals No. 272369. Leave to appeal denied at 485 Mich 1082.

Summary Disposition March 31, 2010:

PEOPLE v TRAKHTENBERG, No. 138875; Court of Appeals No. 290336. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. On remand, while retaining jurisdiction, the Court of Appeals shall remand this case to the Oakland Circuit Court to conduct an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), to determine whether the defendant was deprived of his right to the effective assistance of counsel and whether the defendant is entitled to a new trial based on newly discovered evidence. At the conclusion of the hearing, the circuit court shall forward the record and its findings to the Court of Appeals, which shall then resolve the issues presented by the defendant. The motion to withdraw is denied, without prejudice to defense counsel filing a motion to withdraw in the circuit court. We do not retain jurisdiction.

HARSHAW v CLASSIC CONEY ISLAND, No. 139723; Court of Appeals No. 291980. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v RICHARD ARMSTRONG, No. 139889; Court of Appeals No. 291979. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v CARLSON, No. 140264; Court of Appeals No. 287420. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse only that part of the judgment of the Court of Appeals that vacates the defendant's convictions of and sentences for first-degree criminal sexual conduct based on oral penetration of the victim and remand this case to the Court of Appeals. The challenged evidence that was found to be arguably admissible by the Court of Appeals supported a finding of cunnilingus, which, by definition, is penetration. See MCL 750.520a(r). On remand, the court is to consider whether that evidence was admissible under the circumstances of this case. See *People v Meeboer*, 439 Mich 310 (1992). The court shall also determine whether a remand for a new trial is appropriate pursuant to *Lockhart v Nelson*, 488 US 33; 109 S Ct 285; 102 L Ed 2d 265 (1988). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

Leave to Appeal Granted March 31, 2010:

PEOPLE v DAVID SMITH, No. 140371; Court of Appeals No. 286479. The application for leave to appeal the November 19, 2009, judgment of the Court of Appeals is considered, and it is granted, limited to the issue whether points may be assessed pursuant to MCL 777.49 (offense variable 19) for conduct that occurs after the sentencing offense is completed.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal March 31, 2010:

PEOPLE v WATERSTONE, No. 140775; Court of Appeals No. 294667. Reported below: 287 Mich App 368. We direct the clerk to schedule oral argument for the May 2010 session calendar on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). At oral argument, the parties shall address whether the Court of Appeals erred in holding that the attorney general is disqualified from acting as special prosecutor in this criminal prosecution because of a conflict of interest under MRPC 1.10(a), arising from the attorney general's earlier representation of the defendant in a federal civil case involving the same facts. The prosecution may file a supplemental brief, but not a mere restatement of its application papers, and the defendant may file a brief, no later than April 29, 2010.

The Criminal Law Section of the State Bar of Michigan, the Prosecuting Attorneys Association of Michigan, and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae, to be filed no later than April 29, 2010.

The stay of district court proceedings in this case, ordered by the Court on January 7, 2010, remains in effect.

CORRIGAN, J. I am not participating because I may be a witness in this case.

Leave to Appeal Denied March 31, 2010:

PEOPLE v LAMAY, No. 139443; Court of Appeals No. 291994. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

TEEL v MEREDITH, No. 139476; reported below: 284 Mich App 660.

KELLY, C.J., and HATHAWAY, J., would grant leave to appeal.

PEOPLE v COCKREAM, No. 139884; Court of Appeals No. 286046.

PEOPLE v DUNNING, No. 139954; Court of Appeals No. 285027.

PEOPLE v JOSHUA WILLIAMS, No. 140100; Court of Appeals No. 278247.

PEOPLE v HARDAWAY, No. 140124; Court of Appeals No. 284980. The denial is without prejudice to the defendant's right to file a motion for relief from judgment pursuant to MCR 6.500 *et seq*. that may include the issue of whether, in light of the complainant's affidavit recanting her trial testimony, he is entitled to an evidentiary hearing or some other relief.

PEOPLE v JUDE, No. 140133; Court of Appeals No. 286664.

PEOPLE v DAVID SMITH, No. 140199; Court of Appeals No. 286479.

PEOPLE v COCKREAM, No. 140349; Court of Appeals No. 286064.

Reconsideration Denied March 31, 2010:

PEOPLE v ROBERT LAMONTE WALKER, No. 139565; Court of Appeals No. 293208. Summary disposition at 485 Mich 870.

CAUDILL v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 140130; Court of Appeals No. 294951. Leave to appeal denied at 485 Mich 1107.

Statements Regarding Order of January 28, 2010, Denying Motions for Disqualifications Issued March 31, 2010:

PELLEGRINO v AMPCO SYSTEMS PARKING, No. 137111; Court of Appeals No. 274743.

By order of January 28, 2010, the Court granted the motion for full-Court consideration of the motion for disqualification of Justice MARKMAN and denied the plaintiff's motion to disqualify Justice MARKMAN. 485 Mich 1057.

By order of January 28, 2010, the Court denied the motion for a full-Court decision on the motion to disqualify Justice CORRIGAN. 485 Mich 1058.

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By order of January 28, 2010, the Court denied the motion for a full-Court decision on the motion to disqualify Justice YOUNG. 485 Mich 1059.

KELLY, C.J. (*concurring*). I concur with the Court's resolution of the motions seeking the recusal of Justices CORRIGAN, YOUNG, and MARKMAN. I write separately in response to Justices CORRIGAN's and YOUNG's decisions to not participate.

THE DUTY TO SIT

Justices CORRIGAN's and YOUNG's reasons for not participating, as they have stated here and in their dissenting statements in ADM 2009-4, is that amended MCR 2.003 is unconstitutional. Surely Justices CORRIGAN and YOUNG are entitled to their personal view on this subject. But neither this Court nor any other has adopted that view. Hence, amended MCR 2.003 is clothed in a presumption of constitutionality.[1]

Moreover, a justice has an affirmative duty to participate to the extent possible in matters that are brought before this Court. As former Chief Justice TAYLOR and Justice MARKMAN stated in a 2006 Court decision, "Particularly on the supreme court of a state, a body in which judges who recuse themselves cannot be replaced, it is necessary that judges participate in cases in which recusal is not required."[2] This doctrine is known as the "duty to sit." Under that duty, there is an obligation for a justice

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[1] Court rules are interpreted using the same principles that govern statutory interpretation. *Haliw v Sterling Hts*, 471 Mich 700, 704 (2005). Statutes are clothed in a presumption of constitutionality. *Johnson v Harnischfeger Corp*, 414 Mich 102, 114 (1982); see also, *State v Albert*, 899 P2d 103, 113 n 15 (Alas, 1995) ("Court rules, like statutes and regulations, are presumptively constitutional and the burden of proving unconstitutionality is on the party challenging them."); *Suchit v Baxt*, 176 NJ Super 407, 425 (1980) ("Rules adopted by the Supreme Court are presumed constitutional, and it is the burden of the party contesting the rule to show that the Supreme Court's rule is in fact arbitrary and unreasonable."); *Campuzano v Peritz*, 376 Ill App 3d 485, 490 (2007) (" 'Supreme Court rules are to be construed in the same manner as statutes.' Statutes are presumed constitutional . . . .") (citations omitted); *State v Waldon*, 148 Wash App 952, 962 (2009) (" '"The construction of court rules is governed by the principles of statutory construction."' . . . Statutes are presumed constitutional as written and should be construed to be constitutional if possible. '[A] court rule will not be construed to circumvent or supersede a constitutional mandate.' ") (citations omitted).

[2] *Adair v Michigan*, 474 Mich 1027, 1030 (2006) (statement of TAYLOR, C.J., and MARKMAN, J.). Justices CORRIGAN and YOUNG did not join former Chief Justice TAYLOR and Justice MARKMAN's decision on the recusal motion in *Adair*, but they explicitly endorsed the legal analysis of the ethical questions presented in it. *Id*. at 1051 n 1 (statement of CORRIGAN, J.); *id*. at 1053 (statement of YOUNG, J.).

to remain on any case unless disqualified from doing so.[3] Indeed, the United States Court of Appeals for the Second Circuit has opined that "where the standards governing disqualification have not been met, disqualification is not optional; rather, it is prohibited."[4] Therefore, one wonders by what authority Justices CORRIGAN and YOUNG refuse to acknowledge the constitutional status of the rule at present and, given their duty to sit, refuse to vote on this motion.[5]

THE CONSTITUTIONALITY OF MCR 2.003

With respect to their challenges to the constitutional status of MCR 2.003, Justices CORRIGAN and YOUNG argue that the insertion in the rule of the "appearance of impropriety" standard has rendered the rule unconstitutional.[6] However, federal district courts have rejected First Amendment constitutional challenges to a recusal standard that is synonymous with the "appearance of impropriety" standard on numerous occasions.[7] Indeed, those courts have determined that a state has a compelling interest in preserving the public's confidence in the integrity and impartiality of its judiciary. Moreover, the courts have repeatedly found

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[3] See *Laird v Tatum*, 409 US 824, 837 (1972) (memorandum of Rehnquist, J.).

[4] *In re Aguinda*, 241 F3d 194, 201 (CA 2, 2001).

[5] Justice YOUNG claims that "it is not clear that the duty to sit even applies to collateral motions *within* cases before this Court." This distinction is unsupported by any authority. While a recusal motion may be "collateral" in that it is not dispositive of the merits of a controversy, it is surely critical to the ultimate resolution of a case. Their participation in the underlying appeal does not excuse Justices CORRIGAN and YOUNG from their duty to sit in all matters before the Court from which they are not disqualified.

[6] Justice YOUNG claims that my defense of the constitutionality of MCR 2.003 is "little more than a pastiche of legal non sequiturs." *Post* at 1156. The fact remains, Justices CORRIGAN and YOUNG fail to cite any controlling authority for their assertion that MCR 2.003, as amended, or the "appearance of impropriety" standard, generally, is unconstitutional. I do not contend that they have not given their reasons why they believe the rule is unconstitutional, but contend that their reasons lack apposite legal authority.

[7] These cases have arisen in situations in which organizations send questionnaires to judicial candidates seeking their views on controversial issues. Judges often refuse to respond, citing a possible breach of the judicial canons. The organizations then file suit, alleging that canons that call for recusal if a judge's impartiality might reasonably be questioned are unconstitutional because they chill a candidate's protected speech under *Republican Party of Minnesota v White*, 536 US 765 (2002). The merits of these constitutional claims have not been addressed by circuit

that such recusal rules are narrowly tailored to meet that interest and are neither overbroad nor vague.[8] As a result, they do not "chill" a judge's freedom of speech and do not violate the First Amendment.[9]

Furthermore, a justice's due process rights are not violated by the amended version of MCR 2.003. The rule does not deny any rights to a justice who is recused against his or her will. In his concurring opinion in *Republican Party of Minnesota*, Justice Kennedy noted that states are free to "adopt recusal standards *more rigorous* than due process requires, and censure judges who violate these standards."[10] Justice Kennedy's majority opinion in *Caperton v A T Massey Coal Co, Inc*[11] reaffirmed this

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courts of appeals because they are generally dismissed due to a lack of standing or ripeness. See, e.g., *Florida Family Policy Council v Freeman*, 561 F3d 1246 (CA 11, 2009).

[8] *Bauer v Shepard*, 634 F Supp 2d 912, 948-950 (ND Ind, 2009); *Indiana Right to Life, Inc v Shepard,* 463 F Supp 2d 879, 887 (ND Ind, 2006), rev'd in part on other grounds 507 F3d 545 (CA 7, 2007); *Alaska Right to Life Political Action Comm v Feldman*, 380 F Supp 2d 1080, 1084 (D Alas, 2005), vacated in part on other grounds 504 F3d 840 (CA 9, 2007); *North Dakota Family Alliance, Inc v Bader*, 361 F Supp 2d 1021, 1043-1044 (D ND, 2005); *Family Trust Foundation of Kentucky, Inc v Wolnitzek*, 345 F Supp 2d 672, 687 (ED Ky, 2004).

[9] Assuming, *arguendo*, that MCR 2.003 limits a judicial candidate's constitutional right to free speech, it remains unclear if forced disqualification because of that speech constitutes a "penalty" giving rise to First Amendment standing. In *Florida Family Policy Council*, 561 F3d at 1254-1255, the court declined to answer this question, concluding that the plaintiff could not show that his claim was redressable. If forced disqualification is not a "penalty," a justice cannot make an adequate showing of "actual injury" to establish standing. *Id*. at 1255 ("If . . . the only penalty is disciplinary sanctions for a refusal to disqualify, then a judge's fear of penalty is not objectively reasonable. The fear is not objectively reasonable because it depends on speculation and conjecture that instead of disqualifying himself where the canons require him to do so, the judge will refuse and face discipline.").

Canon 2 of the Michigan Code of Judicial Conduct is similar to Canon 3(E)(1) of the Florida Code of Judicial Conduct, which was at issue in *Florida Family Policy Council*. Canon 2 requires a judge to adhere to the "appearance of impropriety" standard, which presumably should result in the justice recusing himself/herself when an appearance of impropriety exists.

[10] *Republican Party of Minnesota*, 536 US at 794 (Kennedy, J., concurring) (emphasis added).

[11] *Caperton v A T Massey Coal Co, Inc*, 556 US ___; 129 S Ct 2252 (2009).

point. *Caperton* specifically observed that the vast majority of states have adopted the "appearance of impropriety" standard, a more rigorous standard than is required by due process. The Court noted that most disputes over disqualification will be resolved under state standards. Similar generally worded canons of judicial conduct have been upheld in the face of constitutional challenges raised by judges sanctioned under those canons.[12]

In support of their argument, Justices CORRIGAN and YOUNG cite provisions of the state constitution that provide for removing a justice from office. But these provisions are inapposite. Recusal deals only with removing a justice from a case, not removing him or her from office.

For decades this Court has had an unwritten practice that allowed an individual justice to decide recusal motions directed at that justice. Additionally, we have held that each justice has equal power and authority with respect to his or her colleagues.[13] Thus, allowing an individual justice to overrule another justice's decision on a recusal motion would violate this principle. However, also for decades, a majority of four justices has had the authority to make binding orders and judgments on cases and controversies that come before the Court.[14] A motion for the recusal of a justice is a "controversy" like others that come before the Court. This is especially true once a party has filed such a motion and the challenged justice has refused to recuse himself or herself.

Therefore, I disagree with Justices CORRIGAN and YOUNG that the principle of "one man, one vote" and the voters' right to elect their justices are violated by MCR 2.003. The new recusal rule is intended to protect the due process rights of litigants when a justice improperly refuses to recuse himself or herself.[15] As noted previously, the removal of

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[12] See, e.g., *In re Assad*, 124 Nev 391, 403-404; 185 P3d 1044, 1052 (2008), which upheld Canon 2, § 2(A) of the Nevada Code of Judicial Conduct against a due process challenge. Nevada Canon 2(A) provides, "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

[13] See, e.g., *People v Paille #1*, 383 Mich 605, 607 (1970) ("Whatever intra-court battles occasioned the adoption of the restriction upon intra-court review, the wisdom of preventing judges of equal station from overruling each other abides.").

[14] In limited circumstances not applicable here, five votes are necessary for the Court to take action.

[15] Justice YOUNG sees no justification for permitting the disqualification of a justice for a violation of Canon 2 of the Michigan Code of Judicial Conduct that has nothing to do with a particular case. *Post* at 1160-1161. I disagree. Certainly such a justification would exist if a justice was apparently biased for or against the attorney representing a party in a case. In that event, it could be argued that the appearance of impropriety had nothing to do with the case itself. Another example could be found when a justice has become

a justice from an individual case is far different from the removal of a justice from office. Protecting the due process rights of litigants in a particular case or controversy thus *supports*, not undermines, the voters' right to elect fair and unbiased members of this Court.

Justice CORRIGAN also claims that her "research has disclosed that no state requires recusal on the basis of a general 'appearance of impropriety,' let alone permits other justices to force a colleague's recusal on the basis of such a standard." She is mistaken. By Justice CORRIGAN's own count,[16] there are at least eight other states in which a justice's decision not to recuse himself or herself may be reviewed by the entire court.[17] In other states, review by the full court may be available, but remains an open question. Similarly, virtually all states require recusal for the appearance of impropriety. Some states require recusal when the judge's impartiality might reasonably be questioned. This is a standard indistinguishable from the appearance of impropriety. Justice CORRIGAN thus attempts to make a distinction between the two when there is none.

Evidence that these two standards are functionally identical and treated as such abounds. For example, Mississippi allows its supreme court justices to review an individual justice's decision to deny a recusal motion. The Mississippi Rules of Appellate Procedure provide that "[a]ny party may move for the recusal of a justice of the Supreme Court or a judge of the Court of Appeals if it *appears that the justice or judge's impartiality might be questioned by a reasonable person* knowing all the circumstances, or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law." Miss R App P 48C(a)(i). Canon 2(A) of the Mississippi Code of Judicial Conduct defines the test for an "appearance of impropriety" as "whether, based on the conduct, the judge's impartiality might be questioned by a reasonable person knowing all the circumstances." Hence, the two standards are defined using *identical* language. Other examples equating the two standards are abundant in caselaw throughout the United States.[18]

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incompetent. If that justice's " 'conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with . . . competence is impaired,' " *Caperton*, 129 S Ct at 2266 (citation omitted), then that justice should be recused; in that instance, the appearance of impropriety arguably has nothing directly to do with the substance of the case from which the justice should be recused. From these examples, it becomes obvious that grounds for recusal should not be narrowly confined to the case before the court in order for a justice to be removed from the case.

[16] See the chart accompanying Justice CORRIGAN's statement in this matter.

[17] Justice CORRIGAN claims that many states' practices in this regard are unwritten and rarely exercised, so comparison is difficult. The fact remains that other states *do* allow justices to vote on their colleagues' recusal decisions.

[18] See, e.g, *Tracey v Tracey*, 97 Conn App 278, 281 (2006) (" 'The [party] has met its burden [of showing that a judge's impartiality might

Justice CORRIGAN also criticizes the "appearance of impropriety" standard as a broad, generally subjective and aspirational standard by which judges cannot meaningfully judge one another. Yet Justice YOUNG, who has joined Justice CORRIGAN's statement, explicitly disagrees. In *Henry v Dow Chem Co*, Justice YOUNG, responding to Justice WEAVER's statement regarding her participation in that case, stated:

> "Moreover, Justice WEAVER has advocated a disqualification standard that requires judges to recuse themselves if there is merely an *appearance* of impropriety. She has cited with approval Canon 2 of the ABA Model Code of Judicial Conduct, which states that '[a] judge shall avoid . . . the appearance of impropriety in all of the judge's activities' and Model Canon 3(E)(1), which states that a judge 'shall disqualify . . . herself in a proceeding in which the judge's impartiality might reasonably be questioned.'
>
> "The disqualification standard that she has publicly championed is an *objective* standard, not a subjective standard to be determined by her say-so."[19]

In *Caperton*, Justice Kennedy also referred to the "appearance of impropriety" standard as an objective one.[20]

Finally, Justice YOUNG, with whom Justice CORRIGAN agrees, claims that the "lack of case-specific limitations of the 'appearance of impropriety' clause illustrates the unseemly haste with which the majority was driven to amend" MCR 2.003. Haste did not occur here. Disqualification is an issue that has been at the forefront of the Court's attention for many years. In 2006, in *Grievance Administrator v Fieger*, Justice CAVANAGH wrote:

> . . . I take this opportunity to note that three alternate proposals, two of which have been crafted by [the former] majority, regarding how this Court should handle disqualification motions have been languishing in this Court's conference room for a substantial period

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reasonably be questioned] if it can prove that the conduct in question gave rise to a reasonable appearance of impropriety.' ") (citations omitted; second alteration added); *Sussel v Honolulu City & Co Civil Service Comm*, 71 Hawaii 101, 103 (1989) (" '[A]n appearance of impropriety' is the proper standard and any commissioner whose impartiality might reasonably be questioned should be disqualified from hearing the appeal."); Leslie W. Abramson, *Appearance of impropriety: Deciding when a judge's impartiality might reasonably be questioned*, 14 Geo J Legal Ethics 55, 55 n 2 (2000) ("Whether a judge's impartiality might reasonably be questioned is also referred to as the appearance of partiality, the appearance of impropriety, or negative appearances."). The title of Professor Abramson's law review article speaks for itself.

[19] *Henry v Dow Chem Co*, 484 Mich 483, 544 (2009) (opinion by YOUNG, J.) (citation omitted; emphasis in original).

[20] *Caperton*, 129 S Ct at 2266.

> of time. In the same way I will look forward to the dust settling from the case at bar, I will similarly anticipate this Court's timely attention to the important matter of disqualification motions. I take my colleagues at their word that the issue of disqualification will be handled in a prompt manner in the coming months.[21]

Thus, criticism of the amendments of MCR 2.003 as being "hast[y]" is off the mark.

IMPLICATIONS OF NONPARTICIPATION

Justices CORRIGAN's and YOUNG's decisions not to participate in today's decision are difficult to fathom. Apparently, the justices believe that their views regarding the legitimacy of the validly enacted rule of this Court supersede the binding nature of the rule. They provide no authority justifying their refusal to vote.

The Michigan Supreme Court operates by majority rule, meaning that four justices have the power to render binding decisions on behalf of the Court. Those decisions bind not only the parties to the controversies before the Court, but also the individual members of the Court. Should an individual justice disagree with the majority's decision, that justice is free to dissent from the majority's action. But a dissenting justice is not entitled to ignore or abandon his or her duty to decide matters that come before the Court. Nor may a justice announce by declarative fiat that the Court's action is null and void. As Justice YOUNG stated in *Sazima v Shepherd Bar & Restaurant*, "I was not aware that a *dissenting* justice could purport (much less had the authority) to nullify a holding of a majority of this Court by simple declarative fiat."[22] Justice CORRIGAN explicitly acknowledged this principle in her dissent from the amendments of MCR 2.003.[23]

Justices CORRIGAN's and YOUNG's decisions not to participate set a disturbing precedent that one cannot reasonably believe they intend to

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[21] *Grievance Administrator v Fieger*, 476 Mich 231, 327 n 17 (2006) (CAVANAGH, J., dissenting).

[22] *Sazima v Shepherd Bar & Restaurant*, 482 Mich 1110, 1111 (2008) (YOUNG, J., concurring) (emphasis in original).

[23] See the order amending MCR 2.003, 485 Mich cxxx, cxlix-cl (2009) (CORRIGAN, J., dissenting), citing *Paille #1*, *Dodge v Northrop*, 85 Mich 243, 245 (1891) ("Courts of concurrent jurisdiction cannot set aside or modify the orders and decrees of other courts of like jurisdiction."), *In re Wayne Co Prosecutor*, 110 Mich App 739, 742 (1981) (noting the holding in *Paille #1* that "the dual function of Detroit Recorder's Court as a magisterial court as well as a felony trial court does not provide for intra-court review whereby judges of equal station might overrule one another"), and *Wayne Co Prosecutor v Recorder's Court Judges*, 81 Mich App 317, 322 (1978) ("Judges of co-equal authority lack jurisdiction to set aside the orders of bond forfeiture issued by their fellow judges.").

create. Their decisions are analogous to a justice refusing to participate in a matter governed by precedent from which that justice dissented. Essentially, Justices CORRIGAN and YOUNG now state that, because they do not agree with MCR 2.003, as amended, they will refuse to follow it.[24] By contrast, I note that, despite his disagreement with the Court's amendment of MCR 2.003, Justice MARKMAN has participated in each of this Court's decisions on the motions for recusal.

Furthermore, by refusing to vote in this matter, Justice YOUNG engages in a telling inconsistency. In cases involving the application of MCR 7.305(B), Justice YOUNG has voiced his belief that the court rule is unconstitutional but has conceded that he is bound to follow it. He thereafter participated in cases applying that rule. For example, in *In re Certified Question (Waeschle v Oakland Co Medical Examiner)*, Justice YOUNG stated:

> I continue to adhere to my stated position in *In re Certified Question (Wayne Co v Philip Morris, Inc)*, that this Court lacks the authority under state law to answer certified questions. However, this position has failed to carry the day. As the final arbiter of state law, this Court has concluded that it has the authority to answer certified questions. Accordingly, while this Court may exercise that authority, I will exercise careful discretion before answering any certified question. I would decline to answer the question in this instance.[25]

Thus, Justice YOUNG, despite disagreeing with the Court's conclusion in *In re Certified Question (Wayne Co v Philip Morris, Inc)* that it has the authority to answer certified questions, *did* in fact exercise that authority. He also properly conceded that a majority of this Court acts as the final arbiter of state law.

Having made that concession, Justice YOUNG now claims that "this Court's final authority does not extend to questions of *federal* constitutional

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[24] Justice YOUNG claims that he "merely dissent[s]" from the Court's justifications for the amended disqualification rule. *Post* at 1165. But Justice YOUNG's statement is not a dissenting statement. If it were, "(*dissenting*)" would appear after "YOUNG, J." at the outset of the text. It does not. A dissenting statement would also indicate that Justice YOUNG *is* participating, but that he disagrees with the Court's reasoning or analysis. By contrast, Justice YOUNG's statement is an explanation of his refusal to participate and acknowledge that he is bound by MCR 2.003, as amended.

[25] *In re Certified Question* (*Waeschle v Oakland Co Medical Examiner*), 485 Mich 1116, 1117 (2010) (YOUNG, J., dissenting) (citations omitted). In *In re Certified Question (Wayne Co v Philip Morris, Inc)*, 622 NW2d 518 (2001), Justice YOUNG opined that the Court lacked the constitutional authority to resolve certified questions under MCR 7.305(B). He stated, "However, because that position did not carry the day, I concur in the order in this case requesting supplemental briefing and oral argument." *Id*.

law."[26] Accordingly, he believes that he can rightfully refuse to participate in the matter now before the Court. Admittedly, this Court is not the final arbiter of federal constitutional law. That power rests with the United States Supreme Court. Yet, as Justice YOUNG well knows, until a majority of this Court or the United States Supreme Court declares the rule unconstitutional under the state or federal constitution, a presumption of constitutionality attaches to the rule. Justice YOUNG is not released from the binding effect of the presumption that the rule is constitutional by an earnest belief that it is unconstitutional. Also, he can hardly sustain his assertion that he has "never claimed that the Court's action [regarding the amendments of MCR 2.003] is ineffective" if he refuses to abide by the rule.[27]

Likewise, in *In re Certified Question from the Fourteenth District Court of Appeals of Texas (Miller v Ford Motor Co)*, the majority opined:

> Concerning Justice CAVANAGH's solicitude for Justice YOUNG's 'constitutional conscience,' Justice YOUNG . . . has written that this Court lacks the authority to answer certified questions, but his position did not carry the day. Five justices, including Justice CAVANAGH, disagreed. Just as Justice CAVANAGH is within his rights as a supporter of certified questions not to answer a certified question in a particular case (his position here), Justice YOUNG as an opponent of certified questions is within his rights to answer a certified question, because this is now a part of our state's 'judicial power.' Indeed, Justice YOUNG has previously answered certified questions and, in fact, authored a majority opinion responding to a certified question. Justice YOUNG also joined Justice CAVANAGH's opinion in *Wayne Co* [*v Philip Morris, Inc*]. . . . In respecting that the law is the law even where he disagrees with that law, Justice YOUNG's determination to respect the majority position of this Court and to participate in certified questions is the only honorable position that could be taken by a justice of this Court.[28]

Justice YOUNG signed the majority opinion in that case. Yet now, in an analogous case involving application of a court rule that Justice YOUNG believes is unconstitutional, he strays from his previously announced principles.

Finally, I do not expect that members of this Court will always agree about what the law is or how to apply it in a given case. But I do hope that our disagreements will focus on the legal issues,[29] providing a level of

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[26] *Post* at 1165 (emphasis in original).

[27] *Post* at 1165.

[28] *In re Certified Question from the Fourteenth District Court of Appeals of Texas (Miller v Ford Motor Co*), 479 Mich 498, 502 n 2 (2007) (citations omitted).

[29] Both Justice YOUNG and Justice CORRIGAN claim that the majority has refused to consider the significant constitutional issues that they have asked be considered. *Post* at 1147, 1155. This claim is belied by the record

discourse appropriate to the state's highest court. The emotional[30] and political[31] rhetoric that peppers Justices CORRIGAN's and YOUNG's statements is ill-suited to this pursuit.

CONCLUSION

In sum, Justices CORRIGAN and YOUNG have abdicated their duty to sit in this matter. Additionally, their claim that MCR 2.003 is unconstitutional is without merit and unsupported by any legal authority. Nearly all other states employ a recusal rule incorporating language similar to our "appearance of impropriety" standard. Furthermore, in at least eight other states, a justice's decision not to recuse himself or herself may be reviewed by the entire court.

As amended, MCR 2.003 puts into writing for the first time a formal procedure for the disqualification of justices of this Court. In doing so, the Court has become more accountable to litigants and to the public generally. I continue to believe that the justice system and this Court can only be stronger for it.

HATHAWAY, J. (*concurring*). I concur with this Court's resolution of the disqualification motions seeking the recusal of Justices CORRIGAN, YOUNG, and MARKMAN. Further, I fully agree with the analysis set forth in Chief Justice KELLY's concurring statement.

I, too, believe it is clear that our newly adopted amendments to MCR 2.003 are constitutional and appropriate. First and foremost, the United States Supreme Court has already addressed this issue. See *Caperton v A T Massey Coal Co, Inc*, 556 US ___; 129 S Ct 2252; 173 L Ed 2d 1208 (2009). *Caperton* set forth, clearly and unequivocally, that it is appropriate for states to adopt the appearance-of-impropriety standard within their canons of ethics and to incorporate that standard into their disqualification rules. The *Caperton* opinion states:

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of our public administrative conference of March 11, 2010, when the Court devoted more than 30 minutes of discussion to the merits of their proposed amendments to MCR 2.003. See minutes 2:35:30 to 3:08:55 of the March 11, 2010, public administrative conference at <http://www.michbar.org/courts/virtualcourt.cfm> (accessed March 25, 2010).

[30] See *post* at 1156 ("Chief Justice KELLY's . . . statement[] . . . contain[s] little more than a pastiche of legal non sequiturs."); *post* at 1158 ("MCR 2.003(C)(1)(b)(ii) is a startling and supremely stupid policy that could have no conceivable purpose . . . ."); *post* at 1160 ("Unfortunately, majorities rarely conceive or concede that *they* could be capable of abuse of power."); *post* at 1162-1163 ("[The Chief Justice's] claim denigrates the judicial offices that Michigan citizens have entrusted to their judges.").

[31] See *post* at 1150 (" '"I think the national recusal movement is an effort to so gum up [judicial] elections that we are almost forced into an alternative, such as appointing judges."' ") (citations omitted).

One must also take into account the judicial reforms the States have implemented to eliminate even the appearance of partiality. *Almost every State*—West Virginia included—*has adopted the American Bar Association's objective standard:* "*A judge shall avoid impropriety and the appearance of impropriety*." ABA Annotated Model Code of Judicial Conduct, Canon 2 (2004); see Brief for American Bar Association as *Amicus Curiae* 14, and n. 29. *The ABA Model Code's test for appearance of impropriety is* "*whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired*." Canon 2A, Commentary; see also W. Va. Code of Judicial Conduct, Canon 2A, and Commentary (2009) (same).

* * *

These codes of conduct serve to maintain the integrity of the judiciary and the rule of law. The Conference of the Chief Justices has underscored that the codes are "[t]he principal safeguard against judicial campaign abuses" that threaten to imperil "public confidence in the fairness and integrity of the nation's elected judges." Brief for Conference of Chief Justices as *Amicus Curiae* 4, 11. This is a vital state interest:

"Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order." *Republican Party of Minn.* v. *White*, 536 U. S. 765, 793 (2002) (Kennedy, J., concurring).

It is for this reason that States may choose to "*adopt recusal standards more rigorous than due process requires.*" *Id.*, at 794; see also *Bracy* v. *Gramley*, 520 U. S. 899, 904 (1997) (distinguishing the "constitutional floor" from the ceiling set "by common law, statute, or the professional standards of the bench and bar").

"The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and *the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today.*" [*Aetna Life Ins Co v*] *Lavoie*, [475 US 813,] 828 [(1986)]. Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances. [*Caperton*, 129 S Ct at 2266-2267 (emphasis added).]

Our newly amended rule was designed to specifically address disqualification in keeping with the standards and principles enunciated in *Caperton*. Our new rule provides, in pertinent part:

> (1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:
>
> * * *
>
> (b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v* [*A T*] *Massey* [*Coal Co, Inc*, 556] US ___; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct. [MCR 2.003(C)(1).]

The new rule is not unconstitutional or inappropriate merely because a minority of justices on this Court disagree with incorporating an *appearance-of-impropriety* standard within the rule. As recognized by the United States Supreme Court in the above-quoted language, the appearance-of-impropriety standard is part of a code that serves to maintain the integrity of our judiciary and the confidence of the public. *Caperton* recognized that appearances of partiality can rise to such an extreme level that the due process rights of parties become impaired, at which point disqualification is mandated by the United States Constitution. But *Caperton* also recognized that states are free to impose more rigorous standards than due process requires, including the *appearance-of-impropriety* standard. Accordingly, it is constitutional to expressly include this standard within the rule.

Further, I do not agree with any assertion that no other state requires recusal on the basis of a general *appearance-of-impropriety* standard. This argument is premised on the assumption that there is a difference between the standard "*A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned*," and a standard that requires recusal if there is an "*appearance of impropriety*." However, this argument draws a distinction where none exists. These standards are one and the same. As acknowledged in *Caperton*, the test for appearance of impropriety is " '*whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired*.' " *Caperton*, 129 S Ct at 2266 (citation omitted; emphasis added). This test *is* the standard for determining whether a judge's impartiality might reasonably be questioned. The two are the same for purposes of disqualification.

Moreover, I do not agree with any assertion that incorporating the *appearance-of-impropriety* standard into our rule overshadows the other more specifically enumerated grounds for disqualification set forth in MCR 2.003(C)(1), or that the ABA Model Code[1] provides otherwise. The ABA Model Code does not define impartiality by reference to specifically

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[1] The ABA Model Codes can be found at <http://www.abanet.org/judicialethics/resources/resources_aba.html> (accessed March 22, 2010).

enumerated examples of conduct, but rather uses the phrase "including but not limited to the following circumstances," followed by enumerated *nonexclusive* scenarios for recusal in which a "judge's impartiality might reasonably be questioned . . . ." Further, the comments to the ABA Model Code make clear that a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specifically enumerated provisions apply.

Finally, I find concerns about a justice's personal due process rights during the disqualification procedure to be misplaced. Rather, the proper concern is the rights of litigants to have a fair hearing by impartial jurists. I would direct those who believe that the rights of jurists are superior to the rights of the public to Canon 1 of the Code of Judicial Conduct, which provides:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. *A judge should always be aware that the judicial system is for the benefit of the litigant and the public, not the judiciary. The provisions of this code should be construed and applied to further those objectives*. [Emphasis added.]

For all the above reasons, our disqualification rule is constitutional and appropriate.

CORRIGAN, J. I do not participate in the orders issued under the new version of MCR 2.003 for the reasons stated in my November 25, 2009, dissent from the rule's promulgation. Contrary to Chief Justice KELLY's assertions, Justice YOUNG and I have exhaustively detailed our reasons for concluding that the rule is unconstitutional. See 485 Mich cxxx, cxlviii-clii (2009) (CORRIGAN, J., dissenting).[1] We also explain here that the duty to sit clearly cannot require official acts that would violate our oaths to uphold the federal and Michigan constitutions. Const 1963, art 11, § 1. Further, I object to the majority's application of the new rule to this case in light of its decision to adjourn the discussion of proposed changes to the rule previously scheduled for this Court's December 2009 and January 2010 public administrative hearings. As Justice YOUNG observes, the proposed changes are intended to bring the rule into compliance with minimal due process and First Amendment requirements, yet the majority here applies the rule in its current form before even discussing the proposals.

The rule currently requires a justice's recusal on the basis of a mere "appearance of impropriety . . . ." MCR 2.003(C)(1)(b). Yet my research has disclosed that no state requires recusal on the basis of a general "appearance of impropriety," let alone permits other justices to force a colleague's recusal on the basis of such a standard. See the chart attached to this statement as Exhibit A. Instead, a majority of states apply rules

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[1] Available at <http://courts.michigan.gov/supremecourt/Resources/Resources/Administrative/2009—04—112509.pdf> (accessed March 8, 2010).

apparently derived from the American Bar Association (ABA) model rule, which requires recusal if a judge's "impartiality might reasonably be questioned . . . ."[2] Even those states with significantly different rules do not employ an "appearance of impropriety" standard. Further, the vast majority of states employ a practice similar to that of the United States Supreme Court's and Michigan's traditional practices: an individual justice decides whether recusal is required. Indeed, only eight states allow justices to cast votes on their colleagues' recusals.[3]

Significantly, the commonly used ABA standard—"[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned"—appears at the outset of the ABA model rule's listing of grounds for recusal. ABA Model Rule 2.11(A). The comparable threshold Michigan standard, which read "[a] judge is disqualified when the judge cannot impartially hear a case," has now been eliminated. See former MCR 2.003(B). Before its elimination, the Michigan threshold standard for recusal—like those in other states similar to the ABA model rule's threshold—was followed by enumerated, nonexclusive reasons for recusal that informed and limited the meaning of the threshold standard. For example, in Michigan and under the ABA rule, a judge is disqualified if he is actually biased or prejudiced, see current MCR 2.003(C)(1)(a) and ABA Model Rule 2.11(A)(1), or if he has an economic interest in the subject matter in controversy, see current MCR 2.003(C)(1)(f) and ABA Model Rule 2.11(A)(3). But Michigan has now deleted its threshold standard and simply offers a list of nonexclusive, stand-alone reasons that require recusal. Most significantly, Michigan alone includes the "appearance of impropriety" as one of these independent criteria for recusal, MCR 2.003(C)(1)(b). This unique Michigan provision renders superfluous the remaining, more specific enumerated grounds for recusal that we previously shared with the majority of our sister states. Why would a party need to show that a justice is actually biased or has an actual economic interest in a case if that party can merely claim an *appearance* of impropriety under the generalized standards of Canon 2 of the Code of Judicial Conduct?

Chief Justice KELLY and Justice HATHAWAY assert that Michigan's "appearance of impropriety" standard is synonymous with the more common standard requiring recusal when "the judge's impartiality might reasonably be questioned." But, contrary to their implications, Michigan alone has adopted the "appearance of impropriety" as a stand-alone enumerated ground for recusal.[4] Although some courts consider the two standards to be roughly equivalent, the language is not identical, and the plain meaning of "appearance of impropriety" under Canon 2 strikes me as

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[2] See 2007 ABA Model Code of Judicial Conduct, Canon 2, Rule 2.11 (ABA Model Rule 2.11), available at <http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf> (accessed March 8, 2010).

[3] Further, many states' practices in this regard are unwritten and rarely exercised, so comparison is difficult.

[4] Chief Justice KELLY and Justice HATHAWAY incorrectly imply that the United States Supreme Court observed in *Caperton v A T Massey Coal Co,*

dangerously broad in this context. Most significantly, my colleagues ignore or unconvincingly explain away the central problem with the "appearance of impropriety" standard: as just explained, because of this Court's unprecedented choice to adopt this standard as an independent reason for recusal, it effectively renders nugatory the remaining more specific reasons for recusal. Thus, our new, stand-alone criterion for recusal is most certainly *not* comparable to other states' *threshold* standards requiring recusal when a judge's "impartiality might reasonably be questioned," which are circumscribed by concrete, illustrative lists of specific reasons for recusal. If the majority's genuine intent is to bring Michigan in line with other states' standards, it should adopt the common standard—requiring recusal when a judge's impartiality might reasonably be questioned—as a *threshold* standard at the outset of our rule.

Moreover, as noted, an "appearance of impropriety" standard for recusal is particularly problematic in light of the majority's decision that it is empowered to disqualify other justices from hearing a case. The Chief Justice concedes that allowing one justice to overrule another justice's decision on a recusal motion violates the maxim that each justice has equal power and authority with respect to his colleagues. Yet she now justifies this seizure of power on the mere ground that, in essence, the majority rules. That is no explanation for the Court's purported authority in this matter. "Appearance of impropriety" is too nebulous a standard to justify removal of a justice from a case against his will. Certainly Canon 2 of the Michigan Code of Judicial Conduct—like Canon 1 of the ABA Model Code and the comparable standards of many states—requires judges to "avoid all impropriety

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Inc, 556 US ___; 129 S Ct 2252 (2009), that the vast majority of states have adopted the "appearance of impropriety" as a *disqualification* standard. To the contrary, as *Caperton* makes clear, most states—like Michigan—have adopted judicial conduct standards comparable to Canon 1 of the 2007 ABA Model Code of Judicial Conduct and the accompanying rules. But these standards are not equivalent to enforceable recusal rules, let alone recusal rules that may be raised by a party and enforced against an individual justice's will. Indeed, although Chief Justice KELLY lists various states that employ an "appearance of impropriety" standard, the standard appears in their judicial canons, as her statement candidly shows; the standard does not appear in their recusal rules. Justice HATHAWAY also relies on *Caperton,* but this Court has not adopted a rule reciting the ABA Model Code's test for appearance of impropriety cited in *Caperton*. Further, contrary to Justice HATHAWAY's implications, I do not conclude that the recusal standard employed by many states and apparently approved by *Caperton*—"the judge's impartiality might reasonably be questioned"—is unconstitutional. Rather, I contest the unprecedented, broad wording of the new Michigan standard *combined* with the new power of a majority of this Court to vote to remove a fellow coequal justice from a particular case in the absence of any procedural safeguards. As I explain further below, it is this combination of factors that I believe threatens the due process rights of Michigan justices *and* litigants appearing before this Court.

and appearance of impropriety." But we have no sound reason to incorporate this broad, aspirational standard into our binding, enumerated requirements for recusal. Because the standard is difficult to definitively apply, permitting a majority of justices to disqualify a peer on this basis creates a conspicuous threat to the due process rights of each member of this Court.

A written explanation by the voting justices of why they did or did not vote to disqualify a challenged justice from hearing a case does not solve this problem. Indeed, a written statement is meaningless. It does not afford due process when based on such a vague standard. The rule effectively gives a majority of justices carte blanche to disqualify their colleagues simply by articulating its impressions of why a challenged justice's participation *appeared* improper, without regard to the existence of the traditional, more objective grounds for recusal such as personal bias, involvement in the case, or economic interest in the case. This liberal procedure does not merely offend the removed justice's due process rights. As noted in my dissent from the adoption of our new rule, the rule nullifies the electoral choice of the people of Michigan by permitting the Court to decide which justices may participate in a given case. Moreover, particularly when, as in this case, one party seeks the recusal of justices and the other party opposes recusal, the procedure threatens the right of the opposing party to have his cause heard by an impartial court.

Recent developments in other states echo my previously stated concerns about the national push among a handful of well-funded interconnected advocacy groups to chill campaign speech in an effort to hamper judicial elections. See 485 Mich cxxx, clv-clvii (2009) (CORRIGAN, J., dissenting). In particular, the Wisconsin Supreme Court recently rejected new rules that would require a judge to recuse himself even if he received a lawful campaign contribution from a party. Commenting on the effort to " 'deprive citizens who lawfully contribute to judicial campaigns . . . of access to the judges they help elect,' " Wisconsin Supreme Court Justice David Prosser, Jr., warned: " 'I think the national recusal movement is an effort to so gum up [judicial] elections that we are almost forced into an alternative, such as appointing judges.' " Koppel, *States Weigh Judicial Recusals*, Wall St J, January 26, 2010, at A8.

With general regard to Chief Justice KELLY's assertions, I concur fully in the responses offered by Justice YOUNG. Indeed, it is not I who abdicate the duty to sit by declining to participate in the Court's decision under MCR 2.003. Quite to the contrary, the new formulation of MCR 2.003 threatens a justice's duty to sit in cases in which recusal would not be required by any other state in the nation. I have properly discharged my duty to sit by denying the motion for recusal directed at me; I stand ready to hear the controversy before us. I have also properly exercised the duties of my office—which are rooted in my oath to uphold the Constitution of the United States and the Michigan Constitution, Const 1963, art 11, § 1—by declining to participate in the majority's decision with regard to the motion for recusal directed at Justice MARKMAN because I believe the new provisions of MCR 2.003 are unconstitutional.

For the foregoing reasons, I do not participate in the majority's decisions under the unconstitutional new version of MCR 2.003. I further continue to urge my colleagues to rethink their adherence to this new rule in its current form.

EXHIBIT A

U.S. State Supreme Court
Recusal Rules and Practices

Michigan Supreme Court
Justice Maura Corrigan
Research as of 1/11/10
page 1

STATE	Recusal Rules/Statutes	Does rule require recusal for "appearance of impropriety"?	Do other justices vote?
ALABAMA	Canon 3C; Code of Ala § 12-24-1 and 12-24-2	The statutory provisions require recusal for campaign contributions above a specified amount absent waiver and state the legislative intent is to avoid an "appearance of impropriety." The statute contains objective thresholds regarding what constitutes such an appearance.	The clerk states that other justices could vote but that it has never happened. No written rule exists regarding this practice.
ALASKA	Canon 3E; AS 22.20.020	NO	The clerk indicates that AS 22.20.020 allows other justices to appoint a judge to review a justice's recusal declination but that it has never happened.
ARIZONA	Canon 3E(4)	NO	NO
ARKANSAS	Supreme Court Rule 6-4; Canon 2.11	NO	NO
CALIFORNIA	Canon 3E(4)	NO	NO
COLORADO	Canon 3(C); CRCP 97	NO	NO
CONNECTICUT	Code of Judicial Conduct Canon 3C; Conn. Practice Book 1-22	NO	NO
DELAWARE	Code of Judicial Conduct, Canon 3; Rule 2.11	NO	NO
FLORIDA	Code of Judicial Conduct, Canon 3E, [R Jud. Admin. 2.330 is for trial judges]	NO	NO
GEORGIA	OGCA, sect. 15-1-8; Code of Judicial Conduct Canon 3E	NO	NO
HAWAII	Code of Judicial Conduct; Rule 2.11	NO	NO
IDAHO	Canon 3E [Court Rule 40(d) doesn't apply to justices]	NO	NO
ILLINOIS	Supreme Court Rule 63 (IL Code of Judicial Conduct Canon 3)	NO	NO
INDIANA	IN Code of Judicial Conduct Rule 2.11	NO	NO
IOWA	IA R 51 Canon 3(C)	NO	NO
KANSAS	KS Rules Relating to Judicial Conduct Rule 2.11	NO	NO
KENTUCKY	SCR 4.300 KY Code of Judicial Conduct, Canon 3(E); KRS 26A.015 (statute)	NO	NO

EXHIBIT A

U.S. State Supreme Court
Recusal Rules and Practices

Michigan Supreme Court
Justice Maura Corrigan
Research as of 1/11/10
page 2

STATE	Recusal Rules/Statutes	Does rule require recusal for "appearance of impropriety"?	Do other justices vote?
LOUSIANA	Code of Judicial Conduct Canon 3(C); Code of Civ Pro, art. 151, 152, 159; Code of Crim Pro 671, 672; Supreme Court Rules Part L, Rule XXXVI (Civ Pro and Crim Pro rules are enacted by the Legislature)	NO	YES. If challenged justice decides not to recuse, remaining justices vote. Code of Civ Pro art. 159; Code of Crim Pro art. 679
MAINE	Maine Code of Judicial Conduct Canon 3(E)	NO	NO
MARYLAND	Md Rule 16-813, Maryland Code of Judicial Conduct Canon 3(D)	NO	NO
MASSACHUSETTS	Supreme Judicial Court Rule 3:09, Mass Code of Judicial Conduct, Canon 3(E)	NO	NO
MINNESOTA	52 Minn Statutes Annotated, Code of Jud.Conduct, Canon 3(D)	NO	NO
MISSISSIPPI	Miss R App Pro 48(B) for trial judges, and Miss R App Pro 48(C) for disqualifiation of justices or judges of appellate courts	NO	YES. Miss R App Pro 48(C)(a)(iii).
MISSOURI	Supreme Court Rule 2.03, Canon 3(E)	NO	YES. Clerk said that other justices could vote based on the court's unwritten policy for handling recusals, but the clerk was unaware of any time in which justices actually voted on the recusal of a co-equal justice.
MONTANA	Mont CA § 3-1-803; Mont CJC Rule 2.12	NO	NO
NEBRASKA	Neb CR § 5-203(E)	NO	NO
NEVADA	Nev RS 1.225	NO	YES. Nev RS 1.225.
NEW HAMPSHIRE	NH Sup Ct R 38-3(E)	NO	NO
NEW JERSEY	NJ CR 1:12-1	NO	NO
NEW MEXICO	NM Const art 6, § 18; NM CR 21-400	NO	NO
NEW YORK	NY CR 100.3(E)	NO	NO

EXHIBIT A

U.S. State Supreme Court
Recusal Rules and Practices

Michigan Supreme Court
Justice Maura Corrigan
Research as of 1/11/10
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STATE	Recusal Rules/Statutes	Does rule require recusal for "appearance of impropriety"?	Do other justices vote?
NORTH CAROLINA	Judicial Canon 3C(1)	NO	NO. Other justices never vote on recusal. But a party aggrieved by a justice's refusal to recuse could bring it before the judicial standards commission. If the commission recommended removal or censure, that would go before the other justices. And the Chief Justice could remove the case from the S Ct to the COA. But the clerk never remembers that happening or there ever having been an issue.
NORTH DAKOTA	ND Code of Judicial Conduct Canon 3E(1)	NO	NO
OHIO	Ohio Code of Judicial Conduct 2.11; OH Const. Art. IV, sect 5(C)	NO	NO
OKLAHOMA	Code of Judicial Conduct Canon 3E (current)/ R. 2.11 (new proposed); Title 20 OK St. Sect. 1402	NO	Justices generally decide for themselves but in OK the Chief Justice's brother is the AG. In a few case involving the AG's office, the Chief Justice has asked a motion for DQ/recusal to be considered at the justices' conference. Also, when a (usually pro se) litigant asks for DQ of entire S Ct that of course is considered by full court.

EXHIBIT A

U.S. State Supreme Court
Recusal Rules and Practices

Michigan Supreme Court
Justice Maura Corrigan
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STATE	Recusal Rules/Statutes	Does rule require recusal for "appearance of impropriety"?	Do other justices vote?
OREGON	Code of Judicial Conduct JR 2-106; ORS 14.275, 14.210; ORAP 8.30	NO	YES. If a justice does not believe the motion to DQ is well taken, the justice shall refer the motion to the chief justice, who may rule on the motion or may refer the motion to the full court for a decision. ORAP 8.30. In practice, justices tend to DQ themselves liberally and this is not usually an issue. The S Ct did go through this process ("went through the motions") of bringing a DQ motion before the full court where a pro se litigant filed a completely baseless motion to DQ a justice.
PENNSYLVANIA	Code of Judicial Conduct Canon 3C; Conn. Practice Book 1-22	NO	NO.
RHODE ISLAND	RI Code of Judicial Conduct Canon 3(E)	NO	NO. Although the challenged justice may choose to dicuss it with the Court. The clerk had never heard of the Court disagreeing with a challenged justice's decision or of a vote by the unchallenged justices.
SOUTH CAROLINA	SC Code §§ 14-1-130, 14-3-50; SC Code of Judicial Conduct Canon 3(E)	NO	NO. Although the challenged justice could seek input from the Court. Maybe the Court could act if they disagreed with the justice's decision, but the Clerk had never seen this happen.
SOUTH DAKOTA	SD Code 15-12-37; Code of Judicial Conduct 3(E)	NO	NO
TENNESSEE	TN Const art VI, § 11; TN R Sup Ct 10-3(E)	NO	NO, according to the rules. As yet unable to get phone confirmation re: whether might be an informal practice.

EXHIBIT A

U.S. State Supreme Court
Recusal Rules and Practices

Michigan Supreme Court
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STATE	Recusal Rules/Statutes	Does rule require recusal for "appearance of impropriety"?	Do other justices vote?
TEXAS	Const art 5, sec 11; Rule 18b; informal Supreme Court voting practice	NO	YES. No written rule, but their Supreme Court Rules attorney confirms that the remaining justices vote if there is a motion to recuse one justice and he decides not to recuse himself.
UTAH	UT Code 78A-2-222; UT Code of Judicial Conduct Canon 3(E)	NO	NO, according to the rules. As yet unable to get phone confirmation re: whether might be an informal practice.
VERMONT	12 Vt SA § 61 and Vt Code J Conduct Canon 3(E) and Vt R App Pro, Rule 31(d)-(e)	NO	YES. If challenged justice decides not to disqualify himself, quorum of remaining justices vote. Vt R App Pro, Rule 31(e).
VIRGINIA	VA Sup Ct R 6:3-3(E)	NO	NO
WASHINGTON	RC Wash 2.28.030 and Wash CJC 2(D)	NO	NO
WEST VIRGINIA	W Va R of App Proc 29(b) and Code of J Conduct 3(E)(1)	NO	NO
WISCONSIN	Wis CL § 757.19	NO	NO
WYOMING	Wy R Civ P 40.1(b)(2) and Wy R J Cond 2.11	NO	NO

YOUNG, J. I do not participate in the order or the Court's decision-making under the new rule for the reasons stated in my November 25, 2009 dissent from the rule's promulgation.[1]

As I have previously stated, MCR 2.003 as amended is unconstitutional.[2] That the majority has refused to consider the significant constitutional issues arising under the amended rule that I have raised is especially troubling. In particular, on November 19, 2009, before the order amending MCR 2.003 entered, I circulated to the Court a series of substantive amendments that addressed the basic due process and First Amendment problems with the rule the majority nevertheless adopted on

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[1] See 485 Mich cxxx, clxvii-clxxxv (2009) (YOUNG, J., dissenting). At the time I denied the motion to disqualify, I issued a statement explaining my reasons for doing so. A copy of that statement is attached as Exhibit A.

[2] The Chief Justice claims that I "fail to cite any controlling authority for [my] assertion that MCR 2.003, as amended, or the 'appearance of impropriety' standard, generally, is unconstitutional." *Ante* at 1136 n 6. I invite the Chief Justice to reread (or read) my dissenting statement to the order amending MCR 2.003, entered on November 25, 2009, to become acquainted with the arguments that I marshal on behalf of my position on the rule's unconstitutionality. A copy of that order is attached as Exhibit B.

November 25, 2009.[3] In the more than four months since I proposed them, not only have the members of the majority failed to provide me with any written or oral feedback on these amendments, they have also refused to consider these amendments at our December 10, 2009, and January 27, 2010, public administrative conferences, even though they were scheduled to be considered. That the majority is willing to review their fellow justices' recusal decisions under the new rule in the face of its serious constitutional problems indicates an appalling indifference to the role of this Court in enforcing the rule of law.

RESPONSE TO CHIEF JUSTICE KELLY AND JUSTICE HATHAWAY

Chief Justice KELLY's and Justice HATHAWAY's statements explaining the duty to sit and defending the constitutionality of MCR 2.003 contain little more than a pastiche of legal non sequiturs. As such, I will address the various points they raise seriatim.

(1) I am heartened to discover that the Chief Justice now recognizes the duty to sit. She is correct in stating that " 'it is necessary that judges participate in cases in which recusal is not required.' "[4] However, because every justice takes an oath of office to uphold the constitutions of the United States and the state of Michigan,[5] a justice is also obligated to respect his or her constitutionally limited authority when deciding a case. Accordingly, just as a justice has the responsibility to raise sua sponte the issues of standing or subject matter jurisdiction in order to determine whether deciding the merits of a case exceeds the justice's constitutional authority, a justice has a similar responsibility not to rule on motions that require an action beyond the scope of that constitutional authority.

(2) Moreover, it is not clear that the duty to sit even applies to collateral motions *within* cases before this Court. The duty to sit requires a justice to "participate in *cases* in which recusal is not required."[6] Even

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[3] A copy of the amendments I proposed that are currently before the Court, but have been passed twice from consideration at public conferences, is attached as Exhibit C. These proposed amendments are substantially similar to the proposed amendments that I circulated on November 19, 2009, but also incorporate some suggestions from Justice MARKMAN that I received in the interim.

[4] *Ante* at 1135, quoting *Adair v Michigan*, 474 Mich 1027, 1030 (2006) (statement of TAYLOR, C.J., and MARKMAN, J.).

[5] Const 1963, art 11, § 1 requires "[a]ll officers, legislative, executive and judicial, before entering upon the duties of their respective offices [to] take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state . . . ."

[6] *Adair*, 474 Mich at 1030 (statement of TAYLOR, C.J., and MARKMAN, J.) (emphasis added).

though I do not participate in this Court's review of the motions to disqualify, I continue to participate in the defendant's underlying appeal in this case because my recusal is not required.[7] For this independent reason, my nonparticipation in the decision of this motion is not a violation of my duty to sit.

(3) The Chief Justice generously notes that I am entitled to my view on the constitutionality of MCR 2.003. While I am grateful that she concedes as much, the citizens of this state deserve more from its senior court. It is not enough, as the Chief Justice asserts, to claim that all that this Court does is "clothed in a presumption of constitutionality." Were that the case, there would be no need to consider any constitutional challenge to this Court's rules. I have not challenged the constitutionality of MCR 2.003 lightly. Even if my views are repudiated by this Court, the constitutional challenges I have raised deserve serious consideration by this Court. Thus far, the majority has studiously avoided consideration of these challenges, either before adopting this modified disqualification rule or afterward.

(4) Throughout their defenses of MCR 2.003, the Chief Justice and Justice HATHAWAY conflate two of the new substantive requirements under MCR 2.003 and in doing so also misleadingly suggest that the "appearance of impropriety" standard is one that the vast majority of states have adopted. The previous substantive requirements requiring a judge's recusal under the former version of MCR 2.003 mandated recusal whenever "the judge cannot impartially hear a case . . . .[8] This was an actual bias standard.[9] The former rule then provided a nonexclusive list of proxies for actual bias requiring recusal, as well as safe harbors that allowed a judge's participation in a case absent a different reason for disqualification.

The new substantive requirements mandate recusal when

> [t]he judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v* [*A T*] *Massey* [*Coal Co, Inc*], [556] US ___; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), *or* (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.[10]

I need not rehash the persuasive evidence that Justice CORRIGAN has marshaled in her statement showing that Michigan is now *unique* in expressly adopting an "appearance of impropriety" standard as a basis for disqualification. **To put the matter bluntly, there is *no other* disqualification rule in the country like the one we have adopted.**

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[7] A copy of my statement denying the motion to disqualify is attached as Exhibit A.

[8] Former MCR 2.003(B). This standard also appeared in GCR 1963, 912.2(a).

[9] *Cain v Dep't of Corrections*, 451 Mich 470, 495 (1996).

[10] MCR 2.003(C)(1)(b) (emphasis added).

However, in defending the "appearance of impropriety" standard, the Chief Justice and Justice HATHAWAY also fail to recognize an important distinction between the two parts of MCR 2.003(C)(1)(b). The first part of this subrule recognizes the requirements of due process as articulated in *Caperton* and applies only when a judge's conduct affects the *due process rights* of a party in the context of a particular case. ***The second part of this subrule*** applies all of Canon 2 of the Michigan Code of Judicial Conduct ***without requiring that*** **the judge's violation of Canon 2 be relevant to a party's rights in a particular case**.[11] Justice HATHAWAY claims that *Caperton* articulates a test for an "appearance of impropriety" centered on " '*whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.*' "[12] However, the "appearance of impropriety" standard contained in MCR 2.003(C)(1)(b)(ii) comes from the Michigan Code of Judicial Conduct, not *Caperton*, and, more importantly, ***does not contain any limiting language***. MCR 2.003(C)(1)(b)(ii) is a startling and supremely stupid policy that could have no conceivable purpose other than to permit a majority of this Court to remove a fellow justice for any violation of Canon 2, however unrelated to a justice's partiality or impartiality in an underlying case. Rather than disclaim such intention, the Chief Justice *confirms* that "grounds for recusal should not be narrowly confined to the case before the court in order for a justice to be removed from the case."[13] This admission, that a justice *should be removed for reasons having nothing to do with his or her ability to rule in a particular case*, speaks volumes and shows that the majority's intention in promulgating the new "appearance of impropriety" standard is to give the majority a large hammer to wield in its arbitrary use of power.

The Chief Justice's conflation of the distinction between the two clauses of MCR 2.003(C)(1)(b) renders misleading her claim that "federal district courts have rejected First Amendment constitutional challenges to a recusal standard that is synonymous with the 'appearance of impropriety' standard . . . ."[14] She cites five federal district

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[11] For example, Canon 2(A) requires a judge to "avoid all impropriety and appearance of impropriety." Also, contained within Canon 2(B) is the requirement that a judge "respect and observe the law." Accordingly, under the text of this new rule, a judge who received a traffic ticket for driving faster than the posted speed limit, and therefore who knowingly failed to "observe" the law, can be disqualified from a case for failing to meet the "appearance of impropriety" standard, *even if this conduct has no reasonable relevance to whether the judge can impartially hear cases before him*. This conclusion is borne out by the nature and relation of the two clauses. The first is limited to the parties' due process rights; the second is not.

[12] *Ante* at 1146, quoting *Caperton*, 129 S Ct at 2266 (emphasis in Justice HATHAWAY's statement).

[13] *Ante* at 1139 n 15.

[14] *Ante* at 1136.

court decisions that she purports accepted "such recusal rules" as "narrowly tailored to meet [the states'] interest and . . . neither overbroad nor vague." The five cases that the Chief Justice cites, however, involved recusal rules that are *substantially narrower* than Michigan's unique "appearance of impropriety" standard. They all relied on a standard requiring recusal when a judge's "impartiality might reasonably be questioned." There is a significant difference between that standard and the "appearance of impropriety" standard the majority has now engrafted on the old rule. The former has a longstanding provenance in the disqualification jurisprudence of many jurisdictions; the latter, none.

In *Alaska Right to Life Political Action Comm v Feldman*, for example, the United States District Court for the District of Alaska upheld the constitutionality of Alaska's judicial canon requiring recusal when a judge's "impartiality might reasonably be questioned":

> In summary, "[w]hen a judge may have a particular bias or prejudice, the recusal provisions require the judge to remove himself or herself from the case." More specifically, "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ." Without further analysis, the Court concludes this canon is narrowly tailored to serve a compelling State interest, i.e., it offers assurance to parties that the judge will apply the law in the same manner that would be applied to any other litigant. Consequently, it survives Plaintiffs' constitutional challenge.[15]

The remaining four cases that the Chief Justice cites apply similar standards that specifically involve a judge's impartiality *in a given case.*[16]

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[15] *Alaska Right to Life Political Action Comm v Feldman*, 380 F Supp 2d 1080, 1084 (D Alas, 2005) (citations omitted).

[16] *North Dakota Family Alliance, Inc v Bader*, 361 F Supp 2d 1021, 1043 (D ND, 2005) (interpreting ND Code of Judicial Conduct, Canon 3(E)(1), which requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned"); *Family Trust Foundation of Kentucky, Inc v Wolnitzek*, 345 F Supp 2d 672, 705-711 (ED Ky, 2004) (interpreting Ky Sup Ct R 4.300, Ky Code of Judicial Conduct, Canon 3(E)(1), which requires a judge to disqualify "himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned"); *Indiana Right to Life, Inc v Shepard*, 463 F Supp 2d 879, 886-887 (ND Ind, 2006) (interpreting former Ind Code of Judicial Conduct, Canon 3(E)(1), which required a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned"); *Bauer v Shepard*, 634 F Supp 2d 912, 948-950 (ND Ind, 2009) (interpreting Ind Code of Judicial Conduct, Canon 2, Rule 2.11(A)(5), which requires a judge's recusal when that judge has made a public statement (other than one in a court proceeding, judicial decision, or opinion) that

As stated, the "appearance of impropriety" standard contains no such limitation to a particular pending case. It has never been incorporated into a disqualification rule as has the "impartiality might reasonably be questioned" standard. If the goal of the new, supposedly "objective" standard is simply to prevent the risk of bias in the context of a particular case, then the first clause of the subrule suffices. However, if the "appearance of impropriety" clause is not to be rendered nugatory, it *must* apply generally to a judge's conduct, no matter how unrelated to the case at hand. I do not see how the majority can deny that the second clause must be broader than the first. If the members of the majority do, what is their justification for *permitting* the disqualification of a justice for a violation of Canon 2 that has nothing to do with a particular case? The breadth of this second clause alone should trouble the majority. Unfortunately, majorities rarely conceive or concede that *they* could be capable of abuse of power.

The prevention of an elected official from performing his or her duties is a very serious matter, and thus a rule allowing removal of a judge from a particular case should be clear and must be narrowly tailored to the circumstances of a particular case. Any other standard, including an "appearance of impropriety" standard encompassing all conduct, however unrelated to the case at hand, is impermissibly broad and interferes with the due process rights that inhere in the office. The lack of case-specific limitations of the "appearance of impropriety" clause illustrates the unseemly haste with which the majority was driven to amend not only the procedures for this Court's determination of disqualification motions but also the substantive standards by which such motions are decided.[17] Because the disquali-

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"commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy").

[17] Although disqualification has been an issue before the Court for some time, the "appearance of impropriety" standard is a much more recent development. This new standard was not incorporated into any of the three proposals that this Court published for comment in March 2009. See *Proposals Regarding Procedure for Disqualification of Supreme Court Justices*, 483 Mich 1205 (2009). Justice HATHAWAY first proposed the "appearance of impropriety" standard on October 22, 2009, two weeks prior to the November 5, 2009, administrative conference at which the Court voted on adopting the new standard. Moreover, I shared the following exchange with Justice HATHAWAY at that conference when I inquired about the nature of her proposed standard:

> *Justice Hathaway*: If there is an appearance of impropriety, then you cannot sit on a case.
>
> *Justice Young*: And from what perspective is the appearance of impropriety? Is it a subjective standard? Is it an objective standard?

fication of a judge implicates the electorate's right to seat a court of its choosing, the standards for disqualification must be exceedingly clear. The "appearance of impropriety" standard is anything but.

In conflating the general "appearance of impropriety" standard that the majority has promulgated with the case-specific standard that other states and *Caperton* require, the Chief Justice elides the important First Amendment issues uniquely involved in the context of Michigan's court rule. There are different issues involved when a judge's speech implicates a party's due process rights to have a neutral arbiter than when a judge's speech implicates a nonconstitutional "appearance of impropriety" court rule.[18] This is particularly true in light of the decision of the people of Michigan to retain their sovereign right to elect judges.

In every written constitution since 1850, the people of Michigan have retained their sovereign right to elect judges rather than surrender that right to some other process. Accordingly, judicial aspirants in Michigan campaign for judicial office. In campaigning, they will engage in political speech that is clearly protected under the First Amendment. The protection of speech guaranteed under the First Amendment is especially important within the context of political campaigns. James Madison, drafter of the First Amendment, wrote:

> The value and efficacy of [the right of elections] depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.[19]

Thus, any restrictions on campaign speech not only infringe on a candidate's right to speak, but also infringe on the *public's* right to vote intelligently on their candidates.

> *Justice Hathaway*: I haven't thought through all that to be honest with you, to answer you here.
>
> *Justice Young*: But we're going to vote on this today.
>
> *Justice Hathaway*: Then let's vote.

In light of this exchange, I will leave the reader to determine the correctness of Chief Justice KELLY's claim that "criticism of the amendments of MCR 2.003 as being 'hast[y]' is off the mark." *Ante* at 1141.

[18] I believe no one in the majority that promulgated the "appearance of impropriety" standard, including the Chief Justice, has urged that it was of constitutional dimension.

[19] James Madison, *Report on the Virginia Resolutions*, available at <http://press-pubs.uchicago.edu/founders/documents/amendI_speechs24.html> (accessed March 25, 2010).

The importance of citizens' decisions regarding whom to entrust with public office deserves no less than a robust public discussion of issues by candidates seeking their votes. ***The amended court rule frustrates this kind of political discussion between judicial candidates and voters and penalizes a judicial candidate for trying to do so.*** The amended court rule expressly contemplates that campaign speech protected under the First Amendment will nevertheless cause a duly elected judge to be disqualified from hearing a case. This is so because the new rule establishes that a judge's political speech is subject to an "appearance of impropriety" limitation that the Chief Justice recognizes extends beyond the due process requirements that *Caperton* mandated.

Thus, even if the challenged political speech in no way implicated actual bias against a party (or any other constitutional right of that party), an elected justice would still be liable to be disqualified if his or her campaign comments were later determined to have created an appearance of impropriety. It is not hard to contemplate campaign speech that might offend someone's sensibilities and later be considered "improper" under the new rule's standard.

Moreover, the mere *threat* of future disqualification produces a chilling effect on protected speech. The United States Supreme Court's decision in *Republican Party of Minnesota v White* struck down the Minnesota Supreme Court's rule forbidding an incumbent judge or candidate for judicial office from " 'announc[ing] his or her views on disputed legal or political issues' " during an election campaign.[20] While the Minnesota Supreme Court's restriction on campaign speech was more expressly content-based than the restrictions promulgated by the new rule, ***the new majority here is attempting to achieve indirectly what the United States Supreme Court declared in* White *that a court could not do directly: stifle protected judicial campaign speech.*** The new "appearance of impropriety" standard is so broad and vague that judges and judicial candidates will be forced to self-limit their campaign speech so that, once they are elected, they can actually exercise the duties of the office they have sought. **Thus, this rule is facially unconstitutional because it expressly allows a jurist's First Amendment right to free speech to be subordinated to a nonconstitutional standard.** *The new majority is untroubled by this obvious abridgement of First Amendment rights that their new rule causes. And the abridgment is even more invidious because the appearance of impropriety is not tied to a violation of a party's constitutional rights.*

(5) The Chief Justice also questions whether the removal of a judge from a case against his or her will for any speech protected under the First Amendment constitutes a sufficient injury in fact for standing purposes.[21] Such a claim denigrates the judicial offices that Michigan

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[20] *Republican Party of Minnesota v White*, 536 US 765, 768 (2002) (citation omitted).

[21] *Ante* at 1137 n 9.

citizens have entrusted to their judges. The disqualification of a judge from exercising his or her judicial office in a particular case for having asserted protected speech is a cognizable injury in fact sufficient to establish standing. Indeed, though it did not decide the issue, the United States Court of Appeals for the Eleventh Circuit has recognized as "non-frivolous" the argument that "forcing a judge to disqualify himself . . . is a penalty in itself."[22] It is hard to imagine why removing a judge from a case would not support standing to challenge the legitimacy of the removal. It would be passing strange to contemplate any contrary rule under which the very officeholder being prevented from exercising the duties of office lacked standing to challenge the prevention. Chief Justice KELLY offers no rationale or authority for her assertion to the contrary. There is an obvious reason why she has not.

(6) The Chief Justice also states, in an entirely conclusory fashion and without citing any authority: "The rule does not deny any rights to a justice who is recused against his or her will." She fails to address the serious due process concerns that I expressed before the adoption of the amendments. Justice HATHAWAY responds to my arguments by calling into question my commitment to litigants' due process rights, noting that "concerns about a justice's personal due process rights during the disqualification procedure [are] misplaced" and suggesting that I "believe that the rights of jurists are superior to the rights of the public . . . ."[23] This is entirely untrue. The due process rights of litigants *must* be respected. However, that need not and may not be done by creating a process that itself is lacking in due process rights. Justice HATHAWAY's disregard of these *basic* due process rights speaks volumes. While the new rule protects the due process rights of litigants, it need not in Justice HATHAWAY's calculation provide judges with basic guarantees of due process when resolving disqualification motions.

Moreover, the *public* has an important interest in ensuring that their chosen judicial officers are treated fairly during the disqualification process, which is far from being a concern solely about *justices'* due process rights. The removal of a sitting justice against his or her will is a serious matter trenching upon the right to execute the duties of office to which the justice was elected as well as an infringement on the right of electors who placed the justice in office. Before the amendment of MCR 2.003, only a decision of the United States Supreme Court could reverse a Michigan justice's determination regarding a motion for recusal. In interposing itself in this decision as an appellate body, this Court must afford the targeted justice no fewer rights than he or she would enjoy in such an appeal to the United States Supreme Court of a denial of a motion for recusal. These include the right to have the matter heard by an impartial arbiter, the right to counsel, the right to have the issues framed, and the right to present arguments.

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[22] *Florida Family Policy Council v Freeman*, 561 F3d 1246, 1255 (CA 11, 2009).

[23] *Ante* at 1147.

Thus, I have proposed that any appeal of a justice's denial of a motion for recusal must be limited to the grounds stated in the motion and that the justice must be allowed to retain counsel in the matter and submit a brief in response to the motion. If due process means anything—particularly in the disqualification setting, where this issue is pivotal—a targeted justice is most assuredly entitled to an *impartial* arbiter.[24] When personal and political biases could affect the decision-making of members of this Court in the new disqualification appeal process, I cannot imagine that due process demands less than the right to challenge such potential biases of the decision-makers. Accordingly, I proposed amendments that would ensure that this cardinal due process right is preserved, so that a targeted justice facing an appellate review of his or her denial of the recusal motion can challenge the potential biases of other members of this Court. The members of the majority are loathe to permit such a bias challenge, but not because they fail to recognize that there are serious political and personal antagonisms among this Court's members.

Similarly, due process also demands an adequate opportunity for a challenged justice to be heard.[25] Sometimes, this will also entail an evidentiary hearing. I have therefore proposed a procedure for this Court taking evidence. No justice in the majority has explained why any of the due process rights enjoyed before the new rule was promulgated have now lost their constitutional status. I welcome any effort by the majority to justify why these due process rights have now been banished by the Michigan Supreme Court.

(7) The Chief Justice claims as "inapposite" my previous citation of provisions in the state constitution that limit the ability to remove a justice from office.[26] It is true, as I have noted, that these constitutional provisions only refer to removal of a justice from *all* cases, not from a *particular* case. However, as I explained in my dissent from the adoption of amended MCR 2.003, there is no provision in the Michigan Constitution that explicitly allows a majority vote of this Court to overturn the elective will of the People and remove a justice from an individual case, nor is there any language that would even implicitly provide such authority. The Chief Justice offers no constitutional provision to refute this claim, only explaining that "[a] motion for the recusal of a justice is a 'controversy' like others that come before the Court."[27] Clearly, there are limits even to this Court's adjudicative authority. The Chief Justice does not, I hope, suggest that this Court has the constitutional authority to adjudicate *any* "controversy." Moreover, as I have ex-

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[24] "A hearing before an unbiased and impartial decisionmaker is a basic requirement of due process." *Crampton v Dep't of State*, 395 Mich 347, 351 (1975).

[25] "The fundamental requisite of due process of law is the opportunity to be heard." *Dow v Michigan*, 396 Mich 192, 205 (1976) (quotation marks and citations omitted).

[26] *Ante* at 1138. See also 485 Mich cxxx, clxvii-clxxxv (2009) (YOUNG, J., dissenting).

[27] *Ante* at 1138.

plained at length here and in my original dissenting statement, the removal of a fellow justice from a case against the will of the electorate—potentially for reasons that have nothing to do with the justice's impartiality in a particular case—is far from an ordinary "controversy."

(8) Finally, the Chief Justice claims that my decision not to participate is tantamount to "announc[ing] by declarative fiat that the Court's action is null and void."[28] I have never claimed that the Court's action is ineffective. Instead, I merely dissent from the justifications, such as they are, for this Court's amended disqualification procedures because I reach a different constitutional conclusion: that the disqualification procedures fail to protect due process rights guaranteed under the United States Constitution. The Chief Justice claims that my decision not to participate in disqualification proceedings is inconsistent with my participation in cases involving certified questions arising under MCR 7.305(B). She quotes with approval my recent statement in a certified question case:

> I continue to adhere to my stated position in *In re Certified Question (Wayne Co v Philip Morris Inc)*, 622 NW2d 518 (Mich, 2001), that this Court lacks the authority under state law to answer certified questions. However, this position has failed to carry the day. As the final arbiter of state law, this Court has concluded that it has the authority to answer certified questions.[29]

The Chief Justice and I, therefore, agree that this Court's declarations of state law are final. Nevertheless, this Court's final authority does not extend to questions of *federal* constitutional law. As I have explained, both above and in previous statements, the amendments to MCR 2.003 violate the protections of due process guaranteed by the United States Constitution. This Court cannot abrogate these protections, and the majority's conclusion that the amendments to MCR 2.003 satisfy the United States Constitution does not authoritatively make it so. Accordingly, I refuse to participate in procedures that violate the protections of the United States Constitution.

CONCLUSION

I do not participate in the entry of the order or the Court's decision-making under the new disqualification rule. I believe that rule to have serious constitutional flaws. Moreover, my decision not to participate does not violate the duty to sit because deciding whether a fellow justice must be disqualified from hearing a particular case under the current court rule is inconsistent with my judicial duty to uphold the due process requirements of the United States Constitution.

CORRIGAN, J., joined the statement of YOUNG, J.

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[28] *Ante* at 1141.

[29] *In re Certified Question (Waeschle v Oakland Co Med Examiner)*, 485 Mich 1116, 1117 (2010) (YOUNG, J., dissenting) (citation omitted).

EXHIBIT A

STATE OF MICHIGAN

SUPREME COURT

ANTHONY PELLEGRINO, as Personal Representative of the Estate of SHIRLEY ANN PELLEGRINO, Deceased, and ANTHONY PELLEGRINO, individually,

Plaintiff-Appellee,

v No. 137111

AMPCO SYSTEMS PARKING,

Defendant-Appellant.

Statement of Justice Young Denying Plaintiff's Motion to Disqualify
November 18, 2009

YOUNG, J. After careful consideration of the plaintiff's motion for recusal, I deny the motion. I am deciding this motion under this Court's current and traditional rules of disqualification because they are still in effect and the new rule recently considered by my colleagues is patently unconstitutional.

Reasons for Denial of Plaintiff's Motion to Disqualify

A. No new claims of bias have been raised and those raised are without merit and have been repeatedly and unsuccessfully previously litigated by plaintiff's counsel

Plaintiff's counsel (and his firm) has filed numerous motions for my recusal, either in his capacity as a party or as an attorney on behalf of his clients. Each of the prior motions has involved various allegations of claimed bias, principally stemming from my Michigan Supreme Court judicial campaigns.[1] Significantly, the current motion asserts no new factual basis for recusal than the more than a dozen previous disqualification motions plaintiff's counsel has filed against me. Moreover, even though it asserts no new grounds for disqualification, this motion was strategically filed on the eve of oral arguments in this case.

As stated, plaintiff's counsel has sought my recusal on numerous occasions. After careful consideration, and in accordance with this Court's longstanding practice of handling motions for judicial recusal,[2] I have denied each of these prior motions as lacking merit. While counsel's political life outside the courtroom has relevance in that

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[1] By counsel's own admission, he has filed motions for my recusal in the following cases: *Tate v City of Dearborn*, 477 Mich 1101 (2007); *Johnson v Henry Ford Hosp*, 477 Mich 1098 (2007); *Flemister v Traveling Med Services, P.C.*, 729 NW2d 222 (2007); *Short v Antonini*, 729 NW2d 218 (2007); *Ansari v Gold*, 477 Mich 1076 (2007); *State Automobile Mut Ins Co v Fieger*, 477 Mich 1068 (2007); *Grievance Administrator v Fieger*, 476 Mich 231 (2006); *Lewis v St John Hosp*, 474 Mich 1089 (2006); *Heikkila v North Star Trucking, Inc*, 474 Mich 1080 (2006); *Stamplis v St John Health Sys*, 474 Mich 1017 (2006); *McDowell v Detroit*, 474 Mich 999 (2006); *Harter v Grand Aerie Fraternal Order of Eagles*, 693 NW2d 381 (2005); *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003); *Graves v Warner Bros*, 469 Mich 853 (2003).

[2] As has been explained previously, see, e.g., *Johnson*, *supra*, 477 Mich at 1099, this Court's longstanding practice of judicial recusal is nearly identical to that of the United States Supreme Court. See also Statement of Recusal Policy, United States Supreme Court, November 1, 1993, available at 483 Mich 1237.

realm, it has no bearing on my consideration of his or his clients' legal matters.[3] Counsel's clients are entitled to justice under law, no more or less. I have previously and will continue to entertain the arguments counsel makes on behalf of his clients with due regard to their merits under law. As explained in the brief opposing the motion for disqualification, some of my decisions in cases involving plaintiff's counsel have been favorable to counsel's position,[4] while others have not been favorable, as the merits of each case required.

Heretofore, the only appeal from a Michigan Supreme Court Justice's denial of a motion for disqualification was to the Supreme Court of the United States and plaintiff's counsel has availed himself of that appellate route. Plaintiff's counsel has appealed my previous denials of his motions to disqualify to the United States Supreme Court at least three times, and that Court has denied certiorari on each occasion.[5] Moreover, counsel

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[3] Indeed, I have ruled both for and against Mr. Fieger when *he* was the party. See, e.g., *Grievance Administrator v Fieger*, 670 NW2d 563 (2003). What has always and only mattered and will continue to matter to me is the *merits* of his and his client's claims.

[4] *See, e.g., Beaudrie v Henderson*, 465 Mich 124 (2001); *Amtower v William C Roney & Co*, 232 Mich App 226 (1999). Moreover, I have denied leave to appeal in numerous other circumstances where counsel has received relief from the Court of Appeals. *See, e.g., Cauff v Fieger, Fieger, Kenney & Johnson, PC*, 483 Mich 1021 (2009); *Wilson v Keim*, 483 Mich 900 (2009); *Rodriguez v ASE Industries, Inc*, 483 Mich 853 (2009); *Overbay v Botsford Gen Hosp*, 482 Mich 1154 (2008); *Jackson-Ruffin v Metro Cars, Inc*, 482 Mich 1017 (2008); *LaBarge v Walgreen Co*, 480 Mich 1136 (2008); *Briggs v Oakland Co*, 480 Mich 1006 (2007); *Conn v Asplundh Tree Expert Co*, 478 Mich 930 (2007); *Janusz v Sterling Millwork, Inc*, 476 Mich 859 (2006).

[5] *Graves, supra, cert den* 542 US 920 (2004); *Gilbert v DaimlerChrysler Corp, supra, cert den* 546 US 821 (2005); *Grievance Administrator v Fieger, supra, cert den* 549 US 1205 (2007).

has litigated in federal court the constitutionality of this Court's historic practice of handling motions for judicial recusal under which I am deciding this motion.[6] Again, he has been unsuccessful.[7] This history of litigation in the federal courts further underscores that plaintiff's claims of prejudice are without merit.

B. *Caperton* has no applicability to plaintiff's motion to disqualify

While there is nothing new presented in plaintiff's motion to disqualify that has not been considered and rejected more than a dozen times, there is one area of the law that *has* changed since counsel's last motion for recusal. The United States Supreme Court recently decided *Caperton v Massey* and required a justice's recusal in what it repeatedly described as an "extraordinary situation" based on "extreme facts."[8] In *Caperton*, the Court concluded that "there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."[9] Plaintiff's motion does not make any allegations of this nature. Accordingly, *Caperton* is inapposite to counsel's motion and does not require my recusal.

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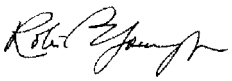
[6] *Fieger v Ferry*, 2007 WL 2827801 (E D Mich, 2007).

[7] *Id.*

[8] *Caperton v AT Massey Coal Co, Inc*, 556 US __, 129 S Ct 2252, 2263 (2009).

[9] *Id. at* ____, 129 S Ct at 2263-2264.

For all of these reasons, I therefore deny plaintiff's motion for recusal. I direct that the Clerk of the Court transmit my denial statement to the parties forthwith.



Justice Robert P. Young, Jr.
Michigan Supreme Court

Order

EXHIBIT B

November 25, 2009

ADM File No. 2009-04

Amendment of Rule 2.003
of the Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rule 2.003 of the Michigan Court Rules are adopted, effective immediately.

[Additions are indicated by underline, and deletions by strikethrough.]

Rule 2.003 Disqualification of Judge

(A) Applicability. This rule applies to all judges, including justices of the Michigan Supreme Court, unless a specific provision is stated to apply only to judges of a certain court. The word "judge" includes a justice of the Michigan Supreme Court.

(BA) Who May Raise. A party may raise the issue of a judge's disqualification by motion, or the judge may raise it.

(CB) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:

(1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:

(a1) The judge is ~~personally~~ biased or prejudiced for or against a party or attorney.

(b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a

party as enunciated in *Caperton v Massey*, US ; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

(c2) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

(d3) The judge has been consulted or employed as an attorney in the matter in controversy.

(e4) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

(f5) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household, has ~~an~~ more than a de minimis economic interest in the subject matter in controversy that could be substantially impacted by the proceeding. ~~or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.~~

(g6) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i~~a~~) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii~~b~~) is acting as a lawyer in the proceeding;

(iii~~c~~) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding; or

(iv~~d~~) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) Disqualification not warranted.

(a) A judge is not disqualified merely because the judge's former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge.

(b) A judge is not disqualified based solely upon campaign speech protected by *Republican Party of Minn v White*, 536 US 765 (2002), so long as such speech does not demonstrate bias or prejudice or an appearance of bias or prejudice for or against a party or an attorney involved in the action.

(DC) Procedure.

(1) *Time for Filing.* To avoid delaying trial and inconveniencing the witnesses, a motion to disqualify must be filed within 14 days after the moving party discovers the ground for disqualification. If the discovery is made within 14 days of the trial date, the motion must be made forthwith. If a motion is not timely filed, untimeliness, including delay in waiving jury trial, is a factor in deciding whether the motion should be granted.

(2) *All Grounds to Be Included; Affidavit.* In any motion under this rule, the moving party must include all grounds for disqualification that are known at the time the motion is filed. An affidavit must accompany the motion.

(3) *Ruling.*

(a) For courts other than the Supreme Court, ~~T~~the challenged judge shall decide the motion. If the challenged judge denies the motion,

(ia) in a court having two or more judges, on the request of a party, the challenged judge shall refer the motion to the chief judge, who shall decide the motion de novo;

(iib) in a single-judge court, or if the challenged judge is the chief judge, on the request of a party, the challenged judge shall refer the motion to the state court administrator for assignment to another judge, who shall decide the motion de novo.

(b) In the Supreme Court, if a justice's participation in a case is challenged by a written motion or if the issue of participation is raised by the justice himself or herself, the challenged justice shall decide the issue and publish his or her reasons about whether to participate.

If the challenged justice denies the motion for disqualification, a party may move for the motion to be decided by the entire Court.

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The entire Court shall then decide the motion for disqualification de novo. The Court's decision shall include the reasons for its grant or denial of the motion for disqualification. The Court shall issue a written order containing a statement of reasons for its grant or denial of the motion for disqualification. Any concurring or dissenting statements shall be in writing.

(4) ~~Motion Granted~~ *If Disqualification Motion is Granted*.

(a) For courts other than the Supreme Court, w~~W~~hen a judge is disqualified, the action must be assigned to another judge of the same court, or, if one is not available, the state court administrator shall assign another judge.

(b) In the Supreme Court, when a justice is disqualified, the underlying action will be decided by the remaining justices of the Court.

(E~~D~~) ~~Remittal~~ Waiver of Disqualification. ~~If it appears that there may be grounds for disqualification, the judge may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If, following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings. The agreement shall be in writing or placed on the record.~~ Parties to the proceeding may waive disqualification even where it appears that there may be grounds for disqualification of the judge. Such waiver may occur whether the grounds for disqualification were raised by a party or by the judge, so long as the judge is willing to participate. Any agreement to waive disqualification must be made by all parties to the litigation and shall be in writing or placed on the record.

KELLY, C.J. (*concurring*).

I voted for this recusal rule and write to discuss it and respond, in part, to the criticism leveled against it.

In adopting this rule, the Michigan Supreme Court has, for the first time in its long history, reduced to writing a rule to govern when a justice should not vote on a case. In the past, the justices wrote rules on recusal but applied them to other judges only, not to themselves.

Some of us have long believed that the interests of the legal community and of the general public are best served if a Supreme Court recusal rule is put in writing. In that

way, all can see and understand something that has long been shrouded in mystery: how recusal works in the Michigan Supreme Court.

Curiously, until recently, it was generally unknown that, when a motion to recuse was filed, only the justice at whom it was directed acted on it. The Court then issued an order that appeared to be an action of all the justices. Typically, no reason was given to the petitioner or the public if the request to recuse was denied. Also, no procedure existed to permit the party seeking a justice's recusal to obtain a vote of the other justices if the motion was denied.

Important to this discussion is the fact that, this year, the United States Supreme Court rendered its decision in the case of *Caperton v A.T. Massey Coal Co, Inc.*[1] It reversed an order of the West Virginia Supreme Court in which a justice there refused to recuse himself following a procedure similar to that long used by the Michigan Supreme Court. The Court found that the party seeking the justice's recusal had been deprived of his constitutional right to due process. This was partly because, the Court found, a justice's decision on his or her own recusal is inherently subjective. But, the due process clause requires an objective decision.[2]

I read *Caperton* to mean that an independent inquiry into a challenged justice's refusal to recuse may be necessary to satisfy due process because the independent inquiry makes possible an objective decision. That independent inquiry has been written into Michigan's new rule where it allows the party requesting recusal to seek a vote on the motion by the entire court.

Those of us supporting Michigan's new rule believe that the situation that gave rise to the *Caperton* case should not be allowed to take place in this state. For that reason, together with the obvious need for increased clarity and understanding about our recusal procedures, we have voted for this rule.

I have read Justice Young's and Justice Corrigan's statements that accompany this order. I quite agree with them that the order must not be applied to curtail fundamental freedoms. I have not heard any of the justices who favored the order suggest that it will be used "to prevent judicial candidates from speaking their minds" or to prevent "the voters [from electing] judges of their choosing." I know of nothing that would reasonably lead one to believe that the order will be used to permit "duly elected justices

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[1] ___US___; 129 S Ct 2252; 173 L Ed 2d 1208 (2009). Since *Caperton* was decided, the Wisconsin Supreme Court amended its recusal rule in response. *See Wisconsin Supreme Court Rule Petitions 08-16, 08-25, 9-10, and 9-11* (acted upon October 28, 2009). Michigan is not the first state to react with a rule change.

[2] *Caperton, supra* at 2263.

[to deprive] their co-equal peers of their constitutionally protected interest in hearing cases." And it seems an outrageous stretch of credulity to suggest that "starting today, those contesting traffic tickets will enjoy greater constitutional protections than justices of this Court."

In suggesting that no precedent exists for a judge to be removed from a case against his or her will, Justice Corrigan and Justice Young forget this: under our existing rules,[3] trial judges are removed from cases against their will in our courts every day and have been for years. Unanswered in their statements is the question: Why should trial judges be subject to having their decisions not to recuse themselves reversed by their peers while justices are insulated from the same treatment?

With respect to the constitutional arguments posed by Justices Corrigan and Young, it should be noted that these arguments were made only at the eleventh hour. The parts of the rule that they attack have been actively before the Court for more than a year. If any serious treatment of them was intended, it would seem it would have been put forth well before the rule was voted on.

As Justice Weaver has pointed out in her statement, the decision to adopt this rule has been anything but "hasty," notwithstanding the assertions of Justices Corrigan and Young. In fact, the rule has received the Court's constant vision and revision, particularly during the last year. The normal procedure for rule adoption has been followed, including public comment and public hearing.

Justice Young belatedly raises numerous constitutional challenges to the rule. Certainly, the Court can and, no doubt, will discuss them in due time. There has been no decision to refuse to place Justice Young's proposals on the conference agenda. Suffice it to say that the rule in no way prevents the United States Supreme Court from reviewing a recusal decision made by our Court, as he apparently fears.

No factual basis exists on which to ground the insinuation that those who voted for this rule will use it to remove a justice from a case for improper reasons. No facts have been shown to support this assertion. None exist. Justice Markman's fears of "gamesmanship" and "politicization" in the Court's future handling of recusal motions

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[3] MCR 2.003(C)(3). If the challenged judge denies the motion to recuse, in a court having two or more judges, the chief judge may reverse the decision and require recusal. In a single-judge court or if the challenged judge is the chief judge, the state court administrator may assign the decision to another judge who may overturn the refusal to recuse.

arise only from his imaginings. Whether there will be further "acrimony" lies, in part, in the hands of each justice.

Moreover, it is a gross perversion of law for Justice Corrigan to allege that, "In one administrative order [the recusal rule], the majority takes away the right of every citizen of Michigan to have his or her vote count." The accurate statement is, with this rule, the Court permits a justice's recusal where that justice is unable to render an unbiased decision and unable or unwilling to acknowledge that fact. The justice system and this Court can only be stronger for it.

CAVANAGH, J. (*concurring*). The process by which justices are disqualified from hearing a case before this Court is not merely a theoretical matter. The disqualification process has very real consequences for the parties who seek justice from this Court, as well as the public at large. Our current practice provides no avenue to redress a decision by a justice who refuses to disqualify himself, no matter how much evidence is produced that the justice is indeed actually biased.

If my dissenting colleagues truly believe that our current practice is the best for Michigan's citizens, then they should have no problem explaining their rationale to the public and hearing the public's assessment of this rationale. However, I believe they know that there is no reasonable justification that can be proffered for allowing a justice accused of bias to be the only one who decides whether he should be disqualified, other than "we have always done it this way." I can think of no reasonable explanation that would be acceptable to the public for maintaining this procedure because it is apparent that it is incongruous with reason. This is especially true in light of the fact that Michigan's own court rules—adopted by *this Court*—govern disqualifications for all other judges and explicitly provide the recourse of having the denial of a disqualification motion reviewed by another judge. See MCR 2.003(C)(3). Remarkably, the majority believes that members of this Court are above the same rules that it has adopted to apply to *all other judges in the state.*

Weaver, J. (*concurring*). At last this Court has adopted clear, fair, written disqualification rules for Michigan Supreme Court justices.[4]

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[4] This concurring statement is submitted November 24, 2009 at approximately 3:20 p.m. and although other justices have indicated a desire to submit concurring and dissenting statements, no other statements have been submitted as yet. Because the order is scheduled for entry on November 25, Thanksgiving Eve, there will not be a reasonable opportunity to respond to subsequently submitted statements. If any response to statements submitted hereafter is necessary, my response will be submitted to the Court on a date after Thanksgiving for the Court to file and distribute to the public, and will also be posted on my personally funded website: **justiceweaver.com**.

This newly amended rule is a positive, historical step forward toward achieving more transparency and fairness in the Michigan Supreme Court. The amended rule provides a fair disqualification process to ensure that the parties appearing before the Court have justices deciding their cases that are not actually biased, nor objectively appear to be biased. It does so in a transparent process by requiring a justice challenged by a party to submit his or her decision and reasons in writing regarding his or her recusal decisions and requiring the Court—the remaining justices—if requested by a party to review the challenged justice's decision and to publish the remaining justices' decision and reasons in writing. This process, of written decision and with written reasons, is fair to the parties and to the challenged justice. It provides the public with more knowledge of how the justices conduct the people's judicial business.

I concur in this Court's adoption of such rules, but write separately to inform the parties in pending cases and the public of the improper delay and procedure concerning entry of this order adopting the amendment and its effective date.

Since May 2003, I have repeatedly called for this Court to recognize; publish for public comment; place on a public hearing agenda; and address the need to have written, clear, fair, orderly, and public procedures concerning the participation or disqualification of justices.[5]

On November 5, 2009, this Court finally adopted rules for disqualification of justices by amending Michigan Court Rule (MCR) 2.003—Disqualification of Judge. At our regularly scheduled public administrative conference, Justice Hathaway moved for the adoption of amendments to that court rule. The motion was seconded by Chief

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[5] See, e.g., the statements or opinions by Weaver, J., in *In re JK*, 468 Mich 202, 219 (2003); *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003); *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91 (2005); *McDowell v Detroit*, 474 Mich 999, 1000 (2006); *Stamplis v St John Health Sys*, 474 Mich 1017 (2006); *Heikkila v North Star Trucking, Inc*, 474 Mich 1080 (2006); *Lewis v St John Hosp*, 474 Mich 1089 (2006); *Adair v Michigan*, 474 Mich 1027, 1044 (2006); *Grievance Administrator v Fieger*, 476 Mich 231, 328 (2006); *Grievance Administrator v Fieger*, 477 Mich 1228, 1231 (2006); *People v Parsons*, 728 NW2d 62 (2007); *Ruiz v Clara's Parlor Inc*, 477 Mich 1044 (2007); *Neal v Dep't of Corrections*, 477 Mich 1049 (2007); *State Auto Mut Ins Co v Fieger*, 477 Mich 1068, 1070 (2007); *Ansari v Gold*, 477 Mich 1076, 1077 (2007); *Short v Antonini*, 729 NW2d 218 (2007); *Flemister v Traveling Med Services, PC*, 729 NW2d 222, 223 (2007); *McDowell v Detroit*, 477 Mich 1079, 1084 (2007); *Johnson v Henry Ford Hosp*, 477 Mich 1098, 1099 (2007); *Tate v City of Dearborn*, 477 Mich 1101, 1102 (2007); *Dep't of Labor & Economic Growth v Jordan*, 480 Mich 869 (2007); *Cooper v Auto Club Ins Ass'n*, 739 NW2d 631 (2007); and *Citizens Protecting Michigan's Constitution v Secretary of State and Reform Michigan Government Now! (RMGN)*, 482 Mich 960 (2008).

Justice Kelly and Justice Weaver, and the motion was adopted by a vote of 4-to-3,[6] with the understanding that Justice Young and Justice Hathaway would possibly offer an amendment to MCR 2.003(D)(1) (Time for Filing) that might be proposed at the next, or a future, public administrative conference for discussion and vote. The only portion of Justice Hathaway's proposed revision that was not adopted on November 5, 2009 was her proposed amendment to Subsection (C)(1) (Time for Filing), which remains and is re-designated now as MCR 2.003(D)(1). By adopting an amendment to MCR 2.003—Disqualification of Judge—this Court has finally established clear, written, and fair rules governing the disqualification of justices on the Michigan Supreme Court.

"Immediate effect" of the amendment to MCR 2.003—Disqualification of Judge—that had just been adopted was established by a 4-to-3 vote on motion by Justice Cavanagh,[7] seconded by Justice Weaver. "Immediate effect" was necessary because there were already two cases with pending motions for disqualification against various justices. One of these pending cases, *Pellegrino v Ampco Systems Parking*, Docket No. 137111, was a case that had originally been scheduled for oral argument on November 3, 2009, but was adjourned because it was anticipated that adoption of clear written disqualification rules would occur at the November 5, 2009 public administrative conference.[8]

Incredibly, although "immediate effect" was given to the amendment of MCR 2.003 on November 5, the order informing the public of the rule change did not enter on that date or promptly thereafter. Instead it is finally being entered 20 days later on November 25, 2009.[9] This Court should not have delayed issuing the order for any amount of time.[10]

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[6] Voting for adoption of the motion were Chief Justice Kelly and Justices Cavanagh, Weaver, and Hathaway. Voting against the motion were Justices Corrigan, Young, and Markman.

[7] Voting for the motion were Chief Justice Kelly and Justices Cavanagh, Weaver, and Hathaway. Voting against the motion were Justices Corrigan, Young, and Markman.

[8] The discussion and possible adoption of disqualification rules had been passed at Justice Young's request and removed from the October 8, 2009 public administrative conference because Justice Young wanted to participate in the discussion, but he was unavailable for that properly noticed public administrative conference.

[9] As a result, apparently when the Michigan Supreme Court says that something has "immediate effect," that is not the case in this matter.

[10] In my 15 years' service as a justice, my experience in the adoption of proposals and other administrative matters, and the entry of orders, is as follows:

It is rare when this Supreme Court adopts proposals or other administrative matters with "immediate effect."

Such matters usually are adopted without an effective time as it is the general rule that the adopted item is effective at the time the Clerk of the Court enters the order within a reasonable time—usually a few days or a week—as the Court "speaks through its orders."

For an administrative matter, not a case matter, if any justice indicates he or she will write a statement, he or she has 14 days to submit it and other justices wishing to respond to it have 14 days to respond—a maximum of 28 days delay from adoption to entry.

Exceptions to the general rule above are:

Sometimes a matter is adopted with a specific future time to be effective like 30 days, 6 months, or 1 year later and the order is entered (after statements within 28 days) before the effective date, but is only effective on the specific adopted date, not the date of the entry of the order.

Other times, those of emergency, which rarely occur, the adopted matter is voted "immediate effect" and should be entered and therefore effective on that day of adoption. For example, see Administrative Order 2006-08, "the Gag order," which stated:

> The following administrative order, supplemental to the provisions of Administrative Order No. 1997-10, is effective immediately.
>
> All correspondence, memoranda and discussions regarding cases or controversies are confidential. This obligation to honor confidentiality does not expire when a case is decided. The only exception to this obligation is that a Justice may disclose any unethical, improper or criminal conduct to the JTC or proper authority.
>
> Cavanagh, Weaver and Kelly, JJ., dissent.
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> Dissenting statements by Weaver and Kelly, JJ., to follow.

If delay occurs for entering the day of adoption, the order is entered as soon as possible "*nunc pro tunc*" (Latin for "now for then") making the late-entered order effective retroactive to the date of adoption. In either case, concurring, dissenting and responding statements by justices are not included with the order and the order has a notation that statements will follow.

Unfortunately these rules were not followed in this administrative item and it would not matter but for these two consequences:

1. Justices Young and Corrigan's attempts to avoid being governed by the new rule adopted in their presence November 5, by filing their statements refusing to be disqualified right before the close of business on November 18, apparently trying to beat the clock, believing the disqualification order would enter November 19 at an emergency (but not identified as such) private administrative conference.

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After the Court provided for "immediate effect" of the amendment to MCR 2.003, this Court *should* have issued the order containing the amendment with a notation that any statements by justices, whether concurrences or dissents, would be released together at a future time. Instead, in a private administrative conference on November 19, 2009,[11] a majority of this Court established that all statements from justices had to be circulated to the Court by November 25, 2009 and that the order adopting the amendment to MCR 2.003 would also issue at that time, November 25, 2009.[12]

The delay and seeming confusion that has arisen from the entry of this order is unfortunate because it deprived the parties and the public for 20 days of their right to have access to the language of the amendment to MCR 2.003, which was given "immediate effect." Further, it allowed two justices to attempt to avoid the application of a new written rule for a justice's disqualification to pending motions for their disqualification in a case.

Specifically, on November 18, 2009, Justices Corrigan and Young directed the Clerk of the Court to submit their responses to the pending motions for recusal against them in the case of *Pellegrino v Ampco Systems Parking*, Docket No. 137111. In his response to the recusal motion, Justice Young stated that "I am deciding this motion under this Court's current and traditional rules for disqualification because they are still in effect . . . ." Thereafter, Justice Corrigan indicated in her responding statement that "[l]ike Justice Young, I am deciding this motion under this Court's current and traditional rules of disqualification . . . ."[13] Despite the fact that Justices Corrigan and Young attempted to avoid complying with the new amended court rule, it remains to be seen whether their denials to the motions for their recusal will be subject to the procedures and safeguards in the newly amended MCR 2.003—Disqualification of Judge.

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2. Leaving "immediate effect" with an Alice in Wonderland definition where "immediate effect" does not mean "immediate effect" and the public is deprived of knowledge of what exactly was adopted with no copies available for now 20 days.

[11] This private administrative conference was justified as not being held in a noticed public administrative conference because it was rightfully an emergency, although it has not yet been so identified.

[12] A motion was made by Justice Weaver to issue the order that day, November 19, with a statement indicating that the order was *nunc pro tunc* to November 5, meaning that it would be retroactive to November 5, 2009 when the Court actually voted to give the amendment to MCR 2.003 "immediate effect." There was no second to this motion.

[13] Justice Markman recognized that the rules were adopted with "immediate effect" on November 5, 2009 when he stated in a e-mail dated November 18, 2009: "This Court made clear at conference that it intended the new disqualification rules to be 'effective immediately.'"

Again, the adoption of the amendment to MCR 2.003—Disqualification of Judge—is a positive, historical step forward toward achieving more transparency and fairness in the Michigan Supreme Court. The amended rule provides a fair disqualification process to ensure that the parties appearing before the Court have justices deciding their cases that are not actually biased, nor objectively appear to be biased. It does so in a transparent process by requiring a justice challenged by a party to submit his or her decision and reasons in writing regarding recusal decisions and requiring the Court—the remaining justices—as requested by a party to review the challenged justice's decision and to publish the remaining justices' decision and reasons in writing. This process, of written decision and with written reasons, is fair to the parties and to the challenged justice. It provides the public with more knowledge of how the justices conduct the people's judicial business.

Hopefully, the day will come when every justice will give these new, written and fair rules for disqualification of justices an opportunity to work and, if experience proves necessary, to refine such rules by workable proposed amendment. And hopefully the day will come when some justices no longer resort to proclaiming dramatic forecasts of failure, negative consequences, or unconstitutionality, and no longer attempt to avoid application of the disqualification rules to themselves as we have seen so far.

Unnecessary delay and attempts to avoid application of adopted rules do not contribute to public confidence in the way some justices perform their duties and in the way the Michigan Supreme Court conducts its business.[14]

CORRIGAN, J. (*dissenting*).

"*May God save these United States, the State of Michigan, and this Honorable Court.*" -- Michigan Supreme Court traditional *oyez*

It is always wise to be wary of any government action taken the day before a holiday or late on a Friday. Such actions are designed to travel under the radar screen. So it is with this 4-3 order.

Tomorrow we celebrate Thanksgiving. Many Americans will pause to thank our Creator for the blessings of liberty—for the right to speak free from government oppression and for the right to vote in free elections and have those votes count.

How sadly ironic, then, that this order empowers the Court to curtail those fundamental freedoms—the rights of judicial candidates to speak their minds under clear standards and the rights of voters to elect judges of their choosing. For the first time in our state's history, duly elected justices may be deprived by their co-equal peers of their constitutionally protected interest in hearing cases. Starting today, those contesting traffic tickets will enjoy greater constitutional protections than justices of this Court.

[14] This statement and the order amending MCR 2.003—Disqualification of Judge—will be published on my personally funded website: **justiceweaver.com**.

The justices in the majority, having assumed the power to remove a co-equal justice, have not lifted a pen to establish their authority to do so. Their new regime brings to mind George Orwell's *Animal Farm*: "All animals are equal[,] but some animals are more equal than others."[15] Of all the justices who have served during this Court's 173-year existence, only the four justices adopting these rules arrogate to themselves this new, "more equal" dominion over their colleagues.

This Court's order also imperils civility among the justices. The current philosophical and personal divisions on this Court are no more than a mild case of acne compared to the cancerous vitriol sure to spew from justices' pens. "Every kingdom divided against itself is laid waste, and no city or house divided against itself will stand." Matthew 12:25 (New Revised Standard). Today's order will guarantee a permanent siege within this institution.

No issue that I have ever tackled is as important as these disqualification provisions. The majority's action here will precipitate a constitutional crisis.

Many have applauded this Court's disqualification initiative. They have not done their homework! The devil is always in the details, and the details of this order eviscerate fundamental freedoms.

I support clear rules that would establish written constitutional standards for the disqualification of judges and justices. But I oppose the ill thought out provision of MCR 2.003(*D*)(3)(b) that allows justices to review de novo another justice's decision not to disqualify from a proceeding.

Chief Justice THOMAS GILES KAVANAGH once said that the members of this Court are seven people on a boat in stormy seas. This provision allows those seven people to throw one another overboard. Peer review of recusal decisions will lead to rancor and incivility in this most fragile and battered institution.[16] This rule is a lacerating wound to this institution. Those who are privileged to be at the Supreme Court table are short timers, just temporary occupants of these chairs. This order will do lasting harm to this institution—and the case for change has not been made.

Violation of the United States and Michigan Constitutions[17]:

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[15] Orwell, *Animal Farm* (New York: Signet Classics, 1996), p 133.

[16] The State Bar of Michigan Board of Commissioners narrowly voted in favor of permitting peer review of a justice's recusal decision despite recognizing the potential for litigants' gamesmanship in the review process. The Board also suggested creating an independent review panel but acknowledged that a constitutional amendment may be required to create the panel. Several commissioners told me that the issue was hotly debated and that the independent review panel was proposed because they did not believe that members of the Court should review de novo a justice's declination to recuse.

[17] Contrary to Chief Justice Kelly's suggestion that our constitutional arguments were not raised before the rule was passed, the arguments were raised at administrative hearings, as Justice Young has explained. Further, the text of the recusal rule as enacted by the

Michigan Constitution

The basic question is whether the Michigan Constitution authorizes today's move. It does not.

Our constitution created a Supreme Court composed of seven elected or appointed justices. Const 1963, art 6, §§ 2 and 23. Under our constitution, a sitting justice may be removed from the bench only in certain ways. First, a justice may be removed under the impeachment provisions in Const 1963, art 11, § 7. Next, a justice may be removed for reasonable cause by a concurrent resolution of two-thirds of the members elected to and serving in each house of the Legislature. Const 1963, art 6, § 25. And finally, this Court may remove a justice upon recommendation of the Judicial Tenure Commission. Const 1963, art 6, § 30(2). The constitution provides no other authority for justices to remove one another. The majority's new rule falls within none of the express methods of removal set forth in our constitution.

So if it is not to be found in the constitution, then where do my colleagues in the majority derive their newly discovered power to remove a fellow justice? They offer not the slightest justification. If the majority believes that such authority somehow inheres in the judicial power of this Court, they are fundamentally mistaken. The judicial power is the "authority to hear and decide controversies, and to make binding orders and judgments respecting them." *Risser v Hoyt*, 53 Mich 185, 193 (1884). Our state constitution vests the "judicial power" in one court of justice, headed by this Court, which consists of seven justices of equal power and authority. Const 1963, art 6, §§ 1 and 2. Although we "hear and decide controversies" and "make binding orders and judgments respecting them" by majority vote, no individual justice has more authority to exercise the judicial power than another justice, and nothing in the nature of the judicial power gives this Court or any justice the power to remove a duly elected or appointed justice. See, e.g., *People v Paille #1*, 383 Mich 605, 607 (1970) ("Whatever intra-court battles occasioned the adoption of the restriction upon intra-court review, *the wisdom of preventing judges of equal station from overruling each other abides*.") (emphasis added); *Dodge v Northrop*, 85 Mich 243, 245 (1891) ("Courts of concurrent jurisdiction cannot set aside or modify the orders and decrees of other courts of like jurisdiction."); *In re Wayne Co Prosecutor*, 110 Mich App 739, 742 (1981) (noting the holding in *Paille* that "the dual function of Detroit Recorder's Court as a magisterial court as well as a felony trial court *does not provide for intra-court review whereby judges of equal station might overrule one another*.") (emphasis added); *Wayne Co Prosecutor v Recorder's Court Judges*, 81 Mich App 317, 322 (1978) ("Judges of co-equal authority lack jurisdiction to set aside the orders of bond forfeiture issued by their fellow judges."). Indeed, that may be precisely why in the United States Supreme Court each justice

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majority was not circulated to the Court until one day before the November 5, 2009, administrative conference.

decides the recusal question individually; the other justices possess no authority to remove a justice.[18]

To make matters worse, it appears the majority's violations of our state constitution may have only just begun. At the November 5, 2009, public hearing, the Chief Justice suggested that the majority may promulgate a rule for appointing a replacement justice when a duly elected or appointed justice is recused. She opined:

> Clearly this rule isn't perfect, and I view it as the first step in the realization of a truly excellent rule. Missing from this is any discussion of replacing a disqualified justice with another judge for the purpose of hearing the case involved. I think that's essential. It isn't here. I'd like to see that subject addressed another day.

Const 1963, art 6, § 2, however, provides that the "supreme court shall consist of seven justices ...." Because a recused justice simply does not participate in the case and does *not* cease to be a justice of the Court, the Chief Justice's suggestion would at the very minimum add an eighth justice. As Justice YOUNG explains more fully, referencing my statement at 483 Mich 1205, 1229-1234 (2009), our constitution does not authorize the appointment of temporary justices in excess of the seven justices that have been duly elected or appointed. The majority's potential arrogation of power to itself apparently knows no bounds.

United States Constitution

The new rule also fails to ensure that minimal due process protections will be accorded to the challenged justice in a recusal appeal. Because justices elected to this Court have a vested property right in exercising their judicial duties, they cannot be divested of that right without an opportunity to be heard before an impartial arbiter. See *Goldberg v Kelly*, 397 US 254, 271 (1970); *Ng Fung Ho v White*, 259 US 276, 284-285 (1922). The majority has not adopted Justice YOUNG's proposed amendments that would have provided the challenged justice the right to counsel, the right to file a brief, and the right to an evidentiary hearing to determine any material factual questions. Also, as Justice YOUNG's cogent dissenting statement, which I join in its entirety, explains well, the majority's new rule violates the First Amendment right to freedom of speech because it trenches on judicial campaign speech protected by *Republican Party of Minnesota v White*, 536 US 765 (2002). The majority's refusal to accord even basic constitutional rights thus calls the validity of the entire new scheme into question.

This rejection of clearly defined procedural protections will likely encourage baseless recusal motions by those seeking to "justice-shop."[19] Indeed, some members of

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[18] See also Letter: New court rules may let minority win, The Detroit News, letter to the editor from Timothy Baughman, November 18, 2009, attached as Appendix A.

[19] See Bashman, *Recusal on appeal: An appellate advocate's perspective*, 7 J App Prac & Process 59, 71 (2005) (stating that while the "subject of strategic recusal ... is not often discussed, no doubt because the goal seems to be unfair and unethical ... you can be sure that strategic recusals do occur.").

the current majority seem willing to entertain ploys to remake the elected composition of this Court to fit the ideological or partisan preferences of certain parties or lawyers.[20] Both this Court and, more importantly, the people of Michigan whom we were elected to serve, deserve better.

By far the most troubling implication of today's new rule is the majority's outright deprivation of the retained sovereign right of the people of Michigan to elect the members of their judicial branch of government. The constitutional magnitude of this action should not be underestimated. With one fell swoop, the majority simply casts aside the one-man, one-vote principle of *Baker v Carr*, 369 US 186 (1962). The justices of this Court were elected by our fellow citizens to hear and decide cases. We campaigned on our judicial philosophies, explaining our philosophies in deciding cases that come before us. The people then chose the justices that they preferred to sit on this Court in free elections where each vote counted equally. In one administrative order, the majority takes away the right of every citizen of Michigan to have his or her vote count. Instead of "one-man, one-vote," we now have "four-justices, one-vote," as four justices usurp the people's constitutional right to choose who decides the cases coming before the highest Court in our state.

Caperton v A.T. Massey Coal Co, Inc:

I have also studied carefully the United States Supreme Court's recent decision in *Caperton v A.T. Massey Coal Co, Inc.*[21] The question under *Caperton* is whether the Due Process Clause of the federal constitution requires this change—that is, that this Court review de novo a justice's decision not to disqualify himself from a proceeding. My research reflects that not one state that has examined its rules post-*Caperton* has changed its rules regarding the identity of the decision maker.[22] Indeed, Michigan becomes an outlier by doing so. The federal constitution plainly does not require any such action.

The United States Supreme Court itself has not changed its own recusal practices in response to *Caperton*. That is, it continues to leave recusal decisions to each individual justice. Nothing in *Caperton* remotely suggests that this longstanding practice violates due process. *Caperton* considered the standards for recusal, not the identity of the decision maker. And unlike the United States Supreme Court, where individual

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[20] See, e.g., *Commentary: Beware power grab for Michigan court*, The Detroit News, November 19, 2009, attached as Appendix B.

[21] *Caperton v A.T. Massey Coal Co, Inc*, ___ US ___; 129 S Ct 2252; 173 L Ed 2d 1208 (2009). *Caperton* held that a state supreme court justice was required to recuse himself from a case involving a corporate party whose chairman and CEO supported the justice's campaign both by directly donating the statutory maximum to the justice and by contributing $2.5 million to an independent group that targeted the justice's opponent during the electoral process because the sum of these contributions raised "a serious, objective risk of actual bias" on the part of the justice. *Id.* at ___, slip op at 16.

[22] My memo to the Court on this subject is attached as Appendix C.

justices' recusal decisions are entirely unreviewable, recusal decisions of justices of this Court *are* subject to review in the United States Supreme Court.

National Implications:

"The game is out there and it's either play or get played . . . [It's] all in the game."
- The Wire[23]

Myriad questions of national importance bob in the wake of this new disqualification procedure. Do judicial candidates or incumbent justices seeking reelection show "an appearance of bias or prejudice" even if they merely respond to an organization's questionnaire about their personal views on legal and social issues?[24] Across the country, organizations have challenged, with varying degrees of success, the constitutionality of certain provisions in state codes of judicial conduct insofar as those provisions infringe on the campaign speech of judicial candidates.[25] Plainly, a line exists between what a judicial candidate can and cannot say during the electoral process.[26] Nevertheless, the amorphous standards in the new rule do not clarify the appropriate demarcation between constitutionally protected campaign speech and disqualifying conduct.

Moreover, the national debate regarding the necessity of new federal recusal procedures is ongoing.[27] Regrettably, however, most of the discussion is glaringly one-sided. I see little interest in truly considering opposing viewpoints. The House Judiciary Subcommittee on Courts and Competition Policy, chaired by Georgia Congressman Hank Johnson, recently postponed a hearing regarding judicial recusals scheduled for October 20, 2009. The chairman of the Judiciary Committee, Michigan Congressman John Conyers, has apparently rescheduled the hearing for December 10, 2009. Three of my colleagues who voted for the new recusal rules have apparently been invited to testify in person at the upcoming Judiciary Committee hearing. In contrast, no member of the

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[23] The Wire, 100 Greatest Quotes, <http://www.youtube.cpm/watch?v=-Sgj78QG9B> at 3:36 and 9:50 to 9:55 (accessed November 25, 2009).

[24] See, e.g., *Duwe v Alexander*, 490 F Supp 2d 968 (WD Wis, 2007).

[25] Compare *Kansas Judicial Review v Stout*, 562 F3d 1240 (CA 10, 2009) (dismissing lawsuit filed by political action committee, judicial candidate, and prospective candidate as moot because the Kansas Supreme Court adopted a new Code of Judicial Conduct after answering questions certified about former Code provisions) with *Duwe*, *supra* at 977 (holding that judicial candidates' responses to survey questions are constitutionally protected speech and do not constitute commitments that could be restricted in the interest of protecting judicial openmindedness).

[26] See *Republican Party of Minnesota*, *supra*.

[27] David Ingram, The National Law Journal, *Congress Set to Take Aim at Judicial Recusals*, <http://www.law.com/jsp/article.jsp?id=1202435099939> (accessed November 23, 2009).

Court who voted against these rules has been invited to testify. My offer to testify in person was rejected by a staffer for the House Judiciary Subcommittee on Courts and Competition Policy. I was told that I could submit a five-page written statement. So much for full and robust debate about the appropriate scope and structure of any potential recusal guidelines.

Moreover, there appears to be a national push among a handful of well-funded interconnected advocacy groups to disqualify judges who express their views during the electoral process. I am aware that George Soros does not support judicial elections. Certain Soros-sponsored groups, including the Brennan Center for Justice and Justice at Stake, have enthusiastically lauded the efforts of the majority.[28] Many voters would be surprised to know about the extensive financial ties that exist between these organizations and George Soros's main foundation, the Open Society Institute. Preliminary scrutiny of IRS Form 990s reveals that the Open Society Institute has spent at least $34 million to derail judicial elections in favor of merit selection since 2000.[29]

Consistent with these national efforts, when Chief Justice KELLY told the public that the Court has only begun its efforts at divining detailed disqualification rules at our November 5, 2009 public administrative conference, she added:

> Also not present in this rule is the question of when financial contributions to sitting justices constitute the appearance of bias or the probability of bias such as to require disqualification. That's I think an important matter that has to be addressed and I hope that we will address it soon in the future.[30]

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[28] See Jonathan Blitzer, *Recusal Reform in Michigan*, July 31, 2009 ("With Justice Elizabeth Weaver leading the charge, the Michigan Supreme Court is poised to codify new standards for how and when judges must recuse themselves.") <http://www.brennancenter.org/blog/archives/recusal_reform_in_michigan/> (accessed November 23, 2009); see also Gavel Grab Blog, *Brandenburg on the Future of Recusal*, November 19, 2009 (where the executive director of Justice at Stake describes the new "tougher" recusal rules as a sign that Michigan is moving "forward instead of backward.") <http://www.gavelgrab.org/?cat=42> (accessed November 23, 2009).

[29] See <http://www.eri-nonprofitsalaries.com/index.cfm?FuseAction=NPO.Form990&EIN=137029285&Year=2009> (accessed November 23, 2009). Additionally, since December 4, 2008, regional advocacy groups, including the Joyce Foundation, have donated $400,000 to the Brennan Center and $190,000 to Justice at Stake. See *Money and Politics Grants List* <http://www.joycefdn.org/programs/moneypolitics/grantlist.aspx> (accessed November 23, 2009).

[30] See minutes 1:02:25 to 1:03:35 of the November 5, 2009 public administrative conference at <http://www.michbar.org/courts/virtualcourt.cfm> (accessed November 23, 2009).

Any effort to expand our new disqualification procedure is ill-advised. The Wisconsin Supreme Court, for example, recently rejected two proposals submitted by the League of Women Voters of Wisconsin Educational Fund and former Justice William Bablitch respectively. The League of Women Voters' proposal would have required justices to disqualify themselves if a lawyer, law firm, or party to a case donated more than $1,000 or if a party contributed to "a mass communication that was disseminated in support of the judge's election" within the preceding two years. In contrast, Justice Bablitch's proposal would have mandated recusal if a lawyer or party donated $10,000, the legal limit for individual contributions to a judicial candidate's campaign, and the proposal would require recusal for certain third party expenditures.[31] After a lengthy public hearing, the Wisconsin Supreme Court instead adopted a proposal clarifying that endorsements, campaign contributions, and independent ad expenditures, standing alone, are not enough to require a justice to recuse himself or herself.[32] In other states, including Florida, committees continue to evaluate appropriate recusal procedures after soliciting input from judges, attorneys, and legal scholars.[33] In light of the uncertainty in various states concerning judicial disqualification procedures, the hasty adoption of these rules today is imprudent and unwise.

Finally, the majority's action is a self-inflicted wound. This rule will take the honor from "your Honor." What foolish person would run for this Court and allow his or her hard earned reputation to be sacrificed not by the slings and arrows of a vitriolic election campaign, but at the hands of colleagues? So much for civility initiatives.

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[31] Adam Korbitz and Alex De Grand, State Bar of Wisconsin, *Court to tackle recusal issue and other rules petitions*, October 27, 2009, <http://www.wisbar.org/AM/Template.cfm?Section=News&Template=/CM/ContentDisplay.cfm&ContentID=87014> (accessed November 24, 2009); Patrick Marley, The Milwaukee Journal Sentinel *State Justices Skeptical of Recusal Proposal*, October 28, 2009, <http://www.leagle.com/unsecure/news.do?feed=yellowbrix&storyid=137049882> (accessed November 23, 2009).

[32] Patrick Marley, *State High Court Says Campaign Donations Can't Force Recusals*, The Milwaukee Journal Sentinel October 29, 2009, <http://www.leagle.com/unsecure/news.do?feed=yellowbrix&storyid=137059379> (accessed November 23, 2009).

[33] Gary Blankenship, The Florida Bar News, *To Recuse or not to Recuse: How to do it is the Real Question*, November 1, 2009, <http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/8c9f13012b96736985256aa900624829/f5197831018965348525765700 6e60e4%21OpenDocument> (accessed November 23, 2009).

The people of Michigan cannot possibly benefit from this order. Today's order is a lacerating wound to this institution and the people of Michigan.[34] May God save these United States, the state of Michigan, and this honorable Court.

YOUNG, J., concurs with CORRIGAN, J.

YOUNG, J. (*dissenting*). I respectfully dissent from the new majority's enactment of this unconstitutional rule of disqualification. ***In eliminating all due process protections, compromising and chilling protected First Amendment rights, and conducting secret appeals that might lead to the removal of an elected justice from a case against his will, the majority has created a 21st Century Star Chamber with its new disqualification rule.***

The issue here is not *whether* this Court should have a disqualification rule—we have had a disqualification rule for 173 years that mirrored the rule that the United States Supreme Court continues to use—but rather *which* disqualification rule best ensures that parties whose cases are decided by this Court have neutral arbiters deciding those cases. Every member of this Court purports to subscribe to the elementary principle of due process that parties whose cases are decided by this Court must have impartial justices deciding those cases.[35] ***However, the plain fact is that the rule issued today is facially unconstitutional in several critical ways, with the result that it will allow four justices to disenfranchise the millions of Michigan voters who elected a justice. And it is also the fact that the justices who voted for this rule—KELLY, CAVANAGH, WEAVER and HATHAWAY—enacted this new rule despite having knowledge that the rule was constitutionally deficient.***[36] The citizens of Michigan should be concerned when a

[34] In the event the majority precipitates a constitutional crisis by purporting to oust a justice from a case, I leave all my possible options open.

[35] "A hearing before an unbiased and impartial decisionmaker is a basic requirement of due process." *Crampton v Dep't of State*, 395 Mich 347, 351 (1975).

[36] There are two responses to Chief Justice KELLY's claim that these constitutional concerns were raised only at the "eleventh hour." First, as Justice CORRIGAN states, the rule that the Court voted on was circulated to the Court just the day before conference. Second, Chief Justice KELLY's suggestion that the Court has no obligation to consider these constitutional objections, even if raised at the hearing, is an abrogation of the obligation that each justice makes to uphold the federal and state constitutions. Moreover, Justice Markman also proposed several amendments at the November 5, 2009 administrative hearing to address some of the constitutional deficiencies with the rule, which he circulated to members of the Court well in advance of the administrative hearing. I also circulated to all members of the Court on November 19, 2009 written proposals to address the constitutional problems I raised. This memorandum is attached as Appendix A. The public is invited to access our administrative hearing at <http://www.michbar.org/courts/virtualcourt.cfm> (accessed November 24, 2009), to

majority of their Supreme Court is indifferent to the state and federal constitutions they have been entrusted and have sworn to uphold.

The New Rule Violates the Fourteenth Amendment Right to Due Process

The removal of a sitting justice against his or her will is a serious matter trenching upon the right to execute the duties of the office to which the justice was elected, as well as an infringement on the rights of electors who placed the justice in office. A justice subject to a motion for disqualification is entitled to the basic due process rights of notice and opportunity to be heard.[37] Heretofore, only an appeal to the United States Supreme Court could reverse a Michigan justice's determination regarding a motion to disqualify. In an appeal taken from a Michigan justice's denial of a motion for disqualification, the challenged justice is entitled to the full range of due process rights that all appellees before the United States Supreme Court are entitled. A justice challenged on such an appeal from his decision not to recuse therefore has a right to counsel, to file briefs in opposition to the appeal, to have the issues on which the disqualification is predicated framed in advance, and the right to have it decided by a neutral arbiter. ***The new rule eliminates all of these due process rights.***

The new rule creates an appellate process whereby the members of the Michigan Supreme Court, rather than the United States Supreme Court, will determine whether one of their challenged colleagues may sit on a case. By interposing itself as an appellate body in the disqualification decision, this Court must afford the targeted justice no fewer rights than he enjoyed in such an appeal to the United States Supreme Court. As stated, a justice has the right to have an appeal be limited to the grounds stated in the motion for disqualification, to retain counsel in the matter, and to submit a brief in response to the motion for disqualification. Sometimes, due process will also necessitate an evidentiary hearing, as there may be facts in dispute between the moving party and the challenged justice. ***Notwithstanding these constitutional requirements of due process, the new majority protected none of them, even though I specifically raised each of them to the Court before this order entered and provided proposed language to the rule that would remedy these constitutional deficiencies.***

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determine whether Chief Justice KELLY or I have accurately described the discussion of constitutional questions I raise herein.

As important, the Chief Justice has refused to place on our next administrative agenda my written proposals so that they can be considered by the Court. This course of conduct underscores my contention that the new majority is indifferent to the serious constitutional questions I and my colleagues in dissent have placed before them.

[37] "'The fundamental requisite of due process of law is the opportunity to be heard.'" *Dow v State of Michigan*, 396 Mich 192, 205 (1976), quoting *Grannis v Ordean*, 234 US 385, 394 (1914). "The 'opportunity to be heard' includes the right to notice of that opportunity." *Id.*

Moreover, if due process means anything—particularly in the disqualification setting where this issue is pivotal—a targeted justice is most assuredly entitled to have an *impartial* arbiter decide the question. When the United States Supreme Court is the arbiter, no serious question on this point arises. ***However, when the justices of this Court become the arbiters of a disqualification decision of one of its members, there are substantial questions whether an impartial arbiter is involved.*** It is no secret that this Court is riven with deep philosophical, personal, and sometimes frankly partisan cleavages.[38] Where personal and political biases could affect the decision-making of members of this Court in the new disqualification appeal process, I cannot imagine that due process demands anything less than the right to challenge the potential biases of the decision-makers in this appellate procedure. Yet the new rule provides no mechanism for challenging the bias of a member of this Court in the appeal process it establishes today. At the November 5, 2009 administrative conference, the new majority specifically repudiated Justice MARKMAN's proposed amendment addressing this issue. The new majority also refused to consider all of the specific due process rules I later proposed in writing. ***The majority's open rejection of these basic constitutional protections indicates that it is willing to sacrifice essential requirements of due process in enacting this rule. The open question is why.***

[38] Justice WEAVER has already gone on record stating that I ought "to recuse [myself in a case] in which Mr. Fieger is himself a party" because of campaign remarks I made in 2000. *Grievance Administrator v Fieger*, 476 Mich 231, 328 and 340 (2006) (WEAVER, J. dissenting). See also *State Automobile Mut Ins Co v Fieger*, 477 Mich 1068, 1070 (2007). She has also gone on the record as dissenting from my participation in cases "where Mr. Geoffrey N. Fieger's law firm represents" a party. *Ansari v Gold*, 477 Mich 1076, 1077 (2007). See also *Flemister v Traveling Med Services*, 729 NW2d 222 (2007); *Short v Antonini*, 729 NW2d 218 (2007); *Johnson v Henry Ford Hosp*, 477 Mich 1098, 1099 (2007); and *Tate v City of Dearborn*, 477 Mich 1101, 1102 (2007). As I note below, Mr. Fieger and his firm have been responsible for nearly all the disqualification motions filed during my tenure on the Court. All have been based on campaign speech and all have been unsuccessful here and in the federal courts, including the United States Supreme Court, where he appealed my denials.

Other of my colleagues have made explicitly hostile partisan comments. See, for example, our Chief Justice's recent comment wherein she promised to "undo a great deal of the damage that the *Republican* Court has done." Brian Dickerson, *Justices Gird for Gang of 3½*, Detroit Free Press, January 11, 2009, at 1B (emphasis added). Some sitting members of this Court openly campaigned against Chief Justice TAYLOR's re-election last year. These actions and published statements fairly call into question how impartially some of my colleagues will decide disqualification appeals under the new rule they have established.

The New Rule also Violates the First Amendment Right to Freedom of Speech

Even beyond the specific due process requirements that the new majority has thrown overboard, the new rule facially violates a judge's First Amendment rights. In every written constitution since 1850, the People of Michigan have retained their sovereign right to elect judges rather than surrender that right to some other process. Accordingly, judicial candidates in Michigan campaign for judicial office. In campaigning, they will engage in political speech that is clearly protected under the First Amendment.[39] The protection of speech guaranteed under the First Amendment is especially important within the context of political campaigns. James Madison, drafter of the First Amendment, wrote:

> The value and efficacy of [the right of elections] depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.[40]

Thus, any restrictions on campaign speech not only infringe on a candidate's right to speak, but also infringe on the *public's* right to vote intelligently on their candidates.

The importance of citizens' decisions regarding whom to entrust with public office deserves no less than a robust public discussion of issues by candidates seeking their votes. ***The order issued today, however, frustrates this kind of political discussion between judicial candidates and voters and penalizes a judicial candidate for trying to do so.*** The order expressly contemplates that campaign speech protected under the First Amendment will nevertheless cause a duly-elected judge to be disqualified from hearing a case. This is so because the new rule establishes that campaign political speech is subject to an "appearance of impropriety" limitation. Apart from the fact that it is

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[39] *Republican Party of Minnesota v White*, 536 US 765 (2002).

[40] James Madison, *Report on the Virginia Resolutions*, available at <http://press-pubs.uchicago.edu/founders/documents/amendI_speechs24.html> (accessed November 19, 2009).

inherently a nebulous standard,[41] the "appearance of impropriety" standard is not a constitutional standard.[42]

Thus, even if the challenged political speech in no way implicated actual bias against a party (or any other constitutional right of such a party), an elected justice is still liable to be disqualified if his campaign comments were later determined to create an appearance of impropriety. It is not hard to contemplate campaign speech that might offend and later be considered "improper" under the new rule's standard.[43]

Moreover, the mere *threat* of future disqualification produces a chilling effect on protected speech. The United States Supreme Court's decision in *Republican Party of Minnesota v White* struck down the Minnesota Supreme Court's rule forbidding an incumbent judge or candidate for judicial office from "announc[ing] his or her views on disputed legal or political issues" during an election campaign.[44] While the Minnesota

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[41] We cannot even be sure that the justices who voted for the rule understand its own implications. See, e.g., note 23, *infra*.

[42] Even the rule's proponent, Justice HATHAWAY, recognizes that "appearance of impropriety" is an extraconstitutional standard. At our November 5, 2009 administrative conference, Justice HATHAWAY explained, "*Caperton* says that states can have stricter standards [than due process requires]. . . . We have Canon 2 of the Michigan Code of Judicial Conduct, which talks about a judge having to adhere to the appearance of impropriety standard." Justice HATHAWAY *clearly believes that the appearance of impropriety does and should trump First Amendment rights*. So, apparently, do her colleagues in the majority.

[43] I made this very point in my statement concerning a disqualification motion addressed to Justice HATHAWAY. See *United States Fidelity & Guaranty Co v Michigan Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 60 (2009) (statement of YOUNG, J.). In fact, journalists looking at Justice HATHAWAY's campaign statements questioned whether she could be fair and impartial to all parties. An article written on the occasion of Justice HATHAWAY's investiture suggested that "[i]n her campaign . . . Hathaway seemed to take sides. She suggested that, if elected, she would be the 'voice' of and stand up for 'middle-class families,' instead of 'siding with big insurance companies and polluters' and 'big corporations.'" Todd Berg, *Diane M. Hathaway Sworn in as Michigan Supreme Court's 104th Justice*, Michigan Lawyers Weekly, January 12, 2009. It will be interesting to see how Justice HATHAWAY fares under the new recusal standard she has championed if challenged by the very parties she stated she would "side against" if elected.

[44] *Republican Party of Minnesota v White*, *supra*, 536 US at 768.

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Supreme Court's restriction on campaign speech was more expressly content-based than the rules promulgated by this order, ***the new majority here is attempting to achieve indirectly what the United States Supreme Court declared in*** **White** ***that a court could not do directly: stifle protected judicial campaign speech.*** The new "appearance of impropriety" standard is so broad and vague that judges and judicial candidates will be forced to self-limit their campaign speech so that, once they are elected, they can actually exercise the duties of the office they have sought. Thus, this rule is facially unconstitutional because it expressly allows a jurist's First Amendment right to free speech to be subordinated to a nonconstitutional standard. ***The new majority is untroubled by this obvious abridgement of First Amendment rights that their new rule causes. Again, the question remains how the new majority could be so unconcerned about such a serious matter.***

The Michigan Constitution Does Not Allow this Court to Remove a Justice from an Individual Case

Under the Michigan Constitution there are at most *four* ways a duly-sitting justice may be removed against his or her will:

- The People can choose not to reelect that justice.[45]
- The House can impeach a justice "for corrupt conduct or for crimes or misdemeanors" by majority vote. Upon impeachment, a judicial officer is forbidden from "exercis[ing] any of the functions of his office...until he is acquitted." The Senate can permanently remove a justice from office by a two-thirds vote.[46]

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[45] Const 1963, art 6, § 2: "The supreme court shall consist of seven justices elected at non-partisan elections as provided by law. The term of office shall be eight years . . . ."

[46] Const 1963, art 11, § 7:

> The house of representatives shall have the sole power of impeaching civil officers for corrupt conduct in office or for crimes or misdemeanors, but a majority of the members elected thereto and serving therein shall be necessary to direct an impeachment. . . . No person shall be convicted without the concurrence of two-thirds of the senators elected and serving. Judgment in case of conviction shall not extend further than removal from

- The House and Senate can enact a concurrent resolution removing a justice "[f]or reasonable cause" that "is not sufficient ground for impeachment" by a vote of 2/3 of the members elected to each house, at which time the governor "shall" remove the justice.[47]

- This Court can remove a justice from the Court upon recommendation of the Judicial Tenure Commission.[48]

Notably, these constitutional provisions only refer to removal of a justice from *all* cases, not from a particular *individual* case, as this order allows. It is important to note, however, that there is no provision in the Michigan Constitution that explicitly allows this Court to overturn the elective will of the People and remove a justice from an individual case, nor is there any language that would even implicitly provide such authority.

Significantly, the Michigan Constitution has provided extra protections for judicial officers that no other officeholder enjoys. And it is not hard to imagine why the People would want to insulate judicial officers from political attacks that would impede their ability to discharge their duties of office. Accordingly, our Constitution acknowledges the primacy of judicial office—*even as between judicial office and executive or legislative offices*. It expressly precludes the recall of judges by Michigan voters while allowing the recall of all other elective officers.[49] In other words, the People have decided that, once they have elected a justice, that decision is final, at least for the duration of the justice's eight-year term. This extraordinary constitutional protection for judicial office is an important backdrop against which to assess the new majority's asserted right to prevent a sitting justice from exercising the duties of his office. If statewide judicial elections are to mean anything, it should not be up to four justices to

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office .... No judicial officer shall exercise any of the functions of his office after an impeachment is directed until he is acquitted.

[47] Const 1963, art 6, § 25: "For reasonable cause, which is not sufficient ground for impeachment, the governor shall remove any judge on a concurrent resolution of two-thirds of the members elected to and serving in each house of the legislature. The cause for removal shall be stated at length in the resolution."

[48] Const 1963, art 6, § 30(2): "On recommendation of the judicial tenure commission, the supreme court may . . . retire or remove a judge . . . ."

[49] Const 1963, art 2, § 8.

pick and choose when to allow the will of the People to be heard and when to stifle that will. By creating through court rule the power to remove justices from individual cases, the majority has done just that.

The authority of this Court to remove an elected justice from a particular case is, therefore, highly questionable. In issuing its new recusal rules, the new majority has not adequately considered, much less justified, the authority of the Court to remove a justice in a particular case, especially since such removal by the fiat of four silences the People, who elected *seven* particular justices to the Court, who are not fungible. I am not sure by what logic an administrative rule may be used to amend our Constitution and create a new authority whereby an elected justice can be removed from a case by his co-equal justices. ***While justices are constitutionally protected from political attacks from without, the new majority has conceived a clever means to launch political attacks from within the Court, giving a majority of four justices the ability to disenfranchise millions of Michigan voters by removing their elected justices from hearing cases that will affect their daily lives.***

The New Rule Will Enhance Gamesmanship That Will Undermine the Integrity of Judicial Elections and This Court

The new disqualification rule is simply bad policy that is the product of a manufactured crisis. Although it purports to ensure that only impartial justices sit on cases, the new rule has the effect of "weaponizing" disqualification as a tool to achieve countermajoritarian results to nullify elections. Shockingly, my colleagues have set themselves up as the gunners on the artillery they have manufactured.

For the entire existence of our Court, the justices of the Michigan Supreme Court have conscientiously striven to address questions of judicial qualification,whether raised on motion by a party or by the justice. They have done so under our unvaried practice that mirrors the one used by the United States Supreme Court.[50] In short, a justice confronted with a disqualification motion has typically consulted with members of this Court and made a determination whether participation in a particular matter was appropriate. Other than providing their personal counsel, other members of the Court have not participated in the decision.

Until recently, no one has challenged, or apparently had reason to challenge, the Court's historical practice for addressing the issue of a justice's disqualification. Of late,

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[50] See *Johnson v Henry Ford Hosp*, 477 Mich 1098, 1099 (2007). See also Statement of Recusal Policy, United States Supreme Court, November 1, 1993, available at 483 Mich 1237.

however, with the shift in the philosophical majority of this Court,[51] disqualification has taken on a new, more politicized role. One need look only as far as a recent volume of the *Michigan Bar Journal* for evidence of this new effort to politicize disqualification motions. In a letter to the editor, attorney John Braden suggests that the judicial electoral process is an unsatisfactory solution for addressing what he believed to be the unfavorable philosophy and decisions of the Court's former philosophical majority.[52] Therefore, he urged his colleagues in the Bar to use motions to disqualify as a suitable alternative to the electoral process guaranteed by the Michigan Constitution to alter the philosophical balance of the Court in order to achieve what he desired: more favorable results for his clients and himself. Moreover, it is entirely foreseeable that sophisticated and well-financed clients, like insurance companies and unions, will demand that their lawyers file motions for disqualification as a matter of course in order to alter the philosophical makeup of the Court in ways the electorate hardly intended. ***Thus, today's order is no less than a call for the use of disqualification as a non-electoral political weapon to remove judges with whose judicial philosophy one disagrees. My colleagues, wittingly or not, in enacting this new rule, give aid to this politicized use of disqualification motions.***

Why do I claim that the new disqualification rule is a product of a "manufactured crisis"? The facts are very plain. After the Court's philosophical majority changed in 1999, disqualification motions became a tactic to alter the decision-making and outcome of a particular case. As I explained in my statement accompanying the proposed disqualification rules when originally published for public comment, each of the motions to disqualify made between 1999 and 2008 were brought against members of what was

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[51] It is no secret that the philosophical majority of this Court changed with the 1998 Supreme Court election. The philosophical transformation of the Michigan Supreme Court that occurred eleven years ago, and the debate that has accompanied that transformation—a debate similar in some ways to that taking place within the federal judicial system—resonated strongly in the electoral political process, which the citizens of Michigan, through their constitution, have chosen as the method by which they select their justices. Perhaps not surprisingly, those who had been most comfortable with the approach of the Michigan Supreme Court over the previous decades were resistant to this transformation, and many responded forcefully in political opposition. The 2000 Supreme Court election, in which three members of the Court's prior philosophical majority stood for election, was one of the most bitterly contested in the state's history, as was the most recent Supreme Court election.

[52] See Opinion and Dissent, 85 *Mich B J* 10, 12 (2006).

then the Court's philosophical majority.[53] Importantly, nearly all of the motions to disqualify brought during my tenure on this Court were the product of one law firm.

Each of the motions to disqualify made by this firm involved various allegations of claimed bias, principally stemming from political speech in Michigan Supreme Court judicial campaigns.[54] This firm has taken advantage of the review process that our traditional disqualification practice guaranteed parties, by appealing my previous denials of its motions to disqualify to the United States Supreme Court at least three times. Notably, that Court has denied certiorari on each occasion.[55] Moreover, this firm has unsuccessfully challenged in federal court the constitutionality of this Court's historic practice of handling motions for judicial recusal that the Court today is jettisoning.[56] While the United States Supreme Court has denied these meritless claims of bias directed at me, as its decision in the *Caperton* case demonstrates, when warranted, the United

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[53] Proposals Regarding Procedure for Disqualification of Supreme Court Justices, 483 Mich 1205, 1236 (2009). Since this statement, three additional motions for disqualification have been filed with the Court: an additional motion by the law firm described above to disqualify Justices MARKMAN and CORRIGAN and myself, and two separate motions to disqualify Justice HATHAWAY.

[54] In addition to a motion to disqualify me in the pending case of *Pellegrino v Ampco Systems Parking* (Docket No. 137111), by counsel's own admission, he has filed motions for my recusal in the following cases: *Tate v City of Dearborn*, 477 Mich 1101 (2007); *Johnson v Henry Ford Hosp*, 477 Mich 1098 (2007); *Flemister v Traveling Med Services*, 729 NW2d 222 (2007); *Short v Antonini*, 729 NW2d 218 (2007); *Ansari v Gold*, 477 Mich 1076 (2007); *State Automobile Mut Ins Co v Fieger*, 477 Mich 1068 (2007); *Grievance Administrator v Fieger*, 476 Mich 231 (2006); *Lewis v St John Hosp*, 474 Mich 1089 (2006); *Heikkila v North Star Trucking, Inc*, 474 Mich 1080 (2006); *Stamplis v St John Health Sys*, 474 Mich 1017 (2006); *McDowell v Detroit*, 474 Mich 999 (2006); *Harter v Grand Aerie Fraternal Order of Eagles*, 693 NW2d 381 (2005); *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003); *Graves v Warner Bros*, 469 Mich 853 (2003).

[55] *Graves*, *supra*, *cert den* 542 US 920 (2004); *Gilbert v DaimlerChrysler Corp*, *supra*, *cert den* 546 US 821 (2005); *Grievance Administrator v Fieger*, *supra*, *cert den* 127 S Ct 1257 (2007).

[56] See *Fieger v Ferry*, 2007 WL 2827801 (E D Mich, 2007).

States Supreme Court is not uninterested in reviewing and reversing a state justice's decisions on disqualification.[57]

Finally, it is not beyond imagining that the new disqualification procedure will become fuel for the ever-intensifying fire of judicial election campaigns in Michigan. For example, if Candidate A is running a campaign against Justice B, it is entirely possible that Candidate A would make a campaign issue over the number of times that Justice B's colleagues voted that he could not be an impartial arbiter of a case. ***Although the new majority would no doubt deny it, the new rule it enacts today creates ample ammunition for future judicial electoral warfare.***

The New Rule was Enacted with Unseemly Haste and in Violation of the New Majority's Commitment to "Transparency"

I close with a final point about the new majority's methods in enacting the rule contained in today's order. So eager was the new majority to enact this unconstitutional rule that they did so with unseemly haste.[58] They not only ignored the obvious

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[57] See *Caperton v A T Massey Coal Co*, ___ US ___, 129 S Ct 2252, 173 L Ed 2d 1208 (2009).

[58] Furthermore, the arrogance that characterizes the majority's eagerness to enact new recusal rules *without even understanding their content* is utterly astounding. The following exchange occurred at our November 5, 2009, administrative conference, when I sought clarification regarding how the new "appearance of impropriety" standard would actually work:

> *Justice HATHAWAY.* If there is an appearance of impropriety, then you cannot sit on a case.
>
> *Justice YOUNG.* And from what perspective is the appearance of impropriety standard? Is it a subjective standard? Is it an objective standard?
>
> *Justice HATHAWAY.* I haven't thought through all that to be honest with you, to answer you here.
>
> *Justice YOUNG.* But we're going to vote on this today.
>
> *Justice HATHAWAY.* Then let's vote.

constitutional problems I and Justices CORRIGAN and MARKMAN had brought to their attention, they enacted the rule in violation of this Court's public administrative process. ***The order issued today does <u>not</u> contain the rule this Court voted on in its November 5, 2009 public administrative conference.***

The disqualification rule approved at our November 5, 2009 administrative conference included my amendment to subsection (D)(1). When the motion to approve Justice HATHAWAY's proposed version of the rule was moved, it was explicitly subject to a friendly amendment I offered (which amendment Justice HATHAWAY accepted) regarding the language of subsection (D)(1). My amendment provided that the actual language of subsection (D)(1) of the rule would be determined *at a later date after conferring with Justice HATHAWAY*. In proof of this, I offer the following exchange that occurred at our November 5, 2009 public administrative conference when we voted on her proposal:

> *Chief Justice KELLY*. Can we act on the motion at this point? Shall we start, Justice Hathaway?
>
> *Justice HATHAWAY*. Well, first I'm going to include Justice Young's . . .
>
> *Justice WEAVER*. Well, no, you can just let him bring it up next time. Just keep it as it is.
>
> *Justice HATHAWAY*. I move that this Court adopt my November 4, 2009 version of alternative C as Michigan Court Rule 2.003 regarding disqualifications of judges.
>
> *Justice WEAVER*. Second.
>
> *Justice HATHAWAY*. And I support.
>
> *Justice YOUNG*. ***With a friendly amendment we can work out.***
>
> *Justice HATHAWAY*. ***Right. Regarding (D)(1).***
>
> *Chief Justice KELLY*. I think we've discussed this issue. Would you like to vote? [Roll call vote omitted.] It passes by a 4 to 3 vote. We have a new

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As this exchange indicates, the members of the new majority are less interested in understanding how the rule actually works than in pushing through immediate adoption of these unconstitutional and ill-advised rules, whatever the cost, in order to supplant a practice that has served this state well for 173 years.

> recusal rule. ***We will take it up again at next month's meeting for further discussion at least of (D)(1).***[59]

Thus, this Court did not vote on a complete rule in our November 5, 2009 administrative conference.[60]

As this exchange shows, there remained a significant procedural issue to resolve before an order effectuating a new disqualification rule could enter and be given immediate effect: the actual language of subsection (D)(1) must still be settled.[61] Chief Justice KELLY acknowledged this and stated on the record that the rule would be returned to our December administrative conference to resolve the language of subsection (D)(1). ***All of this was done in open Court, and members of the public are invited to verify whether I have accurately represented the proceedings and vote by accessing the video recording of the administrative conference from the State Bar of Michigan's "Virtual Court."***[62]

Therefore, I believe that issuing an order today before resolving the status of my amendment is improper and a contravention of the Court's commitment to conduct its administrative matters in public. ***The issuance of the order today enacting this new disqualification rule that was not approved in open Court belies any pretense that this Court is functioning "transparently."***

Given the stated desire of this rule's proponents for having this Court's business done "in an open, transparent, restrained, orderly, fair, and efficient manner,"[63] there is

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[59] Emphasis added.

[60] Once the language of the rule is finalized, however, it is to have immediate effect, as a subsequent majority vote determined.

[61] Justice WEAVER wanted an order that was *retroactive* to the November 5, 2009 vote on the new rule. No other justice supported her position. A court speaks through its orders. *Johnson v White*, 430 Mich 47, 53 (1988). The vote to establish a new disqualification rule cannot be given immediate effect without an order. The order being entered today is being given immediate effect, as desired by the majority. Whatever the timing of the order's effective date, ***my point is that this order does not reflect the actual vote on November 5, 2009.***

[62] http://www.michbar.org/courts/virtualcourt.cfm (last accessed November 23, 2009).

[63] Justice WEAVER's dissenting statement to the minutes of November 13, 2008 conference, available at <http://www.justiceweaver.com/pdfs/eaw-dissent_satellite%20offices_12-2-08.pdf> (accessed November 19, 2009).

another important aspect of this new rule that violates the new majority's alleged interest in transparency: ***The rule enacted today permits an elected justice of this Court to be removed from a case in secrecy.*** At our November 5, 2009 conference, Justice MARKMAN proposed and the new majority repudiated an amendment that would require all appeals of a justice's initial decision to deny a motion for disqualification to be heard in an open session of this Court. So much for the openness and transparency that the new majority has continuously trumpeted.

Finally, as its proponents admit, this order is but an opening salvo for additional radical changes to this Court, ***including the unconstitutional replacement of an elected justice with some other judge not elected to the Supreme Court.***[64] At our November 5, 2009 administrative conference, Chief Justice KELLY indicated her support for the new disqualification rule but also reiterated that it was only "the first step in the realization of a truly excellent rule." She considers it "essential" for this Court to have a rule that would allow the "replac[ement of] a disqualified justice with another judge for the purpose of hearing the case involved." As Justice CORRIGAN explained in great detail in her statement on the proposed disqualification rules,[65] unlike other states, the People of Michigan have not authorized this Court to appoint temporary justices. Rather, the Michigan Constitution provides that "[t]he supreme court *shall* consist of seven justices *elected at non-partisan elections as provided by law*."[66] Thus, this order appears to be preparatory for additional unconstitutional changes to this Court that would further disenfranchise Michigan voters.

This is truly a sad day for this Court, the citizens of Michigan, and for the judicial elective system that our citizens as sovereign have mandated. For all of these reasons, I dissent.

CORRIGAN, J., concurs with YOUNG, J.

MARKMAN, J. (*dissenting*). In place of a judicial disqualification rule that has worked satisfactorily for over 175 years to ensure an honorable Michigan Supreme Court

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[64] As I explained in my statement accompanying the three proposed rules, Proposals Regarding Procedure for Disqualification of Supreme Court Justices, 483 Mich 1205, 1236 n 2 (2009): "[T]wo of [my] colleagues have made the radical proposal that justices *can* be replaced by other judicial officers. See *Adair v State of Michigan*, 474 Mich 1027, 1045, 1051 (2006)."

[65] Proposals Regarding Procedure for Disqualification of Supreme Court Justices, 483 Mich 1205, 1229-1234 (2009) (statement by CORRIGAN, J.).

[66] Const 1963, art 6, § 2.

and that remains employed by the United States Supreme Court and the majority of other state supreme courts, the new rule adopted by the majority, by establishing justices as the reviewing authority for the disqualification decisions of other justices and by adopting a vague "appearance of impropriety" standard applicable to all judges throughout the state: (a) will incentivize disqualification motions and thereby produce a considerable increase in the number of such motions and in the amount of time and effort devoted by this Court to addressing such motions; (b) will introduce an unprecedented degree of gamesmanship and politicization into the judicial process by enabling attorneys to influence which duly-elected justices will be allowed to participate in deciding their own cases and controversies; and (c) will seriously undermine the collegiality of this Court. In the end, the new rule is far more likely to reflect adversely upon the integrity of this Court than it is to enhance this Court's standards of conduct.

Although I opposed the adoption of the new rule, recognizing that there was majority support, I did move for the adoption of four amendments. Each of these was rejected by the same 4-3 vote. Most importantly, in my judgment, the majority refused to adopt the following amendment:

> All disqualification decisions other than the challenged justice's own initial decision shall be decided in public administrative session.

For this Court to disqualify an elected justice of this Court from participation in a case constitutes an action of extraordinary significance in a democratic system of judicial selection and should be undertaken in as open and as transparent a manner as possible. Indeed, it is hard to imagine a more consequential decision of this Court than that of some justices disqualifying an elected and coequal colleague. In view of the emphasis on transparency that has motivated this Court to adopt open administrative hearings, I cannot think of an action that more compellingly requires an open decision-making process than that of determining which justices will, and which justices will not, be allowed to participate in a case. The people are entitled to know why a justice whom they have elected to serve on this Court has been deprived of this right, and they are entitled to the opportunity to assess the rationale and motives of those who have rendered this judgment.

The majority also rejected the following amendment:

> A justice shall raise the issue of another justice's disqualification within 14 days after the former discovers the alleged basis for disqualification, including where a justice discovers the alleged basis during a non-public conference of the Court.

This amendment would have made clear that a justice may raise the issue of another justice's disqualification and that such disqualification could be predicated upon inappropriate conduct or behavior reflected during closed conferences. Tellingly, the single justice on this Court who has repeatedly cast public aspersions upon colleagues on the basis that they have committed unspecified misconduct and misbehavior at closed

conferences not only voted against this amendment, but also voted against the amendment requiring public deliberation on disqualification motions. Under this amendment, in the event a justice exhibits bias or prejudice for or against a party or an attorney, another justice would have 14 days from when they first became aware of this to move for that justice's disqualification. Absent an opportunity for a justice to sua sponte challenge the participation of another justice, statements of genuine bias or prejudice made in the context of confidential case discussions cannot be addressed, and attorneys exclusively will control the flow of disqualification motions, in particular, the few attorneys who have demonstrated a disproportionate inclination to repeatedly offering disqualification motions. Moreover, MRPC 8.3(b) requires "[a] lawyer having knowledge that a judge has committed a significant violation of the Code of Judicial Conduct that raises a substantial question as to the judge's honesty, trustworthiness, or fitness for office [to] inform the Judicial Tenure Commission." Given that the justices of this Court are all lawyers, it seems clear that our rules of conduct *require* us to raise disqualification issues if we believe that a justice should be disqualifying himself and is not doing so.

The majority likewise rejected the following amendment:

> Participation in a disqualification decision is subject to the same disqualification procedures as are applicable to a justice's participation in a particular case.

This amendment was intended to ensure the integrity of the disqualifying justices with reference to the justice whose disqualification is being sought. For instance, if Justice A, the subject of a disqualification motion, believes Justice B is prejudiced against him, or is himself partial for or against lawyers or parties in a particular case, Justice A in fairness ought to be permitted to challenge the propriety of Justice B's participation in the disqualification decision. For instance, if Justice A may be disqualified from participation because he received a campaign contribution from a particular lawyer or party, it cannot be proper for Justice B, whose opponent received a contribution from that same lawyer or party, or who himself received a contribution from the opposing lawyer or party, to participate in the disqualification decision. Individual justices, no less than lawyers and parties, are entitled to a fair hearing before their rights are adjudicated, and this cannot be obtained if there is a conflict of interest between himself and the decision maker. Can a justice who has campaigned against the challenged justice, or who has benefitted from political support from the party or attorney seeking the disqualification, or who has benefitted from political support from groups or organizations that might be advantaged by a justice's disqualification, decide any better than the challenged justice himself whether the latter can participate in a case?

Lastly, the majority rejected the following amendment:

> A decision by an individual justice to disqualify himself or herself from participation may be accompanied by a

> statement that provides the reasons for such decision, but this is not required.

This amendment would have maintained our existing practice of neither requiring nor prohibiting a statement by an individual justice deciding a motion. Making such statements mandatory is likely only to prove embarrassing to third persons who do not deserve to be embarrassed. Further, it is ironic that most of the justices in the majority have had no compunction in the context of even full-blown *opinions* of this Court in choosing not to offer even a whit of explanation for their positions.

As explained above, all four of my proposed amendments were rejected 4-3. So, now we have a rule that allows a majority of justices to decide behind closed doors which other justices can and cannot do what they were duly elected to do-- participate in deciding cases and controversies-- and without any regard to whether the justices making this decision are themselves biased in some manner. However, not only did the majority adopt a rule that confers upon itself the authority to determine which justices may participate in deciding what the law of this state is, but by adopting a novel "appearance of impropriety" standard-- which applies to the entire judiciary in this state, not merely to the justices of this Court-- it has enlarged its own discretion for rendering such decisions. The majority can now disqualify a justice from participation in a case even though it does not believe that the challenged justice is *actually biased*, but merely by reciting that it believes there to be some "appearance of impropriety."

The threshold problem, of course, with the new "appearance of impropriety" standard is its utter vagueness. What is an "appearance of impropriety," and from whose standpoint is the "appearance of impropriety" to be gauged? As this Court once explained, an "appearance of impropriety" standard will subject justices "to vague, subjective, and increasingly politically directed, allegations of misconduct, against which no justice could effectively defend himself or herself." *Adair v Michigan*, 474 Mich 1027, 1039 (2006) (statement of TAYLOR, C.J., and MARKMAN, J.), 1051 (statement of CORRIGAN, J.), 1053 (statement of YOUNG, J.). Further, an "appearance of impropriety" standard is likely to vitiate all other existing grounds for disqualification and create an ethical snare for judges. For example, under the new rule, MCR 2.003(C)(1)(e) requires a judge to disqualify himself where he had been a member of a law firm representing a party within the preceding two years, but MCR 2.003(C)(1)(b)(ii) requires a judge to disqualify himself if his participation would create an "appearance of impropriety." What if the judge has not been a member of the law firm that is representing a party for two years and one month? The judge would be able to participate under MCR 2.003(C)(1)(e), but would he be able to participate under MCR 2.003(C)(1)(b)(ii)? That is, if a judge would be required to disqualify himself if he has been a member of that law firm within the preceding two years, presumably because the chance of bias would be too substantial to allow his participation, could it truly be said that there was no longer any "appearance of impropriety" where that judge has not been a member of that law firm for two years and one month? Is that one month sufficient to alleviate any "appearance of impropriety"? Who knows? In the case of this Court, this decision will be left to the

discretion of other justices who have been no less involved in the political process than the justice whose disqualification has been sought. In other words, there will no longer be any rules, or "safe harbor," on the basis of which a judge can act. Instead, everything will be dependent upon ad hoc standards applied on a case-by-case basis by justices whose own biases and prejudices will apparently never be subject to challenge.

Furthermore, how does the "appearance of impropriety" standard operate in connection with statutes that specifically permit certain actions? For instance, MCL 169.252 and 169.269 specifically allow individual and political committee contributions to Michigan judicial candidates up to certain limits. "Such limits must be understood as clearly reflecting the Legislature's, and the people's, understanding that contributions in these amounts will not supply a basis for disqualification." *Adair,* 474 Mich at 1042 (statement of TAYLOR, C.J., and MARKMAN, J.), 1051 (statement of CORRIGAN, J.), 1053 (statement of YOUNG, J.). "If justices . . . were to recuse themselves on the basis of [legal] campaign contributions to their or their opponents' campaigns, there would be potential recusal motions in virtually every appeal heard by this Court, there would an increasing number of recusal motions designed to effect essentially political ends, and there would be a deepening paralysis on the part of the Court in carrying out its essential responsibilities." *Id.* For these reasons, I believe that where a justice has abided by all applicable statutes and specific court rule provisions that address the asserted basis for disqualification, disqualification is not required. That is, I would "decline to allow general allegations of impropriety that might overlap with specifically authorized or prohibited behavior and conduct to supersede [statutes and court rules] that specifically apply to the conduct in question." *In re Haley,* 476 Mich 180, 195 (2005). "Otherwise, such specific rules and [statutes] would be of little consequence if they could always be countermanded by the vagaries of an 'appearance of impropriety' standard." *Adair,* 474 Mich at 1039 (statement of TAYLOR, C.J., and MARKMAN, J.), 1051 (statement of CORRIGAN, J.), 1053 (statement of YOUNG, J.). However, such details did not appear to interest the majority during the court's recent deliberations, and the relationship between the court rules and the new "appearance of impropriety" standard will undoubtedly be resolved on a case-by-case basis at the majority's standardless discretion.

I am also uncertain as to whether, where a justice has been prohibited from participation in a case on the basis that he is biased against an attorney, that justice will *always* be prohibited from participation in a case in which that attorney is involved. In other words, once a majority of this Court has determined that a justice is biased against an attorney, will parties then be permitted to effectively choose which justices can participate in their cases by simply choosing that attorney to represent them? This would take forum shopping to an altogether new length.

An additional concern I have with the new rule pertains to the manner by which a justice is to responsibly review his colleagues' disqualification decisions. That is, what is the basis upon which a justice is to know whether another justice is or is not biased for or against a party or an attorney, or whether his disqualification is required on other grounds? For example, if another justice is accused of having a "more than de minimis

economic interest in the subject matter in controversy that could be substantially impacted by the proceeding," MCR 2.003(C)(1)(f), without knowing that justice's financial situation, how am I to render an intelligent and responsible decision? What may be a "de minimis economic interest" to one justice might be a substantial economic interest to another justice depending on the particular justice's financial situation. Are justices going to be required to disclose all information that may be pertinent to this decision? Am I then entitled to know the entirety of their, and their spouses', financial circumstances? Am I entitled to question such justice as to aspects of his financial circumstances? Am I entitled to review what I might consider to be relevant financial records or documents? Are fact-finding hearings to be required? If so, will these be done in public or behind closed doors like the disqualification decisions themselves? The majority was uninterested in discussing these and related questions when they were raised during debate.

For all these reasons, and especially for those set forth in the first paragraph of this statement, I strongly dissent from the adoption of the new disqualification rule. The majority will doubtlessly enjoy plaudits from those who fail to look beneath the surface of the majority's claims of "reform." However, as time goes by, it will become increasingly clear that the majority has replaced a time-tested disqualification procedure with one that will lead inevitably to politicization, gamesmanship, and acrimony.[67]

Staff Comment: The amendments adopted by the Court in this order explicitly apply the judicial disqualification rule to all state judges, including Supreme Court Justices. In addition, the amendments revise disqualification standards and establish procedures for the disqualification process.

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[67] In once again revealing a confidential communication of this Court, Justice WEAVER also once again fails to supply fair and necessary context. In suggesting in note 10 of her dissent that I agree with her that the Court "adopted" the new disqualification rule, she cites my statement that the majority "intended" the rule to become "effective immediately." I continue to believe this was the majority's intention. However, Justice WEAVER fails to note my related observation at conference that courts "speak through their orders," not through their subjective intentions. Every other justice, except for Justice WEAVER, agreed with this proposition and concluded that the new rule had not yet been "adopted," but would only become so upon the issuance of an order. To subject ourselves to the new rule, Justice HATHAWAY and I have chosen to wait until such order has been issued before deciding pending disqualification motions.

I, Corbin R. Davis, 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 25, 2009

Corbin R. Davis

Clerk

APPENDIX A

The Detroit News www.detnews.com

November 18, 2009 http://detnews.com/article/20091118/OPINION01/911180309

Letter: New court rules may let minority win

The Nov. 10 editorial ("Justice disqualified") notes that "New rules on recusal of state Supreme Court members could cause problems with subjective standard." It is worse than that. The promulgation of the four-justice Michigan Supreme Court majority rule that permits justices to oust other justices from consideration of a case is a seizure of power without authority that is unprecedented in the history of the court.

The majority of justices speak for the court. But nothing in our Constitution gives a majority of justices -- and here, only a majority of justices who have not been challenged by a litigant, which might be a minority of the court -- the authority to decide whether another justice or justices may sit on a case. Undoubtedly some litigants will, calculating on past decisions that they are likely to lose 4-3 in a case, challenge two justices of what they perceive will be the majority.

Under the new recusal rule, the remaining justices will vote on whether the challenged justices may sit, and in a 3-2 vote the three justices who might be in the minority in the case may oust two other justices from the case.

In the U.S. Supreme Court, each justice individually decides questions of recusal in any case, and there is no recourse to either the chief justice or the rest of the court should a justice not excuse himself or herself from a case.

This is precisely because the members of that court understand the limits on their authority, which, unfortunately, four members of our state Supreme Court do not.

Tim Baughman, Royal Oak

APPENDIX B

The Detroit News www.detnews.com

November 19, 2009 http://detnews.com/article/20091119/OPINION01/911190343

Commentary: Beware power grab for Michigan court

DAN PERO

There's a discredited practice in politics: If you can't win the game, change the rules. The majority of justices on the Michigan Supreme Court is attempting to do just that by making it far easier to dismiss justices elected by Michigan voters from controversial cases and blatantly shift the balance of power on the court.

Michigan Supreme Court justices historically have voluntarily removed themselves from cases they cannot hear impartially. Under the new rules, the well-defined "actual bias" test for disqualification will be replaced by a fuzzy "appearance of impropriety" standard.

The definition of what constitutes the perception of bias is a moving target. Does a $1,000 campaign contribution create the "appearance" that a justice cannot be impartial? Who knows?

What happens if a trial lawyer compares a judge to "Adolf Hitler and Goebbels," as Geoffrey Fieger has done? Isn't it easy to claim there is at least an "appearance" that a judge who has been tagged with that epithet shouldn't rule in cases involving that lawyer? What's to stop an unscrupulous attorney from smearing a justice so the justice is removed from cases down the road?

The new rules also make the disqualification process less transparent and accountable.

Under the old system, litigants could request that individual justices recuse themselves, but the justices made the ultimate decision on whether to hear a case. This worked well in Michigan because justices knew if they abused this process or ruled on cases in which there was clear bias, voters could throw them off the court in the next election.

The new rules, however, give justices the power to request (and achieve) the removal of their colleagues. This policy invites retaliatory recusal demands and endless bias accusations, especially given the petty and vindictive proclivities of many court members.

Even worse, justices will be allowed to vote on disqualification challenges with no public oversight. Any justice can be removed from any case for any reason – and the court will never have to justify or even explain its actions to the voters.

This is an especially ironic twist since the new liberal majority has railed for more transparency. Justice Elizabeth Weaver has made it her mantra. Justice Diane Hathaway campaigned on it. And Chief Justice Marilyn Kelly promised it.

There's not a shred of evidence the existing rules failed to keep Michigan's high court impartial, giving this entire exercise the whiff of partisan politics and ideological gamesmanship. In the future, any combination of four justices on the seven-member court can temporarily unseat a democratically elected colleague and shift the direction of the court. The result will be heightened cynicism about the judicial branch.

The court's new recusal rules are the culmination of an effort to get conservative justices off the court – or at

least push them to the sidelines. If the court does so, it will undermine the ability of Michigan voters to decide who is going to hear the cases that affect their lives, jobs and businesses.

Dan Pero, former chief of staff to Gov. John Engler, is president of the American Justice Partnership, a national organization headquartered in Lansing that focuses on enacting legal reform at the state level. E-mail comments to letters@detnews.com">letters@detnews.com

APPENDIX C

STATE OF MICHIGAN
SUPREME COURT

MEMORANDUM
FOR COURT USE ONLY

TO: The Justices
cc: Corbin Davis, Mike Schmedlen, and Danilo Anselmo

DATE: November 2, 2009

FROM: Justice Maura Corrigan

SUBJECT: ADM 2009-04, #3 on 11/5/09 administrative agenda

In light of my call for further study of *Caperton v A T Massey Coal Co, Inc*, 556 US ___ (2009); 129 S Ct 2252 (June 8, 2009),[1] I would like to share my follow-up research with regard to whether and how *Caperton* bears on courts' general recusal policies. The *Caperton* opinion itself, courts' and commentators' interpretations of *Caperton*, and court practices in the wake of *Caperton* have convinced me that *Caperton* applies very narrowly and does not suggest that due process requires us to change our recusal practices. Indeed, this Court would be a true outlier if we read *Caperton* to require evidentiary hearings or a vote by the full Court in order to resolve recusal motions consistent with due process principles. The fact that *Caperton* does not require such changes to our historical recusal practice provides additional support for my vote in favor of alternative A.

First and foremost, the *Caperton* majority took pains to explain the limited nature of its holding. Indeed, it devoted Part IV of the opinion to clarifying that the Court's "decision today addresses an extraordinary situation where the Constitution requires recusal." Slip op at 16. It

[1] See my statement accompanying the order denying the motion for recusal in *United States Fidelity Insurance & Guaranty Co v Michigan Catastrophic Claims Assoc*, 484 Mich 1, 49-60 (2009).

specified: "the facts now before us are extreme by any measure." *Id.* at 17.[2] Otherwise, it acknowledged that "'most matters relating to judicial disqualification [do] not rise to a constitutional level.'" *Id.* at 6, quoting *FTC v Cement Institute*, 333 US 683, 701 (1948).

Recall that *Caperton* held that a state supreme court justice was disqualified from hearing a case involving a corporate party whose chairman and CEO made "extraordinary efforts to get [the justice] elected" by expending $3 million to support the justice's campaign. *Id.* at 2-3, 11. *Caperton* explicitly limited itself to "the context of judicial elections," *id.* at 11, and, more specifically, to extreme facts when a party directs or significantly contributes to a campaign while that party's case is pending. See *id.* at 13 ("Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case."), 14 ("[T]here is a serious risk of actual bias ... when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."), 15 ("The temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is ... critical."), 17 ("The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case.")

Accordingly, I tend to agree with the following observations by former Texas Chief Justice Thomas Phillips, who authored the amicus brief in *Caperton* on behalf of the Conference of Chief Justices, concerning the limited scope of *Caperton*:

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[2] And see *id.* at 17 ("[E]xtreme cases often test the bounds of established legal principles, and sometimes no administrable standard may be available to address the perceived wrong"; "[t]his Court's recusal cases ... deal[] with extreme facts ... .").

> Some have suggested that judges can never rule in any case where parties to a case or their attorneys are donors. It does no such thing. The holding, as I read it, is that due process is only violated when "[1] a person [2] with a personal stake in a particular case [3] had a significant [4] and disproportionate influence [5] in placing the judge on the case ... [6] when the case was pending or imminent." Given how narrow that holding is, I'm not sure *Caperton* will ever be direct precedent for another recusal. [Coping With 'Caperton': A Q&A With Former Texas Chief Justice, Tony Mauro, The National Law Journal June 11, 2009.]

Cases interpreting *Caperton* have reached similar a conclusion, that is: *Caperton* is limited to extreme facts in the context of campaign support in judicial elections. For just a few examples see *Rhiel v Hook (In re Johnson)*, 408 BR 123, 127 (Bankr, SD Ohio 2009) (*Caperton* is limited to "the specific issue of recusal 'in the context of judicial elections'"); *Ala Dep't of Pub Safety v Prince*, 2009 Ala Civ App LEXIS 510 (Oct 2, 2009) (quoting Chief Justice Roberts' dissent to observe that it is unclear whether *Caperton* applies beyond financial support in judicial elections but, in any event, the majority made clear that *Caperton* was "an exceptional case" that presented "extreme facts" and concluding that the facts in the case before it "are not the 'extreme facts' of *Caperton*"); *Marek v Florida*, 14 So 3d 985, 1000 (Fla 2009) (rejecting a defendant's claim that his constitutional right to due process was violated under *Caperton* when the same judge presided over his 1984 sentencing and the 1988 evidentiary hearing on his initial motion for postconviction relief; *Caperton's* "extraordinary facts regarding a litigant's campaign contributions to a state supreme court justice" are "irrelevant" to this case); *South Dakota v List*, 2009 SD 73, 8 (SD 2009) (citing *Caperton* for the proposition that "most matters relating to judicial disqualification [do] not rise to a constitutional level").

Perhaps most significantly, the few state courts I have discovered that have publicly considered whether *Caperton* bears on their recusal practices have primarily addressed the

case's ramifications for rules concerning contribution limits to judicial elections. These states have not read *Caperton* to require evidentiary hearings or a vote by unchallenged judges or justices.[3] For example, the Supreme Court of Nevada's Commission on the Amendment to the Nevada Code of Judicial Conduct issued a supplementary report recommending two additional rule changes in response to *Caperton*; both changes address recusal on the basis of a judge's financial or electoral campaign support from a party or attorney.[4] Similarly, on October 28, 2009, the Wisconsin Supreme Court conducted a hearing on petitions asking whether to amend the Supreme Court Rules concerning judicial campaign contributions and whether there are circumstances when recusal is required if a party or lawyer in an action "previously made a campaign contribution to or spent money on a media campaign relating to a judicial election for

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[3] At least one state also considered, but rejected, rephrasing its general recusal standards in reaction to *Caperton*. According to a September 2009 report from the Washington Supreme Court Task Force on the Code of Judicial Conduct, a minority of the task force would have adopted the 2007 ABA Model Code for Rule 1.2 of the Code of Judicial Conduct on Promoting Confidence in the Judiciary; based in part on *Caperton*, the version of the rule preferred by the minority would direct judges to avoid not just impropriety, but the "appearance of impropriety." See<http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Code%20of%20Judicial%20Conduct%20Task%20Force%20Committe/Final%20CJC%20%20Task%20Force%20Report%20Sept%2009.pdf> (accessed October 28, 2009). The proposed new Washington State Code of Judicial Conduct also addresses disqualification of a judge on the basis of monetary campaign support in excess of the statutory direct contribution limits. See proposed Rule 2.11(A)(4) and comment [7], <http://www.courts.wa.gov/committee/?fa=committee.home&committee_id=141> (accessed November 2, 2009).

The Chief Justice of the Supreme Court of Ohio informed me that Ohio's high court discussed *Caperton* formally once and decided not to take any action; Ohio's justices, like myself, are interested to see whether other states find reform necessary.

[4] See <http://nevadajudiciary.us/index.php/viewdocumentsandforms/Commission-Files/Nevada-Judicial-Conduct-Code-Commission/Supplemental-Report/> (accessed November 2, 2009).

a judge who is presiding in the case."[5] But thus far, my research has not revealed that any state supreme court has read *Caperton* even to *potentially* require evidentiary hearings or a vote of the full Court. It is worth further noting that the United States Supreme Court appears not to have amended its own recusal process—which comports with our own historical practice—in the wake of *Caperton*.[6]

Along these lines, I again note the comments, published by Michigan Lawyers Weekly, of Wayne County Assistant Prosecuting Attorney Timothy Baughman concerning *Caperton*:

> *Caperton* is a case about standards and not about the identity of the decision-maker. . . .
>
> * * *
>
> Nothing in *Caperton* requires that the decision on a recusal motion be reviewed by another justice or body of justices. For the Michigan Supreme Court [to continue] to follow the practice of the U.S. Supreme Court is perfectly permissible, so long as a system of "objective rules" exists. [*'Caperton' was about recusal standards, not decision maker*, Michigan Lawyers Weekly, June 22, 2009, p 7.]

For these reasons, my study of *Caperton* convinces me that it does not require any changes to our recusal rules. Accordingly, I reiterate my support for alternative A in this file,

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[5] See <http://www.wicourts.gov/supreme/petitions_audio.htm> (accessed October 29, 2009), rule petitions 08-16, 08-25, 09-10 and 09-11. The originating petition, 08-16, appears to have been filed before *Caperton* was decided, but the Court accepted an amendment the petition in light of *Caperton*. See <http://www.wicourts.gov/supreme/docs/0816petitionamend.pdf> (accessed October 29, 2009).

[6] The primary difference between our practice and that of SCOTUS is the fact that a party who wishes to challenge a Michigan Supreme Court justice's recusal decision has another level of recourse; he may appeal that decision to SCOTUS. Thus I find it particularly noteworthy that SCOTUS has not concluded that due process requires unchallenged SCOTUS justices to bless or reverse an individual SCOTUS justice's recusal decision although there is no higher body to which the movant may appeal the decision. Clearly SCOTUS continues to believe that individual justices are generally competent to decide motions for their recusal.

which effectively codifies our historical recusal practice and does not require a vote of the Court under any circumstances.

APPENDIX A

MEMORANDUM

TO: The Justices
cc: Corbin Davis & Mike Schmedlen

FROM: Justice Robert P. Young, Jr.

RE: ADM 2009-04, Disqualification

DATE: November 19, 2009

Before issuing an order adopting the rule on disqualification, the members of this Court should seriously consider the following amendments to MCR 2.003. They are designed primarily to assure minimal due process and to clarify the procedures used when this Court reviews as an appellate body a Justice's decision to deny a motion for recusal. I will discuss in turn my reasons for proposing each of the amendments. I provide at the conclusion of this memo the entire rule as voted on November 5, 2009, containing all of my proposed amendments in redline.

PROPOSED DUE PROCESS AMENDMENTS

- As discussed at our last ADM conference, I believe that the timing requirement for filing disqualification motions in the Supreme Court requires more precision than the language contained in Justice Hathaway's proposal specified. (This is the subject matter of my "friendly amendment" offered before our vote on Justice Hathaway's proposal.) I have split the "Time for Filing" subsection into four parts (subsections (D)(1) through (D)(4)). There is proposed one subsection for procedures respectively in the trial court, the Court of Appeals, and this Court, and a fourth subsection concerning the effect of an untimely motion. Consistent

with my proposal at conference, I have specified that the appellant must file a motion for disqualification with the application if the appellant knows the basis for disqualification at that point and that the appellee must file a motion for disqualification within 28 days of the application if the appellee then knows the basis for disqualification. That way, we are aware of potential grounds for disqualification before acting on the application for leave to appeal. I would also retain the previous language concerning the effect of an untimely proposal and specify that a judge shall not consider a motion made after a case has already been decided. (I previously provided Justice Hathaway with language similar to this proposal, but she has not responded; this language is slightly revised from that that I supplied to her right after the last ADM conference.)

- I would clarify that, when the rule refers to an appeal on disqualification being decided by "the *entire* Court," this includes the challenged justice. This is already implied in the plain text of the current rule – "[t]he entire Court shall then decide the motion for disqualification de novo" – and so my revisions would merely clarify the rule as enacted. These clarifications are contained in subsection (D)(6)(b). If this proposal is repudiated, and a targeted justice is ineligible to hear *any* appeal on a motion for disqualification, there is the possibility, when multiple justices are targeted, that an appeal on disqualification will run afoul of the quorum requirement of MCL 600.211(3), requiring "a majority of justices...for hearing cases and transacting business."
- I continue strongly to support Justice Markman's demand for transparency in the disqualification process. A disqualification matter to be decided under the new

rule as an appeal to the entire Court is not one on the merits and thus is not subject to the same kind of confidentiality that attends our merit discussions of pending appeals. Accordingly, I would expressly require that any appeal to the entire Court on a motion for disqualification be heard and decided in an open session of this Court. This procedure is contained in subsection (D)(6)(b)(ii).

- The removal of a sitting Justice against his or her will is a serious matter trenching upon the right to execute the duties of office to which the Justice was elected as well as an infringement on the right of electors who placed the Justice in office. Heretofore, only an appeal to the Supreme Court of the United States could reverse a Justice's determination regarding a motion to disqualify. In interposing itself in this decision as an appellate body, this Court must afford the targeted Justice no fewer rights than he enjoyed in such an appeal to the Supreme Court of the United States on a denial of a motion to disqualify. I would clarify that a justice subject to a motion for disqualification is entitled to basic due process rights: that the appeal is limited to the grounds stated in the motion for recusal and that the justice be allowed to retain counsel in the matter and submit a brief in response to the motion for disqualification. The procedural requirements for filing such a brief are consistent with the filing of reply briefs in the Court of Appeals and this Court. These proposals are contained in subsections (D)(6)(b)(i) and (ii).
- If due process means anything -- particularly in the disqualification setting where this issue is pivotal – a targeted Justice is most assuredly entitled to an *impartial*

arbiter.[1] Where personal and political biases could affect the decision-making of members of this Court in the new disqualification appeal process, I cannot imagine that due process demands less than the right to challenge such potential biases of the decision-makers in this appellate procedure. Therefore, I would amend the rule to ensue that this cardinal due process right is preserved, such that a targeted justice facing an appellate review of his refusal to disqualify can challenge the potential biases of other members of this Court. The substance of this rule is consistent with Justice Markman's failed motion at the last ADM discussion. However, I have provided specific procedural requirements for a judge to challenge the decision-maker in such an appeal. This is contained in subsection (D)(6)(b)(iii).

- Due process also demands an adequate opportunity for a challenged justice to be heard.[2] Sometimes, this will entail an evidentiary hearing. I have therefore proposed a procedure for this Court taking evidence, contained in subsection (D)(6)(b)(ii).
- I continue to be concerned with the First Amendment implications of our new recusal rules. I propose amending subsection (C)(2)(b) to provide that "A judge is not disqualified based solely upon campaign speech protected by *Republican Party of Minn v White*, 536 US 765 (2002)." This is consistent with Justice Cavanagh's previous recommended revision. Moreover, to keep our court rules

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[1] "A hearing before an unbiased and impartial decisionmaker is a basic requirement of due process." *Crampton v Dep't of State*, 395 Mich 347, 351 (1975).

[2] "The fundamental requisite of due process of law is the opportunity to be heard." *Dow v State of Michigan*, 396 Mich 192, 205 (1976) (internal quotation omitted).

in accordance with the *White* decision, I have specified that campaign speech shall not be the basis for recusal under the "appearance of impropriety" standard in the former subsection (C)(1)(b)(ii), which I propose to be renumbered (C)(1)(c).

- I would clarify when *Caperton* requires a justice's disqualification by using further language consistent with the decision. This is contained in subsection (C)(1)(b).
- I would clarify the procedure by which a justice may challenge another justice's participation in a particular case. I propose amending subsection (B) expressly to allow a justice to raise another justice's participation in a case, and the procedure required to challenge another justice's participation is parallel with the procedure required of a party and is provided in subsection (D)(3). The obligation to challenge arises when a justice becomes aware of the basis for disqualification in a particular case.
- I would specify that a judge may not be subject to disqualification simply because the parties agree among themselves that the judge should be disqualified. I propose adding a new subsection (B)(2)(c) to address this situation.
- Finally, while I do not object to changing the term "remittal" to "waiver" in the new subsection (E), I believe the language in the current rule provides more protection for the parties and a more structured procedural mechanism than the provision as revised. In particular, the previous language specified that parties may not waive a judge's participation in the face of personal bias or prejudice and that the waiver must be made out of the presence of the judge. I cannot think of a single justification for asking parties to waive a judge's *actual* bias and believe that the draftsman of the revised provision inadvertently omitted this

language from the current rule in attempting to restate it. Therefore, I would retain the current language in the rule.

I have indicated in redline my proposed amendments to the rule. The baseline language in subsection (D)(1) is the language that Justice Hathaway initially proposed as the deadline for filing a motion for disqualification, but which was agreed to be reworked at our next ADM conference.

THE RULE VOTED ON WITH JUSTICE YOUNG'S PROPOSED AMENDMENTS

Rule 2.003 Disqualification of Judge

(A) Applicability. This rule applies to all judges, including justices of the Michigan Supreme Court, unless a specific provision is stated to apply only to judges of a certain court. The word "judge" includes a justice of the Michigan Supreme Court.

(B) Who May Raise. A party may raise the issue of a judge's disqualification by motion or the judge may raise it. Any justice on the Supreme Court may raise the issue of another justice's disqualification when grounds in a particular case become known.

(C) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:

(1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:

(a) The judge is biased or prejudiced for or against a party or attorney.

(b) The judge, based on objective and reasonable perceptions, has ~~either (i)~~ a serious risk of actual bias impacting the due process rights of a party when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election

campaign when the case was pending or imminent, as enunciated in *Caperton v Massey*, ___ US ___ (2009).

(c) The judge, based on objective and reasonable perceptions, ~~or (ii)~~ has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct. Recusal shall not be required under this section based on a judge's campaign speech.

(cd) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

(~~d~~e) The judge has been consulted or employed as an attorney in the matter in controversy.

(~~e~~f) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

(~~f~~g) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household, has more than a de minimis economic interest in the subject matter in controversy that could be substantially impacted by the proceeding.

(~~g~~h) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than a de minimis interest that could be substantially affected by the proceeding; or

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) Disqualification Not Warranted.

(a) A judge is not disqualified merely because the judge's former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge.

(b) A judge is not disqualified based solely upon campaign speech protected by *Republican Party of Minn v White*, 536 US 765 (2002). ~~so long as such speech does not demonstrate bias or prejudice or an appearance of bias or prejudice for or against a party or an attorney involved in the action~~.

~~(b)~~(c) A judge shall not be subject to disqualification based solely on the agreement of the parties.

(D) Procedure.

(1) *Time for Filing in the Trial Courts*. ~~For motions in the trial court, t~~To avoid delaying trial and inconveniencing witnesses, if a party is aware of a basis for a motion to disqualify a judge before filing its initial pleading, the party must file a motion to disqualify with the initial pleading. Otherwise, the party must file a motion to disqualify ~~be filed~~ within 14 days after the moving party discovers the ground for disqualification. If the discovery is made within 14 days of the trial date, the motion must be made forthwith. ~~All motions in the Court of Appeals must be filed within 28 days of the disclosure to the parties of the judge's assignment to the case or within 28 days of the discovery of the grounds for disqualification, whichever is later. All motions in the Supreme Court must be filed within 28 days of the order granting leave or oral argument on the application for leave, or within 28 days of the discovery of the grounds for disqualification, whichever is later. Untimely motions in the trial court, Court of Appeals or Supreme Court may be granted for good cause shown.~~

(2) *Time for Filing in the Court of Appeals*. If a party is aware of a basis for a motion to disqualify a Court of Appeals judge assigned to adjudicate the appellant's case, the party must file a motion to disqualify within 14 days after receiving notice of the judges assigned to the appellant's case. Otherwise, a party must file a motion to disqualify within 14 days after the party discovers or should have discovered the basis for disqualification. If a party discovers the basis for disqualification within 14 days before a scheduled oral argument or argument on the application for leave to appeal, the motion must be made forthwith.

(3) *Time for Filing in the Supreme Court*. If an appellant is aware of a basis for a motion to disqualify a justice before the application for leave is filed, the appellant must file a motion to disqualify with the application. Otherwise, the appellant must file a motion to disqualify within 28 days after the appellant discovers or should have discovered the basis for disqualification. If an appellee is aware of a basis for a motion to disqualify a justice, the appellee must file a motion to disqualify within 28 days after the application is filed. Otherwise, an appellee must file a motion to disqualify within 28 days after the

appellee discovers or should have discovered the basis for disqualification. If any party discovers the basis for disqualification within 28 days before a scheduled oral argument or argument on the application for leave to appeal, the motion must be made forthwith.

If a justice is aware of a basis of another justice's disqualification when an application for leave is filed, the justice must raise this question before the order to enter date. Otherwise, a justice must raise the issue of disqualification within 28 days after the justice discovers or should have discovered the basis for disqualification. If a justice discovers the basis for disqualification within 28 days before a scheduled oral argument or argument on the claim or application for leave to appeal, the issue must be raised forthwith.

~~(1)~~(4) *Effect of Untimely Motion.* If a motion is not timely filed in the trial court, the Court of Appeals, or the Supreme Court, untimeliness, including delay in waiving jury trial, is a factor in deciding whether the motion should be granted. No judge shall consider a motion filed after an order resolving the case has been entered.

(52) *All Grounds to be Included; Affidavit.* In any motion under this rule, the moving party must include all grounds for disqualification that are known at the time the motion is filed. An affidavit must accompany the motion.

(63) *Ruling.*

(a) For courts other than the Supreme Court, the challenged judge shall decide the motion. If the challenged judge denies the motion,

(i) in a court having two or more judges, on the request of a party, the challenged judge shall refer the motion to the chief judge, who shall decide the motion de novo;

(ii) in a single-judge court, or if the challenged judge is the chief judge, on the request of a party, the challenged judge shall refer the motion to the state court administrator for assignment to another judge, who shall decide the motion de novo.

(b) In the Supreme Court, if a justice's participation in a case is challenged by a written motion or if the issue of participation is raised by the justice himself or herself or another justice, the challenged justice shall decide the issue and publish his or her reasons about whether to participate. If the challenged justice denies the motion for disqualification, a party may move for the motion to be decided by the entire Court.

(i) The entire Court, including the justice who is the subject of the appeal and any other justice whose participation is challenged in the case, except a justice removed pursuant to subsection (iii), shall then decide the motion for disqualification de novo. In deciding the motion for disqualification, the Court shall be limited to the grounds raised in the motion itself. The Court's decision shall include the reasons for its grant or denial of the motion for disqualification. A justice may only be disqualified from a case upon the vote of a majority of all justices on the Court. The Court shall issue a written order containing a statement of reasons for its grant or denial of the motion for disqualification. Any concurring or dissenting statements shall be in writing, including that of the challenged justice.

(ii) Upon motion by the challenged justice, the Court shall conduct an evidentiary hearing, governed by the Michigan Court Rules and the Michigan Rules of Evidence, to determine any material facts necessary to the resolution of the motion for disqualification. Any appeal on the motion for disqualification decided by the entire Court, including any evidentiary hearing, must be made in an open session of the Court. The challenged justice may retain counsel and file a brief in response to the motion to appeal denial of disqualification. The responsive brief must be filed and served within 21 days after the party moving for disqualification appeals the justice's decision to deny the motion for disqualification.

~~(i)~~(iii) Any appeal on the motion for disqualification must be resolved by a neutral arbiter following the Michigan Court Rules and the Michigan Rules of Evidence. The justice may challenge the participation of any justice to hear an appeal on the motion for disqualification by indicating the basis for any such disqualification of any other justice sitting on the appeal. Such claim of disqualification of a justice is subject to the procedures contained in this rule and shall be resolved in accordance with the appropriate substantive rules for disqualification prior to any decision on the appeal of the original motion for disqualification.

(74) If Disqualification Motion Is Granted.

(a) For courts other than the Supreme Court, when a judge is disqualified, the action must be assigned to another judge of the

same court, or, if one is not available, the state court administrator shall assign another judge.

(b) In the Supreme Court, when a justice is disqualified, the underlying action will be decided by the remaining justices of the Court.

(E) Waiver of Disqualification. If it appears that there may be grounds for disqualification, the judge may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If, following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings. The agreement shall be in writing or placed on the record. ~~Parties to the proceeding may waive disqualification even where it appears that there may be grounds for disqualification of the judge. Such waiver may occur whether the grounds for disqualification were raised by a party or by the judge, so long as the judge is willing to participate. Any agreement to waive disqualification must be made by all parties to the litigation and shall be in writing or placed on the record.~~

EXHIBIT C

MEMORANDUM

TO: The Justices
cc: Corbin Davis & Mike Schmedlen

FROM: Justice Robert P. Young, Jr.

RE: ADM 2009-04, Disqualification

DATE: December 7, 2009

For the convenience of members of the Court, I am reprinting, below, all of my proposed amendments to MCR 2.003. In addition to the amendments that I proposed on November 19, 2009, I include my proposed amendments to the deadline for filing a motion, circulated to the Court on December 4, 2009, and Justice Markman's proposed amendments, circulated to the Court this morning. I also reprint my initial explanations for these proposed amendments, as refined to include the more recent proposals.

PROPOSED DUE PROCESS AMENDMENTS

- I have split the "Time for Filing" subsection into four parts (subsections (D)(1) through (D)(4)). There is proposed one subsection for procedures respectively in the trial court, the Court of Appeals, and this Court, and a fourth subsection concerning the effect of an untimely motion. As to motions in this Court, I have specified that the appellant must file a motion for disqualification with the application if the appellant knows the basis for disqualification at that point. All other motions must be filed with 28 days of discovery of the grounds for disqualification. That way, we are aware of potential grounds for disqualification

before acting on the application for leave to appeal. I would also retain the previous language concerning the effect of an untimely proposal.

- Additionally, I believe that we should require a party to file a motion to disqualify as soon as it is aware of a basis for disqualification – particularly on the eve of trial or oral arguments – and I want the rule to specify this. Justice Hathaway's proposed language already maintains this requirement for motions in the *trial court*: my proposed language would provide parallel requirements for the Court of Appeals and Supreme Court.
- I would clarify that, when the rule refers to an appeal on disqualification being decided by "the *entire* Court," this includes the challenged justice. This is already implied in the plain text of the current rule – "[t]he entire Court shall then decide the motion for disqualification de novo" – and so my revisions would merely clarify the rule as enacted. These clarifications are contained in subsection (D)(6)(b). If this proposal is repudiated, and a targeted justice is ineligible to hear *any* appeal on a motion for disqualification, there is the possibility, when multiple justices are targeted, that an appeal on disqualification will run afoul of the quorum requirement of MCL 600.211(3), requiring "a majority of justices…for hearing cases and transacting business."
- I continue strongly to support Justice Markman's demand for transparency in the disqualification process. A disqualification matter to be decided under the new rule as an appeal to the entire Court is not one on the merits and thus is not subject to the same kind of confidentiality that attends our merit discussions of pending appeals. Accordingly, I would expressly require that any appeal to the

entire Court on a motion for disqualification be heard and decided in an open session of this Court. This procedure is contained in subsection (D)(6)(b)(ii).

- The removal of a sitting Justice against his or her will is a serious matter trenching upon the right to execute the duties of office to which the Justice was elected as well as an infringement on the right of electors who placed the Justice in office. Heretofore, only an appeal to the Supreme Court of the United States could reverse a Justice's determination regarding a motion to disqualify. In interposing itself in this decision as an appellate body, this Court must afford the targeted Justice no fewer rights than he enjoyed in such an appeal to the Supreme Court of the United States on a denial of a motion to disqualify. I would clarify that a justice subject to a motion for disqualification is entitled to basic due process rights: that the appeal is limited to the grounds stated in the motion for recusal and that the justice be allowed to retain counsel in the matter and submit a brief in response to the motion for disqualification. The procedural requirements for filing such a brief are consistent with the filing of reply briefs in the Court of Appeals and this Court. These proposals are contained in subsections (D)(6)(b)(i) and (ii).
- If due process means anything – particularly in the disqualification setting where this issue is pivotal – a targeted Justice is most assuredly entitled to an *impartial* arbiter.[1] Where personal and political biases could affect the decision-making of members of this Court in the new disqualification appeal process, I cannot

[1] "A hearing before an unbiased and impartial decisionmaker is a basic requirement of due process." *Crampton v Dep't of State*, 395 Mich 347, 351 (1975).

imagine that due process demands less than the right to challenge such potential biases of the decision-makers in this appellate procedure. Therefore, I would amend the rule to ensue that this cardinal due process right is preserved, such that a targeted justice facing an appellate review of his refusal to disqualify can challenge the potential biases of other members of this Court. The substance of this rule is consistent with Justice Markman's failed motion at the last ADM discussion. However, I have provided specific procedural requirements for a judge to challenge the decision-maker in such an appeal. This is contained in subsection (D)(6)(b)(iii).

- Due process also demands an adequate opportunity for a challenged justice to be heard.[2] Sometimes, this will entail an evidentiary hearing. I have therefore proposed a procedure for this Court taking evidence, contained in subsection (D)(6)(b)(ii).
- I continue to be concerned with the First Amendment implications of our new recusal rules. I propose amending subsection (C)(2)(b) to provide that "A judge is not disqualified based solely upon campaign speech protected by *Republican Party of Minn v White*, 536 US 765 (2002)." This is consistent with Justice Cavanagh's previous recommended revision. Moreover, to keep our court rules in accordance with the *White* decision, I have specified that campaign speech shall not be the basis for recusal under the "appearance of impropriety" standard in the former subsection (C)(1)(b)(ii), which I propose to be renumbered (C)(1)(c).

[2] "The fundamental requisite of due process of law is the opportunity to be heard." *Dow v State of Michigan*, 396 Mich 192, 205 (1976) (internal quotation omitted).

- I would clarify when *Caperton* requires a justice's disqualification by using further language consistent with the decision. This is contained in subsection (C)(1)(b).
- I would clarify the procedure by which a justice may challenge another justice's participation in a particular case. I propose amending subsection (B) expressly to allow a justice to raise another justice's participation in a case, and the procedure required to challenge another justice's participation is parallel with the procedure required of a party and is provided in subsection (D)(3). The obligation to challenge arises when a justice becomes aware of the basis for disqualification in a particular case.
- I would specify that a judge may not be subject to disqualification simply because the parties agree among themselves that the judge should be disqualified. I propose adding a new subsection (B)(2)(c) to address this situation.
- Finally, while I do not object to changing the term "remittal" to "waiver" in the new subsection (E), I believe the language in the current rule provides more protection for the parties and a more structured procedural mechanism than the provision as revised. In particular, the previous language specified that parties may not waive a judge's participation in the face of personal bias or prejudice and that the waiver must be made out of the presence of the judge. I cannot think of a single justification for asking parties to waive a judge's *actual* bias and believe that the draftsman of the revised provision inadvertently omitted this language from the current rule in attempting to restate it. Therefore, I would retain the current language in the rule.

I have indicated in redline my proposed amendments to the rule as it appears in the Court's November 25, 2009 order (as amended with the Court's December 3, 2009 order).

THE NOVEMBER 25, 2009 ORDER (AS AMENDED DECEMBER 3, 2009) WITH JUSTICE YOUNG'S PROPOSED AMENDMENTS

Rule 2.003 Disqualification of Judge

(A) Applicability. This rule applies to all judges, including justices of the Michigan Supreme Court, unless a specific provision is stated to apply only to judges of a certain court. The word "judge" includes a justice of the Michigan Supreme Court.

(B) Who May Raise. A party may raise the issue of a judge's disqualification by motion or the judge may raise it. Any justice on the Supreme Court may raise the issue of another justice's disqualification when grounds in a particular case become known.

(C) Grounds.

(1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:

(a) The judge is biased or prejudiced for or against a party or attorney.

(b) The judge, based on objective and reasonable perceptions, has ~~either (i) a~~ serious risk of actual bias impacting the due process rights of a party when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent, as enunciated in *Caperton v Massey*, ___ US ___ (2009).

(c) The judge, based on objective and reasonable perceptions, ~~or (ii)~~ has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct. Recusal shall not be required under this section based on a judge's

campaign speech protected by *Republican Party of Minnesota v White*, 536 US 765 (2002).

(cd) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

(de) The judge has been consulted or employed as an attorney in the matter in controversy.

(ef) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

(fg) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household, has more than a de minimis economic interest in the subject matter in controversy that could be substantially impacted by the proceeding.

(gh) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than a de minimis interest that could be substantially affected by the proceeding; or

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) Disqualification Not Warranted.

(a) A judge is not disqualified merely because the judge's former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge.

(b) A judge is not disqualified based solely upon campaign speech protected by *Republican Party of Minn v White,* 536 US 765 (2002)~~, so long as such speech does not demonstrate bias or prejudice or an appearance of bias or prejudice for or against a party or an attorney involved in the action~~.

~~(b)~~(c) A judge shall not be subject to disqualification based solely on the agreement of the parties.

(D) Procedure.

(1) *Time for Filing in the Trial Courts.* ~~For motions in the trial court, t~~To avoid delaying trial and inconveniencing witnesses, ~~all~~a motions ~~to~~ for disqualification~~y~~ must be filed within 14 days ~~after~~ of ~~the moving party~~ discovery~~s~~ of the grounds for disqualification. If the discovery is made within 14 days of the trial date, the motion must be made forthwith. ~~If a motion is not timely filed, untimeliness, including delay in waiving jury trial, is a factor in deciding whether the motion should be granted.~~

(2) *Time for Filing in the Court of Appeals.* All motions for disqualification must be filed within 14 days of disclosure of the judges' assignment to the case or within 14 days of the discovery of the grounds for disqualification. If a party discovers the grounds for disqualification within 14 days before a scheduled oral argument or argument on the application for leave to appeal, the motion must be made forthwith.

(3) *Time for Filing in the Supreme Court.* If an appellant is aware of grounds for disqualification of a justice, the appellant must file a motion to disqualify with the application for leave to appeal. All other motions must be filed within 28 days after the filing of the application for leave to appeal or within 28 days of the discovery of the grounds for disqualification. If a party discovers the grounds for disqualification within 28 days of a scheduled oral argument or argument on the application for leave to appeal, the motion must be made forthwith.

All requests for review by the entire Court pursuant to subsection (3)(b) must be made within 14 days of the entry of the decision by the individual justice.

If a justice is aware of grounds for disqualification of another justice, the justice must raise the question before the order to enter date. Otherwise, a justice must raise the issue within 28 days after the justice discovers or should have discovered the grounds for disqualification. If a justice discovers the grounds for disqualification within 28 days of a scheduled oral argument or argument on the application for leave to appeal, the issue must be raised forthwith.

~~(1)~~(4) *Untimely Motions.* If a motion is not timely filed in the trial court, the Court of Appeals, or the Supreme Court, untimeliness, including delay in waiving jury trial, is a factor in deciding whether the motion should be granted. No judge shall consider a motion filed after an order resolving the case has been entered.

(52) *All Grounds to be Included; Affidavit.* In any motion under this rule, the moving party must include all grounds for disqualification that are known at the time the motion is filed. An affidavit must accompany the motion.

(63) *Ruling.*

(a) For courts other than the Supreme Court, the challenged judge shall decide the motion. If the challenged judge denies the motion,

(i) in a court having two or more judges, on the request of a party, the challenged judge shall refer the motion to the chief judge, who shall decide the motion de novo;

(ii) in a single-judge court, or if the challenged judge is the chief judge, on the request of a party, the challenged judge shall refer the motion to the state court administrator for assignment to another judge, who shall decide the motion de novo.

(b) In the Supreme Court, if a justice's participation in a case is challenged by a written motion or if the issue of participation is raised by the justice himself or herself or another justice, the challenged justice shall decide the issue and publish his or her reasons about whether to participate. If the challenged justice denies the motion for disqualification, a party may move for the motion to be decided by the entire Court.

(i) The entire Court, including the justice who is the subject of the appeal and any other justice whose participation is challenged in the case, except a justice removed pursuant to subsection (iii), shall then decide the motion for disqualification de novo. In deciding the motion for disqualification, the Court shall be limited to the grounds raised in the motion itself. The Court's decision shall include the reasons for its grant or denial of the motion for disqualification. A justice may only be disqualified from a case upon the vote of a majority of all justices on the Court. The Court shall issue a written order containing a statement of reasons for its grant or denial of the motion for disqualification. Any concurring or dissenting statements shall be in writing, including that of the challenged justice.

(ii) Upon motion by a justice, the Court shall conduct an evidentiary hearing, governed by the Michigan Court Rules and the Michigan Rules of Evidence, to determine any

material facts necessary to the resolution of the motion for disqualification. Any appeal on the motion for disqualification decided by the entire Court, including any evidentiary hearing, must be made in an open session of the Court. The challenged justice may retain counsel and file a brief in response to the motion to appeal denial of disqualification. The responsive brief must be filed and served within 21 days after the party moving for disqualification appeals the justice's decision to deny the motion for disqualification.

~~(i)~~(ii) Any appeal on the motion for disqualification must be resolved by a neutral arbiter following the Michigan Court Rules and the Michigan Rules of Evidence. The justice may challenge the participation of any justice to hear an appeal on the motion for disqualification by indicating the basis for any such disqualification of any other justice sitting on the appeal. Such claim of disqualification of a justice is subject to the procedures contained in this rule and shall be resolved in accordance with the appropriate substantive rules for disqualification prior to any decision on the appeal of the original motion for disqualification.

(7) *If Disqualification Motion Is Granted.*

(a) For courts other than the Supreme Court, when a judge is disqualified, the action must be assigned to another judge of the same court, or, if one is not available, the state court administrator shall assign another judge.

(b) In the Supreme Court, when a justice is disqualified, the underlying action will be decided by the remaining justices of the Court.

(E) Waiver of Disqualification. If it appears that there may be grounds for disqualification, the judge may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If, following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings. The agreement shall be in writing or placed on the record. ~~Parties to the proceeding may waive disqualification even where it appears that there may be grounds for disqualification of the judge. Such waiver may occur whether the grounds for disqualification were raised by a party or by the judge, so long as the judge is willing to participate. Any agreement to waive disqualification must be made by all parties to the litigation and shall be in writing or placed on the record.~~

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the Court (other than grants and denials of leave to appeal from the Court of Appeals) of general interest to the bench and bar of the state.

Order Entered August 25, 2009:

PROPOSED AMENDMENTS OF RULES 7.105, 7.204, 7.205, AND 7.302 OF THE MICHIGAN COURT RULES.

On order of the Court, this is to advise that the Court is considering amendments of Rules 7.105, 7.204, 7.205, and 7.302 of the Michigan Court Rules. Before the Court determines 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 proposed amendment or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website at www.courts.mi.gov/supremecourt.

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.

[Proposed additions are indicated in underlining and proposed deletions are indicated in overstriking.]

RULE 7. 105. APPEALS FROM ADMINISTRATIVE AGENCIES IN "CONTESTED CASES".

(A) [Unchanged.]

(B) Scope; Timeliness of Appeal from Decision or Order of Michigan Department of Corrections Hearing Division.

(1) This rule governs an appeal to the circuit court from an agency decision in a contested case, except when a statute requires a different procedure. A petitioner intending to rely on a different procedure permitted by statute shall identify the statutory procedure in the petition for review. Failure to do so waives the right to use the different procedure.

(2) The court need not dismiss an action incorrectly initiated under some other rule, if it is timely filed and served as required by this rule and the applicable statute. Instead, leave may be freely given, when justice requires, to amend an appeal and a response to conform to the requirements of this rule and otherwise proceed under this rule.

(3) For purposes of appeal of a final decision or order issued by the hearings division of the Michigan Department of Corrections, if an application for leave to appeal the decision or order is received by the court more than 60 days after the date of delivery or mailing of notice of the decision on rehearing, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the application as a pro se party, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at

the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to applications from decisions or orders of the hearings division rendered on or after _____ [a date no more than two months before the effective date of the proposed rule].

(C)-(O) [Unchanged.]

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.]

(2) An appeal of right in a criminal case must be taken

(a) in accordance with MCR 6.425(G)(3);

(b) within 42 days after entry of an order denying a timely motion for the appointment of a lawyer pursuant to MCR 6.425(G)(1);

(c) within 42 days after entry of the judgment or order appealed from; or

(d) within 42 days after the entry of an order denying a motion for a new trial, for directed verdict of acquittal, or to correct an invalid sentence, if the motion was filed within the time provided in MCR 6.419(B), 6.429(B), or 6.431(A), as the case may be.

A motion for rehearing or reconsideration of a motion mentioned in subrules (A)(1)(b) or (A)(2)(d) does not extend the time for filing a claim of appeal, unless the motion for rehearing or reconsideration was itself filed within the 21- or 42-day period.

(e) If a claim of appeal is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the claim as a pro se party, the claim shall be deemed presented for filing on the date of deposit of the claim in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to claims of appeal from decisions or orders rendered on or after [a date no more than two months before the effective date of the proposed rule]. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to appeal in a Michigan court.

(3) 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)-(H) [Unchanged.]

RULE 7.205. APPLICATION FOR LEAVE TO APPEAL.

(A) Time Requirements. An application for leave to appeal must be filed within

(1) 21 days after entry of the judgment or order to be appealed from or within other time as allowed by law or rule; or

(2) 21 days after entry of an order deciding a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed, if the motion was filed within the initial 21-day appeal period or within further time the trial court has allowed for good cause during that 21-day period.

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.

(3) If an application for leave to appeal in a criminal case is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the claim as a pro se party, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to applications for leave to appeal from decisions or orders rendered on or after—[a date no more than two months before the effective date of the proposed rule]. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to appeal in a Michigan court.

(B)-(G) [Unchanged.]

RULE 7.302. APPLICATION FOR LEAVE TO APPEAL.

(A)-(B) [Unchanged.]

(C) When to File.

(1) Before Court of Appeals Decision. In an appeal before the Court of Appeals decision, the application must be filed within 42 days

(a) after a claim of appeal is filed in the Court of Appeals;

(b) after an application for leave to appeal is filed in the Court of Appeals; or

(c) after entry of an order by the Court of Appeals granting an application for leave to appeal.

(2) Other Appeals. Except as provided in subrule (C)(4), in other appeals the application must be filed within 42 days in civil cases, or within 56 days in criminal cases,

(a) after the Court of Appeals clerk mails notice of an order entered by the Court of Appeals;

(b) after the filing of the opinion appealed from; or

(c) after the Court of Appeals clerk mails notice of an order denying a timely filed motion for rehearing.

However, the time limit is 28 days where the appeal is from an order terminating parental rights or an order of discipline or dismissal entered by the Attorney Discipline Board.

(3) Later Application, Exception. Late applications will not be accepted except as allowed under this subrule. If an application for leave to appeal in a criminal case is received by the clerk more than 56 days after the Court of Appeals decision, and the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the application as a pro se party, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to applications from decisions of the Court of Appeals rendered on or after—[a date no more than two months before the effective date of the proposed rule]. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to appeal in a Michigan court.

(4) Decisions Remanding for Further Proceedings. If the decision of the Court of Appeals remands the case to a lower court for further proceedings, an application for leave may be filed within 28 days in appeals from orders terminating parental rights, 42 days in other civil cases, or 56 days in criminal cases, after

(a) the Court of Appeals decision ordering the remand,

(b) the Court of Appeals clerk mails notice of an order denying a timely filed motion for rehearing of a decision remanding the case to the lower court for further proceedings, or

(c) the Court of Appeals decision disposing of the case following the remand procedure, in which case an application may be made on all issues raised in the Court of Appeals, including those related to the remand question.

(5) Effect of Appeal on Decision Remanding Case. If a party appeals a decision which remands for further proceedings as provided in subrule (C)(4)(a), the following provisions apply:

(a) If the Court of Appeals decision is a judgment under MCR 7.215(E)(1), an application for leave to appeal stays proceedings on remand unless the Court of Appeals or the Supreme Court orders otherwise.

(b) If the Court of Appeals decision is an order other than a judgment under MCR 7.215(E)(1), the proceedings on remand are not stayed by an application for leave to appeal unless so ordered by the Court of Appeals or the Supreme Court.

(6) Orders Denying Motions to Remand. If the Court of Appeals has denied a motion to remand, the appellant may raise issues relating to that denial in an application for leave to appeal from the decision on the merits.

(D)-(H) [Unchanged.]

KELLY, C.J. I have proposed the adoption of a prison mailbox rule in Michigan because I see the Court being asked frequently to determine if pro se criminal appeals were timely filed.[1] Usually, the prisoner-appellant insists that he or she put the appeal in the hands of prison authorities before the deadline for filing, but it arrived at the Court late. As a consequence, the prisoner's appeal of right was lost. A prison mailbox rule could resolve most of these controversies. Under this rule, if the appeal is delivered to prison authorities within the filing deadline, it is considered timely filed. If not, it is untimely.

The problem of late criminal pro se filings arises in large part from the unique situation of prisoners representing themselves. Like everyone else, prisoners have a constitutional right to an appeal. But, unlike others, prisoners proceeding pro se cannot do what appellants not imprisoned can do to monitor their filings and to ensure that the appellate court receives them on time.

This fact is unaffected by the length of the appeal period. No matter the length of the period, the problem is the same. Assume that a prisoner must put his or her appeal in the hands of prison authorities four days before the deadline in order to ensure it reaches the court on time. In that case, that prisoner has four fewer days to file than another appellant who can deliver his or her appeal to the clerk in person on the deadline day. Because the length of the appeal period is irrelevant with respect to the issue now before the Court, we should leave changes in its length to a separate administrative proceeding.

The prisoner acting pro se has no choice but to entrust the forwarding of his or her appeal to prison authorities over whom he or she has no control. The moment the prisoner hands a timely claim of appeal to a prison official, he or she becomes powerless to ensure its timely delivery to the court. Repeatedly, in this Court, a prisoner claims to have given his or her appeal to prison officials well in advance of the filing deadline, yet it arrived at the court late.

Federal courts have encountered the same problem. And, over 20 years ago, they resolved it by adopting a federal prison mailbox rule. Numerous other states have followed their lead.[2] It is time for Michigan to do the same.

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[1] It is not accurate to call this "a solution in search of a problem." The problem is estimated to have arisen in the Supreme Court at least 10 times a year in recent years. Of course, even one lost appeal is worthy of our attention because it is the potential loss of a legal right. As a consequence of the problem under consideration here, prisoners have lost not only their state appeals but their federal habeas corpus appeals. Their federal appeals are considered procedurally deficient if their state appeals were rejected as untimely.

[2] To date, 20 states have adopted a prison mailbox rule. An additional 10 states, including Michigan, have rejected such a rule, and 20 states have not decided the question. See Anno: *Application of "prisoner mailbox rule" by state courts under state statutory and common law*, 29 ALR6th 237.

CORRIGAN, J. Although I will carefully consider any public comments received concerning these proposed amendments of the Michigan Court Rules, I continue to question the wisdom of adopting a prison mailbox rule. Michigan already has an inordinately generous method for ensuring that imprisoned parties have sufficient time to assemble and file appeals; we allow parties 12 months to file late appeals if they did not timely file appeals of right or applications for leave. MCR 7.205(F)(3). Our late appeal period indiscriminately allows all parties in most proceedings 12 additional months to file. As a result, it permits equal treatment of any party, including a prison inmate, who may have difficulty accessing the United States Postal Service mail or obtaining documents to support his appeal. It also permits our court clerks to accept an inmate's filing without the need for proof or debate concerning when he placed his documents in the outgoing mail. Because we already provide this generous period for late appeals, I believe that a prison mailbox rule is a solution in search of a problem in Michigan. I would not join the minority of jurisdictions with prisoner mailbox rules.[1]

First, our appellate rules differ significantly from those jurisdictions with prison mailbox rules. My research has yet to identify a state court system that utilizes a prison mailbox rule and *also* gives litigants 12 months to apply for late appeals. Rather, states with mailbox rules afford shorter periods for appeal. Commonly they give parties 30[2] or 42[3] days within which to appeal; some states also allow an additional 30 day extension of the period for appeal upon a showing of good cause or excusable neglect.[4] No state in the Union with a mailbox rule affords 12 months for late appeals. Indeed, the federal system—which employs a prison mailbox rule on which the proposed Michigan rule is modeled—provides only 10 days during which a criminal defendant may file an appeal. Fed R App Pro 4(b)(1). I would not adopt this new system while we continue to permit a prisoner a much longer 12 month period during which to apply for late appeal.

If this Court ultimately decides to adopt a mailbox rule in Michigan, I suggest that we also shorten our current 12 month period in accord with the appeals periods in other states with mailbox rules. The disadvantage of Michigan's unusually lengthy 12 month period is that it delays finality for litigants and crime victims. If we adopt a mailbox rule, I would not further delay finality by tacking such a rule onto our current scheme of generous appellate deadlines. Rather, I would suggest adopting shorter periods for appeal as in other states.

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[1] See Anno: *Application of "prisoner mailbox rule" by state courts under state statutory and common law*, 29 ALR6th 237, for information on the minority of states that have adopted such rules.

[2] E.g., Massachusetts, Mass R App Pro 4(b); Mississippi, Miss R App P 4(a); Ohio, Ohio App R 4(a).

[3] E.g., Alabama, Ala R App P 4(b)(1); Idaho, Idaho App R 14(a).

[4] E.g., Massachusetts, Mass R App P 4(c); Mississippi, Miss R App Pro 4(g).

Next, the federal mailbox rule—which originated from *Houston v Lack,* 487 US 266 (1988)—arose from the United States Supreme Court's interpretation of Rule 4(a)(1) of the Federal Rules of Appellate Procedure; the Court concluded that a pro se defendant who is incarcerated in a federal prison "files" his notice of appeal under this rule when he delivers it to prison authorities. See *O'Rourke v State*, 782 SW2d 808, 809 (Mo App, 1990). But many states have rejected the application of *Houston* to the text of individual state court rules. See *id.* and cases cited therein. Michigan's rule, MCR 7.202(4), clearly states that " 'filing' means the delivery of a document to 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." I would continue to adhere to this text, which provides a bright line, certain rule that applies to all litigants. A mailbox rule, in contrast, establishes evidentiary burdens for prisoners seeking an appeal, who will be required to prove and likely litigate issues such as when and whether they delivered documents to prison authorities.

A mailbox rule also singles out prisoners for special treatment even though other parties have difficulty accessing the United States Postal Service mail or assembling documents in support of their appeals. On this point, I disagree with Justice MARKMAN's statement that prisoners belong to a "lone class of persons lacking ultimate control over the timely filing of their pleadings." Indeed, I note Justice Scalia's dissent in *Houston*, 487 US at 277, where, in criticizing the majority's interpretation of Fed R App Pro 4(a)(1), he listed equally deserving beneficiaries of a mailbox rule, stating:

> It would be within the realm of normal judicial creativity (though in my view wrong) to interpret the phrase "filed with the clerk" to mean "mailed to the clerk," or even "mailed to the clerk or given to a person bearing an obligation to mail to the clerk." But interpreting it to mean "delivered to the clerk or, if you are a prisoner, delivered to your warden" is no more acceptable than any of an infinite number of variants, such as: "delivered to the clerk or, if you are out of the country, delivered to a United States consul"; or "delivered to the clerk or, if you are a soldier on active duty in a war zone, delivered to your commanding officer"; or "delivered to the clerk or, if you are held hostage in a foreign country, meant to be delivered to the clerk."

Justice Scalia's comments persuade me that we need a single, defined rule to make clear when an appeal is filed. If this Court makes an exception for one category of appellants, we exclude other worthy groups. But to incorporate all worthy groups, we would impossibly complicate the clerk's business.

Finally, in considering the proposed amendments, I remind the Court that we have considered adopting a mailbox rule on at least eight prior occasions, but each time we have declined to adopt such a rule for reasons that include those discussed above. Adopting such a rule would not only fail to improve our current, generous system, it would also create new problems and inequities.

YOUNG, J., concurred with CORRIGAN, J.

MARKMAN, J. I share Justice CORRIGAN's concerns about the length of the delayed appeals process in Michigan and also share her interest in reviewing and reconsidering the relevant court rules. However, I fail to see the connection between this problem and the merits of introducing a mailbox rule in Michigan. The purpose of a mailbox rule is to ensure that the lone class of persons lacking ultimate control over the timely filing of their pleadings, inmates in the custody of the Department of Corrections, can be assured that their pleadings will be filed in a timely fashion. Whether Michigan's period for delayed appeals is 30 days or 180 days or one year, inmates, in the absence of a mailbox rule, will continue to be denied the assurance that their pleadings are timely filed, and will remain at the sufferance of whatever mishandling or delays on the part of the department may sometimes occur in transmitting pleadings to the proper court. I am not convinced that every detail of the proposed rule is perfect, but I am convinced that the linkage asserted by Justice CORRIGAN does not exist and that some form of a mailbox rule in fairness ought to be adopted.

Staff Comment: These proposed amendments would create a prison mailbox rule, which would allow a claim of appeal or application for leave to appeal to be deemed filed when a prison inmate acting pro se places the legal documents in the prison's outgoing mail. The proposed rule would apply to appeals from administrative agencies, appeals from circuit court (both claims of appeal and applications for leave to appeal), and appeals from decisions of the Court of Appeals to the Supreme Court, and would apply prospectively.

The staff comment is not an authoritative construction by the 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 these proposals may be sent to the Supreme Court Clerk in writing or electronically by November 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. All comments will be posted on the Court's website. When filing a comment, please refer to ADM File No. 2009-07.

Order Entered September 9, 2009:

PROPOSED AMENDMENT OF RULE 3.932 OF THE MICHIGAN COURT RULES.

On order of the Court, this is to advise that the Court is considering alternative amendments of Rule 3.932 of the Michigan Court Rules. Before determining whether the either of these proposals 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 proposals or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted on the Court's website, www.courts.michigan.gov/supremecourt.

[Additions are indicated by underline and deletions by strikethrough.]

Alternative A — Elimination of the Consent Calendar Provisions

RULE 3.932. SUMMARY INITIAL PROCEEDINGS.

(A)-(B) [Unchanged.]

~~(C) Consent Calendar. If the court receives a petition, citation, or appearance ticket, and it appears that protective and supportive action by the court will serve the best interests of the juvenile and the public, the court may proceed on the consent calendar without authorizing a petition to be filed. No case may be placed on the consent calendar unless the juvenile and the parent, guardian, or legal custodian agree to have the case placed on the consent calendar. The court may transfer a case from the formal calendar to the consent calendar at any time before disposition.~~

~~(1) Notice. Formal notice is not required for cases placed on the consent calendar except as required by article 2 of the Crime Victim's Rights Act, MCL 780.781 et seq.~~

~~(2) Plea; Adjudication. No formal plea may be entered in a consent calendar case, and the court must not enter an adjudication.~~

~~(3) Conference. The court shall conduct a consent calendar conference with the juvenile and the parent, guardian, or legal custodian to discuss the allegations. The victim may, but need not, be present.~~

~~(4) Case Plan. If it appears to the court that the juvenile has engaged in conduct that would subject the juvenile to the jurisdiction of the court, the court may issue a written consent calendar case plan.~~

~~(5) Custody. A consent calendar case plan must not contain a provision removing the juvenile from the custody of the parent, guardian, or legal custodian.~~

~~(6) Disposition. No order of disposition may be entered by the court in a case placed on the consent calendar.~~

~~(7) Closure. Upon successful completion by the juvenile of the consent calendar case plan, the court shall close the case and may destroy all records of the proceeding. No report or abstract may be made to any other agency nor may the court require the juvenile to be fingerprinted for a case completed and closed on the consent calendar.~~

~~(8) Transfer to Formal Calendar. If it appears to the court at any time that the proceeding on the consent calendar is not in the best interest of either the juvenile or the public, the court may, without hearing, transfer the case from the consent calendar to the formal calendar on the charges contained in the original petition, citation, or appearance ticket. Statements made by the juvenile during the proceeding on the consent calendar may not be used against the juvenile at a trial on the formal calendar on the same charge.~~

~~(D)~~(C) Formal Calendar. The court may authorize a petition to be filed and docketed on the formal calendar if it appears to the court that formal court action is in the best interest<u>s</u> of the juvenile and the public. The court shall not authorize an original petition under MCL 712A.2(a)(1), unless the prosecuting attorney has approved submitting the petition to the court. At any time before disposition, the court may transfer the matter to the consent calendar.

Alternative B — Addition of Prosecutor's Approval and No Consent Calendar for Offenses Prohibited from Diversion in the Juvenile Diversion Act

RULE 3.932. SUMMARY INITIAL PROCEEDINGS.

(A)-(B) [Unchanged.]

(C) Consent Calendar. If the court receives a petition, citation, or appearance ticket, and it appears that protective and supportive action by the court will serve the best interests of the juvenile and the public, the court may proceed on the consent calendar without authorizing a petition to be filed. No case may be placed on the consent calendar unless the juvenile and the parent, guardian, or legal custodian, and the prosecutor, agree to have the case placed on the consent calendar. The court may not place an "assaultive crime," as defined in MCL 722.822(a) of the Juvenile Diversion Act, on the consent calendar. The court may transfer a case from the formal calendar to the consent calendar at any time before disposition.

(1)-(8) [Unchanged.]

(D) [Unchanged.]

Staff Comment: Alternative A would eliminate the consent calendar provisions of MCR 3.932. Alternative B would require a prosecutor's consent to the use of the consent calendar and would prohibit the court from placing a case for an assaultive crime as defined in the Juvenile Diversion Act on the consent calendar.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by January 1, 2010, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-21. Your comments and the comments of others will be posted on the Court's website at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered September 15, 2009:

PROPOSED AMENDMENTS OF RULES 3.800, 3.802, 3.901, 3.903, 3.920, 3.921, 3.931, 3.935, 3.961, 3.963, 3.965, 3.974, 3.975, 3.976, 3.977, 3.980, 5.125, 5.402, AND 5.404 AND PROPOSED ADOPTION OF RULES 3.002, 3.807, 3.905, 3.967, AND 5.109 OF THE MICHIGAN COURT RULES.

On order of the Court, this is to advise that the Court is considering an amendment of Rules 3.800, 3.802, 3.901, 3.903, 3.920, 3.921, 3.931, 3.935, 3.961, 3.963, 3.965, 3.974, 3.975, 3.976, 3.977, 3.980, 5.125, 5.402, and 5.404 and adoption of new Rules 3.002, 3.807, 3.905, 3.967, and 5.109 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

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 are indicated by underlining and deletions are indicated by strikeover.]

RULE 3.002. INDIAN CHILDREN.

For purposes of applying the Indian Child Welfare Act, 25 USC 1901 *et seq.*, to proceedings under the Juvenile Code, the Adoption Code, and the Estates and Protected Individuals Code, the following definitions taken from 25 USC 1903 and 25 USC 1911(a) shall apply.

(1) "Child custody proceeding" shall mean and include

(a) "foster-care placement," which shall mean any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated,

(b) "termination of parental rights," which shall mean any action resulting in the termination of the parent-child relationship,

(c) "preadoptive placement," which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but before or in lieu of adoptive placement, and

(d) "adoptive placement," which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act that, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "Exclusive jurisdiction" shall mean that an Indian tribe has jurisdiction exclusive as to any state over any child custody proceeding as defined above involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the state by existing federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child. 25 USC 1911(a).

(3) "Extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of 18 years and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

(4) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 43 USC 1606.

(5) "Indian child" means any unmarried person who is under age 18 and is either

(a) a member of an Indian tribe, or

(b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

(6) "Indian child's tribe" means

(a) the Indian tribe of which an Indian child is a member or eligible for membership, or

(b) in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts.

(7) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under state law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child.

(8) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians.

(9) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 43 USC 1602(c).

(10) "Parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include an unwed father whose paternity has not been acknowledged or established.

(11) "Reservation" means Indian country as defined in section 18 USC 1151 and any lands not covered under such section, for which title is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation.

(12) "Secretary" means the Secretary of the Interior.

(13) "Tribal court" means a court with jurisdiction over child custody proceedings and that is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe that is vested with authority over child custody proceedings.

RULE 3.800. APPLICABLE RULES; INTERESTED PARTIES; INDIAN CHILD.

(A) [Unchanged.]

(B) Interested Parties.

(1) The persons interested in various adoption proceedings, including proceedings involving an Indian child, are as provided by MCL 710.24a~~,~~ except ~~that the~~as otherwise provided in subrules (2) and (3).

(2) If the adoptee is an Indian child, in addition to the above, the persons interested are the child's tribe and the Indian custodian, if any, and, if the Indian's child's parent or Indian custodian, or tribe, is unknown, the Secretary of the Interior.

(3) The interested persons in a petition to terminate the rights of the noncustodial parent pursuant to MCL 710.51(6) are:

(a) the petitioner;

(b) the adoptee, if over 14 years of age; ~~and~~

(c) the noncustodial parent; and

(d) if the adoptee is an Indian child, the child's tribe and the Indian custodian, if any, and, if the Indian child's parent or Indian custodian, or tribe, is unknown, the Secretary of the Interior.

RULE 3.802. MANNER AND METHOD OF SERVICE.

(A) Service of Papers.

(1)–(2) [Unchanged.]

(3) Notice of Proceeding Concerning Indian Child.

If an Indian child is the subject of an adoption proceeding and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(2),

(a) in addition to any other service requirements, the petitioner shall notify the parent or Indian custodian and the Indian child's tribe, by personal service or by registered mail with return receipt requested, of the pending proceedings on a petition for adoption of the Indian child and of their right of intervention on a form approved by the State Court Administrative Office. If the identity or location of the parent or Indian custodian, or of the tribe, cannot be determined, notice shall be given to the Secretary of the Interior by registered mail with return receipt requested.

(b) the court shall notify the parent or Indian custodian and the Indian child's tribe of all other hearings pertaining to the adoption proceeding as provided in this rule. If the identity or location of the parent or Indian custodian, or of the tribe, cannot be determined, notice of the hearings shall be given to the Secretary of the Interior. Such notice may be made by first-class mail.

(~~3~~4) [Former (3) is renumbered, but otherwise unchanged.]

(B)–(C) [Unchanged.]

RULE 3.807. INDIAN CHILD.

(A) Definitions. If an Indian child, as defined by the Indian Child Welfare Act, 25 USC 1903, is the subject of an adoption proceeding, the definitions in MCR 3.002 shall control.

(B) Jurisdiction, Notice, Transfer, Intervention.

(1) If an Indian child is the subject of an adoption proceeding and an Indian tribe has exclusive jurisdiction as defined in MCR 3.002(2), the matter shall be dismissed.

(2) If an Indian child is the subject of an adoption proceeding and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(2), the court shall ensure that the petitioner has given notice of the proceedings to the persons prescribed in MCR 3.800(B) in accordance with MCR 3.802(A)(3).

(a) If either parent or the Indian custodian or the Indian child's tribe petitions the court to transfer the proceeding to the tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer of the case to tribal court jurisdiction or the court finds good cause not to transfer. In determining whether good cause not to transfer exists, the court shall consider the Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg No 228, 67590-67592, C.2-C.4. A perceived inadequacy of the tribal court or tribal services does not constitute good cause to refuse to transfer the case.

(b) The court shall not dismiss the matter until the transfer has been accepted by the tribal court.

(c) If the tribal court declines transfer, the Indian Child Welfare Act applies, as do the provisions of these rules that pertain to an Indian child (see 25 USC 1902, 1911[b]).

(d) A petition to transfer may be made at any time in accordance with 25 USC 1911(b).

(3) The Indian custodian of the child and the Indian child's tribe have a right to intervene at any point in the proceeding pursuant to 25 USC 1911(c).

(C) Record of Tribal Affiliation. Upon application by an Indian individual who has reached the age of 18 and who was the subject of an adoption placement, the court that entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

RULE 3.901. APPLICABILITY OF RULES.

(A) [Unchanged.]

(B) Application. Unless the context otherwise indicates:

(1) MCR 3.901-3.930, ~~3.980,~~ and 3.991-3.993 apply to delinquency proceedings and child protective proceedings;

(2)-(5) [Unchanged.]

RULE 3.903. DEFINITIONS.

(A) General Definitions. When used in this subchapter, unless the context otherwise indicates:

(1)-(12) [Unchanged.]

(13) "Legal Custodian" means an adult who has been given legal custody of a minor by order of a circuit court in Michigan or a comparable court of another state or who possesses a valid power of attorney given pursuant to MCL 700.5103 or a comparable statute of another state. It also includes the term "Indian custodian" as defined in MCR 3.002(7).

(14)-(16) [Unchanged.]

(17) "Parent" means the mother, the father as defined in MCR 3.903(A)(7), or both, of the minor. It also includes the term "parent" as defined in MCR 3.002(10).

(18)-(26) [Unchanged.]

(B)-(E) [Unchanged.]

(F) Indian Child Welfare Act.

If an Indian child, as defined by the Indian Child Welfare Act, 25 USC 1901 *et seq.*, is the subject of a protective proceeding or is charged with a status offense in violation of MCL 712A.2(a)(2)-(4) or (d), the definitions in MCR 3.002 shall control.

RULE 3.905. INDIAN CHILDREN; JURISDICTION, NOTICE, TRANSFER, INTERVENTION.

(A) If an Indian child is the subject of a protective proceeding or is charged with a status offense in violation of MCL 712A.2(a)(2)-(4) or (d), and if an Indian tribe has exclusive jurisdiction as defined in MCR 3.002(2), and the matter is not before the state court as a result of emergency removal pursuant to 25 USC 1922, the matter shall be dismissed.

(B) If an Indian child is the subject of a protective proceeding or is charged with a status offense in violation of MCL 712A.2(a)(2)-(4) or (d), and if an Indian tribe has exclusive jurisdiction as defined in MCR 3.002(2), and the matter is before the state court as a result of emergency removal pursuant to 25 USC 1922, and either the tribe notifies the state court that it is exercising its jurisdiction, or the emergency no longer exists, then the state court shall dismiss the matter.

(C) If an Indian child is the subject of a protective proceeding or is charged with a status offense in violation of MCL 712A.2(a)(2)-(4) or (d) and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(2), the court shall ensure that the petitioner has given notice of the proceedings to the persons described in MCR 3.921 in accordance with MCR 3.920(C).

(1) If either parent or the Indian custodian or the Indian child's tribe petitions the court to transfer the proceeding to the tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer of the case to tribal court jurisdiction or the court finds good cause not to transfer. In determining whether good cause not to transfer exists, the court shall consider the Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg No 228, 67590-67592, C.2-C.4. (November 26, 1979). A perceived inadequacy of the tribal court or tribal services does not constitute good cause to refuse to transfer the case.

(2) The court shall not dismiss the matter until the transfer has been accepted by the tribal court.

(3) If the tribal court declines transfer, the Indian Child Welfare Act applies to the continued proceeding in state court, as do the provisions of these rules that pertain to an Indian child. See 25 USC 1902, 1911(b).

(4) A petition to transfer may be made at any time in accordance with 25 USC 1911(b).

(D) The Indian custodian of the child and the Indian child's tribe have a right to intervene at any point in the proceeding pursuant to 25 USC 1911(c).

RULE 3.920. SERVICE OF PROCESS.

(A)-(B) [Unchanged.]

(C) Notice of Proceeding Concerning Indian Child. If an Indian child is the subject of a protective proceeding or is charged with a status offense in violation of MCL 712A.2(a)(2)-(4) or (d) and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(2):

(1) in addition to any other service requirements, the petitioner shall notify the parent or Indian custodian and the Indian child's tribe, by personal service or by registered mail with return receipt requested, of the pending proceedings on a petition filed under MCR 3.931 or MCR 3.961 and of their right of intervention on a form approved by the State Court Administrative Office. If the identity or location of the parent or Indian custodian, or of the tribe, cannot be determined, notice shall be given to the Secretary of the Interior by registered mail with return receipt requested. Subsequent notices shall be served in accordance with this subrule for proceedings under MCR 3.967 and MCR 3.977.

(2) the court shall notify the parent or Indian custodian and the Indian child's tribe of all hearings other than those specified in subrule (1) as provided in subrule (D). If the identity or location of the parent or Indian custodian or the tribe cannot be determined, notice of the hearings shall be given to the Secretary of the Interior. Such notice may be by first-class mail.

(~~C~~D)-(~~H~~I) [Renumbered, but otherwise unchanged.]

RULE 3.921. PERSONS ENTITLED TO NOTICE.

(A) Delinquency Proceedings.

(1) General. In a delinquency proceeding, the court shall direct that the following persons be notified of each hearing except as provided in subrule (A)(3):

(a)–(f) [Unchanged.]

(g) in accordance with the notice provisions of MCR 3.905, if the juvenile is charged with a status offense in violation of MCL 712A.2(a)(2)-(4) or (d) and if the juvenile is an Indian child:

(*i*) the juvenile's tribe and, if the tribe is unknown, the Secretary of the Interior, and

(*ii*) the juvenile's parents or Indian custodian, and if unknown, the Secretary of the Interior.

(2)–(3) [Unchanged.]

(B) Protective Proceedings.

(1) General. In a child protective proceeding, except as provided in subrules (B)(2) and (3), the court shall ensure that the following persons are notified of each hearing:

(a)–(g) [Unchanged.]

(h) in accordance with the notice provisions of MCR 3.905, if the child is an Indian child:

(*i*) the child's tribe and, if the tribe is unknown, the Secretary of the Interior, and

(*ii*) the child's parents or Indian custodian, and if unknown, the Secretary of the Interior, and

(i) [former (h) relettered, but otherwise unchanged.]

(2) Dispositional Review Hearings and Permanency Planning Hearings. Before a dispositional review hearing or a permanency planning hearing, the court shall ensure that the following persons are notified in writing of each hearing:

(a)–(i) [Unchanged.]

(j) ~~any tribal leader, if there is an Indian tribe affiliation~~if the child is an Indian child, the child's tribe,

(k) [Unchanged.]

(l) if the child is an Indian child and the parents, guardian, legal custodian, or tribe are unknown, to the Secretary of Interior, and

(m) [former (l) relettered, but otherwise unchanged.]

(3) Termination of Parental Rights. Written notice of a hearing to determine if the parental rights to a child shall be terminated must be

given to those appropriate persons or entities listed in subrule (B)(2), except that if the child is an Indian child, notice shall be given in accordance with MCR 3.920(C)(1).

(C)–(D) [Unchanged.]

RULE 3.931. INITIATING DELINQUENCY PROCEEDINGS.

(A) [Unchanged.]

(B) Content of Petition. A petition must contain the following information:

(1) the juvenile's name, address, and date of birth, if known;

(2) the names and addresses, if known, of

(a) the juvenile's mother and father,

(b) the guardian, legal custodian, or person having custody of the juvenile, if other than a mother or father,

(c) the nearest known relative of the juvenile, if no parent, guardian, or legal custodian can be found, ~~and~~

(d) the juvenile's membership or eligibility for membership in an Indian tribe, if any, and the identity of the tribe, and

(~~d~~e) any court with prior continuing jurisdiction;

(3)–(8) [Unchanged.]

(C)–(D) [Unchanged.]

RULE 3.935. PRELIMINARY HEARING.

(A) [Unchanged.]

(B) Procedure.

(1)–(4) [Unchanged.]

(5) If the charge is a status offense in violation of MCL 712A.2(a)(2)-(4) or (d), the court must inquire if the juvenile or a parent is a member of an~~y American~~ Indian tribe ~~or band~~. If the juvenile is a member, or if a parent is a ~~tribal~~ member and the juvenile is eligible for membership in the tribe, the court must determine the identity of the tribe ~~or band~~ and ~~follow the procedures set forth in~~comply with MCR ~~3.980~~3.905 before proceeding with the hearing.

(6)-(8) [Unchanged.]

(C)–(F) [Unchanged.]

RULE 3.961. INITIATING CHILD PROTECTIVE PROCEEDINGS.

(A) [Unchanged.]

(B) Content of Petition. A petition must contain the following information, if known:

(1)–(4) [Unchanged.]

(5) The child's membership or eligibility for membership in an ~~American~~ Indian tribe ~~or band~~, if any, and the identity of the tribe.

(6) The type of relief requested. A request for removal of the child or a parent or for termination of parental rights at the initial disposition must be specifically stated. If the petition requests removal of an Indian child or if an Indian child was taken into protective custody pursuant to MCR 3.963 as a result of an emergency, the petition must specifically describe:

(a) the active efforts that have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family; and

(a) documentation, including attempts, to identify the child's tribe.

(7) [Unchanged.]

RULE 3.963. PROTECTIVE CUSTODY OF CHILD.

(A) Taking Custody Without Court Order. An officer may without court order remove a child from the child's surroundings and take the child into protective custody if, after investigation, the officer has reasonable grounds to conclude that the health, safety, or welfare of the child is endangered. If the child is an Indian child who resides or is domiciled on a reservation, but is temporarily located off the reservation, the officer may take the child into protective custody only when necessary to prevent imminent physical harm to the child.

(B) Court-Ordered Custody.

(1) The court may issue a written order authorizing a child protective services worker, an officer, or other person deemed suitable by the court to immediately take a child into protective custody when, upon presentment of proofs as required by the court, the judge or referee has reasonable grounds to believe that the conditions or surroundings under which the child is found are such as would endanger the health, safety, or welfare of the child and that remaining in the home would be contrary to the welfare of the child. If the child is an Indian child who resides or is domiciled on a reservation, but is temporarily located off the reservation, the child is subject to the exclusive jurisdiction of the tribal court. However, the state court may enter an order for protective custody of that child when it is necessary to prevent imminent physical harm to the child. At the time it issues the order or as provided in MCR 3.965(D), the court shall make a judicial determination that reasonable efforts to prevent removal of the child have been made or are not required. The court may also include in such an order authorization to enter specified premises to remove the child.

(2)–(3) [Unchanged.]

(C) [Unchanged.]

RULE 3.965. PRELIMINARY HEARING.

(A) [Unchanged.]

(B) Procedure.

(1) The court must determine if the parent, guardian, or legal custodian has been notified, and if the lawyer-guardian ad litem for the child is present. The preliminary hearing may be adjourned for the purpose of securing the appearance of an attorney, parent, guardian, or legal custodian or may be conducted in the absence of the parent, guardian, or legal custodian if notice has been given or if the court finds that a reasonable attempt to give notice was made.

(2) The court must inquire if the child or either parent is a member of an Indian tribe. If the child is a member, or if a parent is a member and the child is eligible for membership in the tribe, the court must determine the identity of the child's tribe, notify the tribe, and, if the child was

taken into protective custody pursuant to MCR 3.963(A) or the petition requests removal of the child, follow the procedures set forth in MCR 3.967. If necessary, the court may adjourn the preliminary hearing pending the conclusion of the removal hearing. A removal hearing may be held in conjunction with the preliminary hearing if all necessary parties have been notified as required by MCR 3.905, there are no objections by the parties to do so, and at least one expert witness is present to provide testimony.

(23)-(89) [Renumbered, but otherwise unchanged.]

~~(9) The court must inquire if the child or either parent is a member of any American Indian tribe or band. If the child is a member, or if a parent is a tribal member and the child is eligible for membership in the tribe, the court must determine the identity of the child's tribe, notify the tribe or band, and follow the procedures set forth in MCR 3.980.~~

(10)-(11) [Unchanged.]

(12) If the court authorizes the filing of the petition, the court:

(a) may release the child to a parent, guardian, or legal custodian and may order such reasonable terms and conditions believed necessary to protect the physical health or mental well-being of the child; or

(b) may order placement of the child after making the determinations specified in subrules (C) and (D), if those determinations have not previously been made. If the child is an Indian child, the child must be placed in descending order of preference with:

(i) a member of the child's extended family,

(ii) a foster home licensed, approved, or specified by the child's tribe,

(iii) an Indian foster family licensed or approved by a non-Indian licensing authority,

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.

The court may order another placement for good cause shown. If the Indian child's tribe has established by resolution a different order of preference than the order prescribed above, placement shall follow that tribe's order of preference as long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in 25 USC 1915(b). The standards to be applied in meeting the preference requirements above shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(13) [Unchanged.]

(C)-(E) [Unchanged.]

RULE 3.967. REMOVAL HEARING FOR INDIAN CHILD.

(A) Child in Protective Custody. If an Indian child is taken into protective custody pursuant to MCR 3.963(A) or (B) or MCR 3.974, a removal hearing must be held within 14 days after removal from a parent or Indian custodian unless that parent or Indian custodian has requested an additional 20 days for the hearing pursuant to 25 USC 1912(a). Absent

extraordinary circumstances that make additional delay unavoidable, temporary emergency custody shall not be continued for more than 90 days without a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness, that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(B) Child Not in Protective Custody. If an Indian child has not been taken into protective custody and the petition requests removal of that child, a removal hearing must be conducted before the court may enter an order removing the Indian child from the parent or Indian custodian.

(C) Notice of the removal hearing must be sent to the parties prescribed in MCR 3.921 in compliance with MCR 3.920(C)(1).

(D) Evidence. An Indian child may be removed from a parent or Indian custodian, or, for an Indian child already taken into protective custody pursuant to MCR 3.963 or MCR 3.974(B), remain removed from a parent or Indian custodian pending further proceedings, only upon clear and convincing evidence, including the testimony of at least one expert witness who has knowledge about the child-rearing practices of the Indian child's tribe, that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, that these efforts have proved unsuccessful, and that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(E) A removal hearing may be combined with any other hearing.

(F) The Indian child, if removed from home, must be placed in descending order of preference with:

(1) a member of the child's extended family,

(2) a foster home licensed, approved, or specified by the child's tribe,

(3) an Indian foster family licensed or approved by a non-Indian licensing authority,

(4) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.

The court may order another placement for good cause shown. If the Indian child's tribe has established by resolution a different order of preference than the order prescribed in subrule (F), placement shall follow that tribe's order of preference as long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in 25 USC 1915(b).

The standards to be applied in meeting the preference requirements above shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

RULE 3.974. POST-DISPOSITIONAL PROCEDURES; CHILD AT HOME.

(A) Review of Child's Progress.

(1)–(2) [Unchanged.]

(3) Change of Placement. Except as provided in subrule (B), the court may not order a change in the placement of a child solely on the basis of

a progress review. If the child over whom the court has retained jurisdiction remains at home following the initial dispositional hearing or has otherwise returned home from foster care, the court must conduct a hearing before it may order the placement of the child. Such a hearing must be conducted in the manner provided in MCR 3.975(E), except as otherwise provided in this subrule for Indian children. If the child is an Indian child, in addition to the hearing prescribed by this subrule, the court must also conduct a removal hearing in accordance with MCR 3.967 before it may order the placement of the Indian child.

(B) Emergency Removal; Protective Custody.

(1) General. If the child, over whom the court has retained jurisdiction, remains at home following the initial dispositional hearing or has otherwise returned home from foster care, the court may order ~~temporary removal of~~ the child to be taken into protective custody to protect the health, safety, or welfare of the child, pending an emergency removal hearing, except, that if the child is an Indian child and the child resides or is domiciled within a reservation, but is temporarily located off the reservation, the court may order the child to be taken into protective custody only when necessary to prevent imminent physical harm to the child.

(2) Notice. The court shall ensure that the parties are given notice of the hearing as provided in MCR 3.920 and MCR 3.921.

(3) Emergency Removal Hearing. If the court orders ~~removal of~~ the child to be taken into protective custody~~from the parent, guardian, or legal custodian~~ to protect the child's health, safety, or welfare, the court must conduct an emergency removal hearing no later than 24 hours after the child has been taken into custody, excluding Sundays and holidays as defined in MCR 8.110(D)(2). If the child is an Indian child, the court must also conduct a removal hearing in accordance with MCR 3.967 in order for the child to remain removed from a parent or Indian custodian. Unless the child is returned to the parent pending the dispositional review, the court must make a written determination that the criteria for placement listed in MCR 3.965(C)(2) are satisfied.

(a)–(b) [Unchanged.]

(C) Dispositional Review Hearing; Procedure. If the child is in placement pursuant to subrule (B), the dispositional review hearing must commence no later than 14 days after the child is placed by the court, except for good cause shown. The dispositional review hearing may be combined with the removal hearing for an Indian child prescribed by MCR 3.967. The dispositional review hearing must be conducted in accordance with the procedures and rules of evidence applicable to a dispositional hearing.

RULE 3.975. POST-DISPOSITIONAL PROCEDURES; CHILD IN FOSTER CARE.

(A)-(E) [Unchanged.]

(F) Criteria.

(1) Review of Case Service Plan. The court, in reviewing the progress toward compliance with the case service plan, must consider:

(a)–(d) [Unchanged.]

(e) any likely harm to the child if the child continues to be separated from his or her parent, guardian, or custodian; ~~and~~

(f) any likely harm to the child if the child is returned to the parent, guardian, or legal custodian~~.~~; and

(g) if the child is an Indian child, whether the child's placement remains appropriate and complies with MCR 3.967(F).

(2) Progress Toward Returning Child Home. The court must decide the extent of the progress made toward alleviating or mitigating conditions that caused the child to be, and to remain, in foster care.

(G)-(H) [Unchanged.]

RULE 3.976 PERMANENCY PLANNING HEARING.

(A)-(B) [Unchanged.]

(C) Notice. The parties entitled to participate in a permanency planning hearing include the:

(1) parents of the child, if the parent's parental rights have not been terminated,

(2) ~~the~~ child, if the child is of an appropriate age to participate,

(3) guardian,

(4) legal custodian,

(5) foster parents,

(6) preadoptive parents, ~~and~~

(7) relative caregivers, and

(8) if the child is an Indian child, the Indian child's tribe.

Written notice of a permanency planning hearing must be given as provided in MCR 3.920 and MCR 3.921(B)(2). The notice must include a brief statement of the purpose of the hearing, and must include a notice that the hearing may result in further proceedings to terminate parental rights. The notice must inform the parties of their opportunity to participate in the hearing and that any information they wish to provide should be submitted in advance to the court, the agency, the lawyer-guardian ad litem for the child, or an attorney for one of the parties.

(D)-(E) [Unchanged.]

RULE 3.977. TERMINATION OF PARENTAL RIGHTS.

(A) General.

(1) This rule applies to all proceedings in which termination of parental rights is sought. Proceedings for termination of parental rights involving an Indian child, ~~as defined by 25 USC 1901 *et seq.*,~~ are governed by ~~MCR 3.980~~25 USC 1912 in addition to this rule.

(2)–(3) [Unchanged.]

(B)-(F) [Unchanged.]

(G) Termination of Parental Rights; Indian Child

In addition to the required findings in this rule, the parental rights of a parent of an Indian child must not be terminated unless:

(1) the court is satisfied that active efforts have been made to provide remedial service and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful, and

(2) the court finds evidence beyond a reasonable doubt, including testimony of at least one qualified expert witness, that parental rights should be terminated because continued custody of the child by the parent or Indian custodian will likely result in serious emotional or physical damage to the child.

(~~G~~H)-(~~J~~K) [Renumbered, but otherwise unchanged.]

~~RULE 3.980. AMERICAN INDIAN CHILDREN.~~

~~(A) Notice; Transfer. If any Indian child as defined by the Indian Child Welfare Act, 25 USC 1901 et seq., is the subject of a protective proceeding or is charged with an offense in violation of MCL 712A.2(a)(2)-(4) or (d), the following procedures shall be used:~~

~~(1) If the Indian child resides on a reservation or is under tribal court jurisdiction at the time of referral, the matter shall be transferred to the tribal court having jurisdiction.~~

~~(2) If the child does not reside on a reservation, the court shall ensure that the petitioner has given notice of the proceedings to the child's tribe and the child's parents or Indian custodian and, if the tribe is unknown, to the Secretary of the Interior.~~

~~(3) If the tribe exercises its right to appear in the proceeding and requests that the proceeding be transferred to tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer of the case to tribal court jurisdiction or the court finds good cause not to transfer. A perceived inadequacy of the tribal court or tribal services does not constitute good cause to refuse to transfer the case.~~

~~(B) Emergency Removal.\so~~

~~(1) An Indian child who resides or is domiciled on a reservation, but is temporarily located off the reservation, must not be removed from a parent or Indian custodian unless the removal is to prevent imminent physical harm to the child.~~

~~(2) An Indian child not residing or domiciled on a reservation may be temporarily removed if reasonable efforts have been made to prevent removal of the child, and continued placement with the parent or Indian custodian would be contrary to the welfare of the child.~~

~~(C) Removal Hearing.~~

~~(1) After Emergency Removal. If an Indian child is removed under subrule (B)(1) or (2), a removal hearing must be completed within 28 days of removal from the parent or Indian custodian.~~

~~(2) Non-Emergency Removal. Except in cases of emergency removal under subrules (B)(1) or (2), a removal hearing must be completed before an Indian child may be removed from the parent or Indian custodian.~~

~~(3) Evidence. An Indian child must not be removed from a parent or Indian custodian, or, for an Indian child removed under subrules (B)(1) or (2), remain removed from a parent or Indian custodian pending further proceedings, without clear and convincing evidence, including the testimony of at least one expert witness who has knowledge about the child-rearing practices of the Indian child's tribe, that services designed to prevent the break up of the Indian family have been furnished to the~~

~~family and that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical injury to the child.~~

~~(4) A removal hearing may be combined with any other hearing.~~

~~(5) The Indian child, if removed from home, must be placed, in descending order of preference, with:~~

~~(a) a member of the child's extended family,~~

~~(b) a foster home licensed, approved, or specified by the child's tribe,~~

~~(c) an Indian foster family licensed or approved by a non-Indian licensing authority,~~

~~(d) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.~~

~~The court may order another placement for good cause shown.~~

~~(D) Termination of Parental Rights. In addition to the required findings under MCR 3.977, the parental rights of a parent of an Indian child must not be terminated unless there is also evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that parental rights should be terminated because continued custody of the child by the parent or Indian custodian will likely result in serious emotional or physical damage to the child.~~

RULE 5.109. NOTICE OF GUARDIANSHIP PROCEEDINGS CONCERNING INDIAN CHILD.

If an Indian child is the subject of a guardianship proceeding and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(2):

(1) in addition to any other service requirements, the petitioner shall notify the parent or Indian custodian and the Indian child's tribe, by personal service or by registered mail with return receipt requested, of the pending proceedings on a petition to establish guardianship over the Indian child and of their right of intervention on a form approved by the State Court Administrative Office. If the identity or location of the parent or Indian custodian, or of the tribe, cannot be determined, notice shall be given to the Secretary of the Interior by registered mail with return receipt requested.

(2) the court shall notify the parent or Indian custodian and the Indian child's tribe of all other hearings pertaining to the guardianship proceeding as provided in MCR 5.105. If the identity or location of the parent or Indian custodian, or of the tribe, cannot be determined, notice of the hearings shall be given to the Secretary of the Interior. Such notice may be made by first-class mail.

RULE 5.125. INTERESTED PERSONS DEFINED.

(A) Special Persons. In addition to persons named in subrule (C) with respect to specific proceedings, the following persons must be served:

(1)–(7) [Unchanged.]

(8) In a guardianship proceeding for a minor, if the minor is an Indian child as defined by the Indian Child Welfare Act, 25 USC 1901 *et seq*., the

minor's tribe and the Indian custodian, if any, and, if the Indian child's parent or Indian custodian, or tribe, is unknown, the Secretary of the Interior.

(B)-(E) [Unchanged.]

RULE 5.402. COMMON PROVISIONS.

(A)–(D) [Unchanged.]

(E) Indian Child; Definitions, Jurisdiction, Notice, Transfer, Intervention.

(1) If an Indian child, as defined by the Indian Child Welfare Act, 25 USC 1903, is the subject of a guardianship proceeding under the Estates and Protected Individuals Code, the definitions in MCR 3.002 shall control. This does not include guardianships established under the Juvenile Code and MCR 3.979.

(2) If an Indian child is the subject of a petition to establish guardianship of a minor and an Indian tribe has exclusive jurisdiction as defined in MCR 3.002(2), the matter shall be dismissed.

(3) If an Indian child is the subject of a petition to establish guardianship of a minor and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(2), the court shall ensure that the petitioner has given notice of the proceedings to the persons prescribed in MCR 5.125(A)(8) and (C) in accordance with MCR 5.109.

(a) If either parent or the Indian custodian or the Indian child's tribe petitions the court to transfer the proceeding to the tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer of the case to tribal court jurisdiction or the court finds good cause not to transfer. In determining whether good cause not to transfer exists, the court shall consider the Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg No 228, 67590-67592, C.2-C.4. A perceived inadequacy of the tribal court or tribal services does not constitute good cause to refuse to transfer the case.

(b) The court shall not dismiss the matter until the transfer has been accepted by the tribal court.

(c) If the tribal court declines transfer, the Indian Child Welfare Act applies, as do the provisions of these rules that pertain to an Indian child (see 25 USC 1902, 1911[b]).

(d) A petition to transfer may be made at any time in accordance with 25 USC 1911(b).

(4) The Indian custodian of the child and the Indian child's tribe have a right to intervene at any point in the proceeding pursuant to 25 USC 1911(c).

RULE 5.404. GUARDIANSHIP OF MINOR.

(A) Petition for Guardianship of Minor. The petitioner shall state in the petition whether or not the minor is an Indian child or whether that fact is unknown. If the court requires the petitioner to file a social history before hearing a petition for guardianship of a minor, it shall do so on a form approved by the State Court Administrative Office. The social

history for minor guardianship is confidential, and it is not to be released, except on order of the court, to the parties or the attorneys for the parties.

(B)–(F) [Unchanged.]

Staff Comment: These proposed amendments were recommended by the Indian Child Welfare Act subcommittee in an effort to incorporate the specific provisions of the Indian Child Welfare Act into the relevant rules that relate to adoption and guardianships. The proposal incorporates provisions of the Indian Child Welfare Act into specific provisions within various rules relating to child protective proceedings and juvenile status offenses. The proposal is designed to make the rules reflect a more integrated approach to addressing issues specific to Indian children.

MCR 3.002(1)(c) defines "preadoptive placement" to mean the "temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but before or in lieu of adoptive placement, and . . . ." The phrase "in lieu of adoptive placement" is not intended to mean that it is permissible to leave a child in foster care indefinitely, in violation of MCL 712A.19b(6) or (7) or 45 CFR 1355.20, 45 CFR 1356.21, or 45 CFR 1356.50. Rather, it addresses situations where the parental rights to a child have been terminated and there is no permanency plan for adoption of the child. One example is when the child has been placed with a juvenile guardian and the guardianship is subsequently revoked. In this situation, jurisdiction over the child pursuant to MCL 712A.2(b) will be reinstated and the child is placed in foster care.

The proposed amendment of MCR 3.905(C)(1) states that a court shall consider guidelines established by the Bureau of Indian Affairs (BIA) in determining whether good cause not to transfer exists (Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg No 228, 67590-67592, C.2-C.4. [November 26, 1979]). Some examples of good cause are that the Indian tribe does not have a tribal court or that the Indian child is over 12 years old and objects to the transfer. For additional examples of good cause and relevant case law, see the BIA guidelines cited above and A Practical Guide to the Indian Child Welfare Act. (Native American Rights Fund, A Practical Guide to the Indian Child Welfare Act [Boulder, CO: Native American Rights Fund, 2007], 7.15 and 7.16, p 60.)

The staff comment is not an authoritative construction by the 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 these proposals may be sent to the Supreme Court Clerk in writing or electronically by January 1, 2010, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-43. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Superintending Control Denied September 23, 2009:

321 HENDERSON RECEIVABLES ORIGINATION, LLC v WAYNE COUNTY CIRCUIT COURT CHIEF JUDGE, No. 139395.

Superintending Control Denied September 28, 2009:

ALLEN v ATTORNEY GRIEVANCE COMMISSION, No. 139048; AGC: 3284/07.

Order Entered October 13, 2009:

PROPOSED AMENDMENT OF RULE 6.433 OF THE MICHIGAN COURT RULES.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.433 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.mi.gov/supremecourt.

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 are indicated by underlining and deletions are indicated by strikeover.]

RULE 6.433. DOCUMENTS FOR POSTCONVICTION PROCEEDINGS; INDIGENT DEFENDANT.

(A)-(B) [Unchanged.]

(C) Other Postconviction Proceedings. An indigent defendant who is not eligible to file an appeal of right or an application for leave to appeal may obtain records and documents as provided in this subrule. (1)

The defendant must make a written request to the sentencing court for specific court documents or transcripts indicating that the materials are required to pursue postconviction remedies in a state or federal court and are not otherwise available to the defendant. (2)

If the documents or transcripts have been filed with the court and not provided previously to the defendant, the clerk must provide the defendant with copies of such materials without cost to the defendant. If the requested materials have been provided previously to the defendant, on defendant's showing of good cause to the court, the clerk must provide the defendant with another copy.

(3)-(4) [Unchanged.]

Staff Comment: This proposal would insert a "good cause" provision into MCR 6.433 to require a defendant in postconviction proceedings to show good cause to obtain a second set of court documents. This amendment would mirror the good-cause provision in MCR 6.433(B)(2) for appeals by leave.

The staff comment is not an authoritative construction by the 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 these proposals may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2010, at

P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-25. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered November 13, 2009:

PROPOSED AMENDMENTS OF RULES 7.211, 7.313, AND 8.119 OF THE MICHIGAN COURT RULES.

On order of the Court, this is to advise that the Court is considering amendments of Rules 7.211, 7.313, and 8.119 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

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 are indicated by underlining and deletions are indicated by strikeover.]

RULE 7.211. MOTIONS IN COURT OF APPEALS.

(A)-(B) [Unchanged.]

(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)-(8) Motion to Remand.

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

(a) Trial court files that have been sealed in whole or in part by a trial court order will remain sealed while in the possession of the Court of Appeals. Public requests to view such trial court files will be referred to the trial court.

(b) Materials that are subject to a protective order entered under MCR 2.302(C) may be submitted for inclusion in the Court of Appeals file in sealed form if they are accompanied by a copy of the protective order. A party objecting to such sealed submissions may file an appropriate motion in the Court of Appeals.

(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(F). Materials that are subject to a motion to seal a Court of Appeals file in whole or in part 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 7 days after the motion is

served on the other parties, or within 7 days after the motion is filed in the Court of Appeals, whichever is later.

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

(f) An order granting or denying a motion to seal a Court of Appeals file in whole or in part may be challenged by any person at any time during the pendency of an appeal.

(D)-(E) [Unchanged.]

RULE 7.313. MOTIONS IN SUPREME COURT.

(A) What to File. To have a motion heard, a party must file with the clerk:

(1) a motion stating briefly but distinctly the grounds on which it is based and the relief required;

(2) an affidavit supporting any allegations of fact in the motion;

(3) a notice that the motion will be heard on a Tuesday at least 7 days after the motion is filed;

(4) the fee provided by MCR 7.319(B)(7)(c) or (d); and

(5) proof that the motion and supporting papers were served on the opposing party.

Eight copies of the motion must be filed, except only 2 copies need be filed of a motion to extend time, to place a case on or withdraw a case from the session calendar, or for oral argument. The attorney must sign the motion. By filing a motion for immediate consideration, a party may obtain an earlier hearing on the motion.

(B) Motion Day. Tuesday of each week is motion day. There is no oral argument on motions, unless ordered by the Court.

(C) Answer. An answer may be filed at any time before an order is entered on the motion.

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

(D)-(E) [Relettered but otherwise unchanged.]

RULE 8.119. COURT RECORDS AND REPORTS; DUTIES OF CLERKS.

(A)-(E) [Unchanged.]

(F) Sealed Records.

(1) Except as otherwise provided by statute or court rule, a court may not enter an order that seals courts records, in whole or in part, in any action or proceeding, unless

(a) a party has filed a written motion that identifies the specific interest to be protected,

(b) the court has made a finding of good cause, in writing or on the record, which specifies the grounds for the order, and

(c) there is no less restrictive means to adequately and effectively protect the specific interest asserted.

(2) In determining whether good cause has been shown, the court must consider,

(a) the interests of the parties, including, where there is an allegation of domestic violence, the safety of the alleged or potential victim of the domestic violence, and

(b) the interest of the public.

(3) The court must provide any interested person the opportunity to be heard concerning the sealing of the records.

(4) For purposes of this rule, "court records" includes all documents and records of any nature that are filed with the clerk in connection with the action. Nothing in this rule is intended to limit the court's authority to issue protective orders pursuant to MCR 2.302(C). Materials that are subject to a motion to seal a record in whole or in part shall be held under seal pending the court's disposition of the motion.

(5) A court may not seal a court order or opinion, including an order or opinion that disposes of a motion to seal the record.

(6) Any person may file a motion to set aside an order that disposes of a motion to seal the record, or an objection to entry of a proposed order. MCR 2.119 governs the proceedings on such a motion or objection. If the court denies a motion to set aside the order or enters the order after objection is filed, the moving or objecting person may file an application for leave to appeal in the same manner as a party to the action. See MCR 8.116(D).

(7) Whenever the court grants a motion to seal a court record, in whole or in part, the court must forward a copy of the order to the Clerk of the Supreme Court and to the State Court Administrative Office.

(G) [Unchanged.]

Staff Comment: These proposed amendments of MCR 7.211, 7.313, and 8.119 would clarify that materials filed with a trial court, with the Court of Appeals, or with the Supreme Court that relate to a motion to seal a record are nonpublic until the court disposes of the motion.

The staff comment is not an authoritative construction by the 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 these proposals may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2010, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2009-18. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered November 24, 2009:

PROPOSED AMENDMENT OF RULES 1.5, 1.7, 1.8, 3.1, 3.3, 3.4, 3.5, 3.6, 5.4, 5.5, and 8.5 OF THE MICHIGAN RULES OF PROFESSIONAL CONDUCT, AND THE ADDITION OF RULES 2.4, 5.7 AND 6.6.

On July 2, 2004, at the request of the State Bar of Michigan, this Court published for comment proposed changes to the Michigan Rules of Professional Conduct in ADM File No. 2003-62. In large part, the proposed modifications were similar to changes that had been made by the American Bar Association in 2002 to its Model Rules of Professional

Conduct. Following the period for comment, this Court held a public hearing in September 2005 concerning the published proposals. After careful consideration, the Court closed ADM File No. 2003-62 on January 22, 2009, and opened this administrative file to further consider certain proposals that had been included in ADM File No. 2003-62.

On order of the Court, this is to advise that the Court has determined to publish for comment a number of proposed modifications to the Michigan Rules of Professional Conduct. Many of the proposals are similar to those published for comment on July 2, 2004. The manner in which the current rules would be modified is shown by overstriking (deletions) and underlining (additions). With regard to proposed new Rules 2.4, 5.7, and 6.6, which have no equivalent in the current MRPCs, there is no overstriking or underlining.

Before determining whether these proposals 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 proposals. In some instances, alternative language is presented.

The Court welcomes the views of all. In addition, this matter will be considered at a public hearing before the Court makes a final decision. The notices and agendas for public hearings are posted on the Court's website, www.courts.michigan.gov/supremecourt.

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

RULE 1.5. FEES. (ALTERNATIVE A)

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee or an unreasonable amount for expenses. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, The scope of the representation under Rule 1.2, and the basis or rate of the fee and expenses for which the client will be responsible, must shall be

communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate previously agreed upon. Any changes in the basis or rate of the fee or expenses must also be communicated to the client in writing.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or by other law. For a A contingent-fee agreement to be valid, it must shall be in writing and signed by the client, and shall it must state the method by which the fee is to be determined, including the percentage that will accrue to the lawyer in the event of settlement, trial, or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly identify any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon conclusion of a contingent-fee matter, the lawyer shall provide the client with a written statement of that describes the outcome of the matter and, if there is a recovery, shows the remittance to the client and the method of its determination. See also MCR 8.121 for additional requirements applicable to some contingent-fee agreements.

(d) A lawyer shall not enter into an arrangement for, charge, or collect: a contingent fee in a domestic relations matter or in a criminal matter.

(1) any fee in a domestic-relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony, support, or property settlement; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A lawyer and a client may agree that the client will pay the lawyer a fee at the time of engagement for the sole purpose of committing the lawyer to represent the client and not as payment for services, provided that the fee is reasonable and that the agreement is in writing, is signed by the client, and clearly states that the fee will not be returned to the client at any time or under any circumstance, and that it is not payment for services to be rendered.

(f) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the client is given written notice of the fee arrangement advised of and consents to the arrangement in writing does not object to the participation of all the lawyers involved; and

(2) the total fee is not increased solely by reason of the provision for division of fees and is otherwise reasonable.

Nothing in this paragraph precludes payment under a separation or retirement agreement to a lawyer who formerly was with the firm.

Comment

Reasonableness of Fee and Expenses. *Paragraph (a) requires that all fees and expenses charged by lawyers be reasonable under the circumstances. The factors specified in subparagraphs (1) through (8) are not exclusive, and all factors may not be relevant in all situations. A lawyer*

may seek reimbursement for services performed in-house, such as copying, or for other costs incurred in-house, such as telephone expenses, either by charging a reasonable amount to which the client has agreed or by charging an amount that reflects the cost incurred by the lawyer.

Basis or Rate of Fee. *When the lawyer has regularly represented a client, they the lawyer and the client ordinarily will have evolved reached an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to the fees and expenses must should be promptly established promptly, as directed by paragraph (b). It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. So as to reduce the possibility of misunderstanding, the lawyer minimally must give the client a simple memorandum or a copy of the lawyer's customary fee schedule that states the general nature of the services to be provided, the basis, rate, or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses, or disbursements in the course of the representation. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.*

A contingent fee, like any other fee, is subject to the reasonableness standard of paragraph (a). In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable. See MCR 8.121.

Paragraph (d) prohibits a lawyer from charging a client a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony, support, or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of postjudgment balances due under support, alimony, or other financial orders because such contracts do not implicate the same policy concerns involved in securing a divorce or in the amount of alimony, support, or property settlement.

Paragraph (e) permits a lawyer and a client to agree that the client will pay the lawyer a reasonable fee at the time of engagement for the sole purpose of committing the lawyer to represent the client and not as payment for services. In order to be valid, such an agreement must be in writing and signed by the client, and clearly state that the fee will not be

returned to the client at any time or under any circumstance, and that it is not payment for services to be rendered.

Terms of Payment. *A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(ji). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.*

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage. See MCR 8.121.

Division of Fee. *A division of fee under paragraph (f) is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1. Paragraph (e) permits the lawyers to divide a fee on agreement between the participating lawyers if the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive.*

Paragraph (f) does not prohibit or regulate a division of fee to be received in the future for work done when lawyers previously were associated in a law firm.

Disputes over Fees. *If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, of a class, or of a person entitled to a reasonable fee as part*

of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Staff Comment: Alternative A is similar to the proposed revision of MRPC 1.5 that was published for comment on July 2, 2004, in ADM File No. 2003-62. It differs from the current rule in several ways (indicated by overstriking and underlining). For example, paragraph (b) would require a written communication regarding fees and expenses, and paragraphs (c) and (d) contain more specific requirements regarding contingent fees, including the requirement that all contingency fee agreements be signed by the client. Under paragraph (e), a lawyer and a client could agree to payment of a nonrefundable fee that is fully earned when received and is for the sole purpose of committing the lawyer to represent the client, even though the lawyer may perform no additional work. Proposed paragraph (f) would require that the client be given written notice of any fee-sharing arrangement agreed upon by attorneys from different firms, that the client consent in writing, and that the total fee not be increased solely because of the division of fees.

RULE 1.5 FEES (ALTERNATIVE B: ATTORNEY GRIEVANCE COMMISSION PROPOSAL)

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b)Definitions:

(1) "Advance fee" payments are payments for contemplated services that are made to a lawyer prior to the lawyer having earned the fee.

(2) "Advance expense" payments are payments for contemplated expenses in connection with the lawyer's services.

(3) A "general retainer" is a fee a lawyer charges for agreeing to provide legal services on an as-needed basis during a specified time

period. Such a fee is not payment for the actual performance of services, but only to engage the attorney's availability. A lawyer and client may agree that a general retainer is earned by the lawyer when paid by the client. Written notice must be promptly provided to the client that the general retainer is paid solely to commit the lawyer to represent the client and not as a fee to be earned by future services.

(4) A "flat fee" is one that embraces all services that a lawyer is to perform, whether the work is to be relatively simple or complex.

(5) The definitions of "advance fee," "advance expense," "general retainer," and "flat fee" guide the application of the later provisions of this rule, even if different terminology is employed by lawyer or client.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) Agreements for Legal Services.

(1) The scope of the representation shall be agreed upon with the client pursuant to Rule 1.2(a).

(2) The basis or rate of the fee for which the client will be responsible must be disclosed and agreed upon with the client at the beginning of the representation and confirmed in a writing to the client within a reasonable time, except when the lawyer will charge a regularly represented client on the same basis or rate, or the fee is less than $1,000.

(3) Any changes in the basis or rate of the fee or expenses must be agreed upon and confirmed in the manner described in paragraph (2) prior to the change being effected.

(4) A fee agreement shall not give sole discretion to an attorney to enhance a fee.

(d) Deposits and Withdrawals of Fees.

(1) *Deposit and withdrawal.* A lawyer must deposit advanced costs, fees and retainers, other than a general retainer, into an IOLTA or non-IOLTA client trust account and may withdraw such payments only as the fee is earned or the expense is incurred. See Rule 1.15 for further requirements concerning trust accounts.

(2) *Notification upon withdrawal of fee or expense.* A lawyer accepting advance fee or expense payments must notify the client in writing of the time, amount, and purpose of any withdrawal of the fee or expense, together with a complete accounting. The lawyer must transmit such notice no later than the date of the withdrawal.

(3) *Withdrawal of flat fees.* A lawyer and client may agree as to the timing, manner, and proportion of fees the lawyer may withdraw from an advance fee payment of a flat fee. The agreement, however, must reasonably protect the client's right to a refund of unearned fees if the lawyer fails to complete the services or the client discharges the lawyer. In no event may the lawyer withdraw unearned fees. See Rule 1.15(d) for further requirements when there is a dispute over disbursement of fees.

(4) *When refundable.* Notwithstanding any contrary agreement between the lawyer and client, advanced fees, including flat fees, and

expense payments are refundable to the client if the fee is not earned either in whole or in part, or the expense is not incurred.

(5) *Unearned fees.* A lawyer may not withdraw unearned fees from the IOLTA or non-IOLTA client trust account.

(6) *General retainers*. A general retainer fee is earned upon receipt. A general retainer fee shall not be deposited into an IOLTA or non-IOLTA trust account, but is considered the property of the lawyer or law firm. If a general retainer fee is found to be clearly excessive, Rule 1.15(d) is not violated unless the lawyer or law firm does not refund the excess portion of the fee by the effective date of an applicable order of restitution.

(e) *General provisions:*

(1) A fee agreement may include a charge for interest on the unpaid balance of fees where the parties stipulate in writing for the payment of interest not exceeding 7% per annum. See, also, MCL 438.31 for additional requirements applicable to charging interest.

(2)(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) (e)(3) or by other law. A contingent-fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal; litigation and other expenses are to be deducted before the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent-fee matter, the lawyer shall provide the client with a written statement of the outcome of the matter and, if there is a recovery, show the remittance to the client and the method of its determination. See also MCR 8.121 for additional requirements applicable to some contingent-fee agreements.

(3) (d) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee in a domestic relations matter or in a criminal matter.:

(A) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce, or upon the amount of alimony, support or property settlement in lieu thereof; or,

(B) a contingent fee for representing a defendant in a criminal case.

(4) (e) A division of a fee between lawyers who are not in the same firm may be made only if:

(A)(1) the client is advised of and does not object to lawyer who will be representing the client advises the client of the participation of all the lawyers involved and the client provides informed consent in writing; and

(B) (2) the total fee is reasonable.

Comment from Attorney Grievance Commission about its proposal

The proposed changes to MRPC 1.5(b) are definitional and are included to provide structure to subsequent rule provisions and apply even where other terminology is employed between a lawyer and client. Definitions are included for advanced fees and expenses, a general retainer, and flat fees. A lawyer would be able to charge an engagement fee, with a

client's informed, written consent. The writing must contain a notice that the engagement fee is paid solely to have the lawyer represent the client and not to be charged as a fee for future services.

The proposed changes to MRPC 1.5(c) clarify that the scope of the lawyer and client representation is not to be set solely by the lawyer but agreed upon with the client in accordance with MRPC 1.2(a). Additionally, the timing of the lawyer's duty to communicate the lawyer's fees to a client is made clear. Where a lawyer has not previously represented a client, the lawyer has the duty to communicate the basis or rate of his fees within a reasonable time from the outset of the representation, and any subsequent changes to the fee rate, and the client must agree. Fee agreements over $1,000 must be in writing.

MRPC 1.5(c)(4) is designed to eliminate the practice of lawyers awarding themselves discretionary "bonuses." The practice of certain lawyers in awarding themselves a "bonus" creates confusion to clients as to the precise amount of fees that the client may expect to pay. The practice appears to have gained ground of late, particularly with "high end" divorce practitioners. See Olson v Olson, 256 Mich App 619 (2003). Essentially, the practice of divorce lawyers awarding themselves bonuses makes the fee charged a contingent fee that is prohibited under these rules as against public interest.

Proposed MRPC 1.5(d) provides guidance on fee handling. MRPC (d)(1) requires advanced fees and costs, other than a general retainer, to be placed into a trust account where it would be retained until earned. Fees cannot be withdrawn from the account until the lawyer has sent a fee statement to the client. See, generally, MRPC 1.15(b)(3). Under MRPC 1.5(d)(4), fees described as "flat" or "non-refundable" still must be earned through the performance of service. This is in accord with MRPC 1.16(d), which provides that unearned fees shall be returned to a client upon the termination of a lawyer's representation.

Proposed MRPC 1.5(e) contains general fee provisions. 1.5(e) allows a lawyer to charge the statutory 7% interest rate where the parties stipulate in writing. On numerous occasions, lawyers have come to the attention of the Attorney Grievance Commission where the lawyer has charged a client a usurious rate of interest. The changes to the contingent fee rule are in line with other court rules, disciplinary rules and case law. A contingent fee must be in writing and signed by a client. Where there is a recovery, costs and expenses shall be deducted before the fee is calculated, in accord with case law and MCR 8.121(C).

The changes to MRPC 1.5(e)(3) subdivide the prohibitions against charging contingent fees in criminal and divorce matters. They further clarify that a lawyer may charge a contingent fee to collect on outstanding divorce judgments or settled alimony and support. MRPC 1.5(4) retains the ability of lawyers to collect a referral fee, but clarifies the duty to have the informed consent of the client, confirmed in writing.

Staff Comment: Alternative B is a new revision of MRPC 1.5 that has been proposed by the Attorney Grievance Commission. Changes in the existing rule are indicated by overstriking and underlining. The accompanying comment from the commission explains the proposed changes.

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULES INVOLVING CURRENT CLIENTS

(a) Except as provided in paragraph (2), a A lawyer shall not represent a client if the representation involves a conflict of interest, which exists if of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes that the representation of one client will not be directly adversely affect the relationship with the to the lawyer's representation of another client; and or

(2) there is a significant risk that each client consents after consultation. (b) A lawyer shall not represent a client if the representation of that one or more clients will may be materially limited by the lawyer's responsibilities to another client, a former client, or to a third person, or by a personal interest of the lawyer. the lawyer's own interests, unless:

(b) Notwithstanding the existence of a conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; the representation will not be adversely affected; and

(2) the representation is not prohibited by law; the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding before a tribunal; and

(4) each affected client consents in writing after the lawyer discloses the material risks presented by the conflict of interest and explains any reasonably available alternatives, or the lawyer promptly affirms a client's oral consent in a writing sent to that client.

Comment

Loyalty to a Client. *Loyalty and independent judgment are is an essential elements of a in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The A lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and nonlitigation matters the parties and issues involved in a matter and to determine whether there are actual or potential conflicts of interest. A conflict of interest may arise from the lawyer's responsibilities to another client, a former client, or a third person, or from the lawyer's own interests.*

If a lawyer determines that there is a conflict of interest such a conflict arises after representation has been undertaken, the lawyer must should decline the representation or withdraw from the representation, unless each affected client consents to the representation in writing, following full disclosure of the conflict by the lawyer in a manner that can be reasonably understood by the client, or the lawyer promptly affirms the client's oral consent in a writing sent to the client. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to

represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see comment to Rule 1.3 and Scope, ante.

Developments such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client who is represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option of withdrawing from one of the representations in order to avoid the conflict. Where necessary, the lawyer must seek court approval and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9.

Identifying Directly Adverse Conflicts of Interest. *As a general proposition, 'Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as an advocate in one matter against a person client the lawyer represents in some other matter, even if it is the matters are wholly unrelated. Otherwise that client is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to provide effective representation. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue the client's case less effectively out of deference to the other client. A similar conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally not directly adverse, such as competing economic enterprises, does not ordinarily require the consent of the respective clients. Where the lawyer and potential client have addressed these issues before establishing a client-lawyer relationship by appropriate agreement on future conflict, as discussed below, these concerns are minimized.*

Directly adverse conflicts also can arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer in an unrelated matter, the lawyer could not undertake the representation without the consent of each client.

Identifying Conflicts of Interest; Material Limitation. *Even if there is no directly adverse conflict, a conflict of interest still may exist if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for a client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, if a lawyer represents several individuals seeking to form a joint venture, the lawyer's ability to recommend or advocate all possible positions for each individual client is likely to be materially limited by the obligation of loyalty to all clients.*

Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the each client. Paragraph (b) addresses such situations. A possible The mere possibility of a conflict does not itself preclude the representation or require disclosure and consent. The critical questions are the likelihood that a conflict will eventuate arise and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

***Lawyer's Responsibilities to Former Clients and Other Third Persons**. In addition to conflicts involving current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor, or corporate director.*

***Consultation and Consent**. A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.*

***Conflicts Arising from Lawyer's Personal Interests.** The A lawyer's own interests should not be permitted to have an adverse effect on the lawyer's representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. For example, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. Likewise, a A lawyer may not allow related business interests to affect the representation of a client, for example, by referring the clients to an enterprise in which the lawyer has an undisclosed interest.*

When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyers' family relationships will interfere with their loyalty to

their clients and their independent professional judgment. In such a circumstance, each client is entitled to know of the existence and implications of the relationship between the lawyers before representation is undertaken. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated.

Conflicts in Litigation. *Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.*

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

Interest of Person Paying for a Lawyer's Service. *A lawyer may be paid from a source other than the client if the client consents after being is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). If payment from another source would present a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person making the payment or by the lawyer's responsibilities to a payer who is also a client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation. For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal*

representation of the directors or employees if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Prohibited Representations. *Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), the existence of some conflicts precludes a lawyer from undertaking or continuing to represent a particular client. When a lawyer is representing more than one client, the question of whether consent can be given notwithstanding a conflict must be resolved as to each client. The critical question is whether the interests of the clients will be adequately protected if the clients are permitted to consent to the representation.*

Under some circumstances, it may be impossible to make the disclosure necessary to obtain a client's consent to representation notwithstanding a conflict. For example, when a lawyer represents different clients in related matters and one client refuses to allow the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In such a circumstance, each party may have to obtain separate representation.

Revoking Consent. *A client's consent to an existing or future conflict constitutes consent both to the lawyer's representation of the client and to the lawyer's representation of other existing or future clients. With regard to the former, the client is free to revoke the consent and terminate a lawyer's representation at any time. The question of whether the client may revoke the consent as to other existing or future clients is another matter. The answer is to be determined under contract law if the lawyer has relied upon the client's consent when undertaking or continuing representation of the client, and the consent is a material term of the representation. In other circumstances, whether the lawyer is precluded from continuing to represent other clients depends on the circumstances, including the nature of the conflict; the reason the client revoked consent, e.g., because of a material change in circumstances; the reasonable expectations of the other existing or future clients; and the likelihood that the other clients or the lawyer would suffer a material detriment*

Consent to Future Conflict. *The effectiveness of a client's consent to representation notwithstanding a conflict that might arise in the future generally depends on the extent to which the client understands the material risks and benefits. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences, the greater the likelihood that the client will have the necessary understanding. For example, if the client consents to a particular type of conflict with which the client is familiar, then the consent ordinarily will be effective with regard to that type of conflict. On the other hand, if the consent is general and open-ended and is given by an unsophisticated client without the advice of independent counsel, then it is unlikely that the client understood the material risks involved and the consent may not be effective. Consent to representation notwithstanding a conflict that might arise in the future will not be effective if the circumstances that actually materialize would preclude representation under paragraph (b).*

Conflicts in Litigation. *A lawyer may not represent opposing parties in the same litigation. Even when the simultaneous representation of parties is not precluded, conflicts may arise. For example, there may be substantial discrepancy in the parties' testimony, the parties' positions may be incompatible in relation to an opposing party, or there may be substantially different possibilities of settlement of claims and liabilities. The common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met. The potential for a conflict of interest in a criminal case is so grave, however, that a lawyer ordinarily should decline to represent more than one codefendant.*

A lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest does exist, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case, e.g., when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. The factors to be considered in determining whether clients need to be advised of the risks include (a) where the cases are pending, (b) whether the issue is substantive or procedural, (c) the temporal relationship between the matters, (d) the significance of the issue to the immediate and long-term interests of the clients, and (e) the clients' reasonable expectations in retaining the lawyer. If there is a significant risk of material limitation, then the lawyer must decline one of the representations or withdraw from one or both matters unless the clients consent to representation notwithstanding the conflict.

When a lawyer represents or seeks to prosecute or defend a class-action lawsuit, unnamed members of the class ordinarily are not considered to be the lawyer's clients under paragraph (a)(1) of this rule. The lawyer thus does not need to obtain the consent of such a person before representing a client who is suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class-action lawsuit does not need to obtain the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Other Nonlitigation *Conflicts Situations. Conflicts of interest may exist in contexts other than litigation sometimes may be difficult to assess. Relevant factors to be considered in determining whether there is significant potential for adverse effect or material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.*

For example, a lawyer may not represent multiple parties in a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. For example, a A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction a question of law. Under one view, the client is the fiduciary; under another view, the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, Tthe lawyer should make clear the lawyer's relationship to the parties involved.

Whether a client may consent to representation notwithstanding a conflict depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible if the clients are generally aligned in interest, even though there are some differences among them. Thus a lawyer may help to organize a business in which two or more clients are entrepreneurs, work out the financial reorganization of an enterprise in which two or more clients have an interest, or arrange a property distribution in connection with the settlement of an estate.

Special Considerations in Common Representation. *In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because of potentially adverse interests, the result can be additional cost, embarrassment, and recrimination. In some situations, the risk of failure is so great that multiple representation is impossible. For example, a lawyer cannot undertake common representation of clients if contentious litigation or negotiations between them are imminent or contemplated. Moreover, representation of multiple clients is improper when it is unlikely that the lawyer can maintain impartiality. Generally, if the relationship between the parties already is antagonistic, it is unlikely that the clients' interests can be adequately served by common representation. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.*

An important factor in determining whether common representation is appropriate is the effect on the attorney-client privilege and client-lawyer confidentiality. With regard to the attorney-client privilege, the prevailing rule is that the privilege does not attach as between commonly represented clients, and the clients should be so advised. With regard to client-lawyer confidentiality, continued common representation almost certainly will be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. Thus, at the outset of the common representation, the lawyer should advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the common representation if the clients agree, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that

failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and, with the consent of both clients, agree to keep that information confidential.

Organizational Clients. *A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent a constituent or affiliated organization such as a parent or a subsidiary. Thus the lawyer is not precluded from representing another client in an unrelated matter, even though that client's position is adverse to an affiliate of the organizational client, unless (a) the circumstances are such that the affiliate should be considered a client of the lawyer, (b) there is an understanding between the lawyer and the organizational client that the lawyer will avoid representing another client whose position is adverse to the client's affiliates, or (c) the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.*

A lawyer for who represents a corporation or other organization and who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual roles will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should not act as the corporation's lawyer if a conflict of interest arises. The lawyer should advise the other members of the board that some matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege, and that the lawyer might not be able to participate as a director or might not be able to represent the corporation in certain matters because of a conflict of interest.

Conflict Charged by an Opposing Party. *Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. See MCR 6.101(C)(4). Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope, ante.*

Staff Comment: The proposed changes in current MRPC 1.7 are similar in many respects to the version of MRPC 1.7 that was published for comment on July 2, 2004, in ADM File No. 2003-62. The additions to the current rule and the expanded commentary (indicated by overstriking and underlining) are intended to provide additional guidance to lawyers and to make the conflict-of-interest doctrine less difficult to understand and apply with regard to current clients. For example,

proposed paragraph (b) contains more specific requirements regarding the circumstances in which a lawyer may represent a client despite the existence of a conflict of interest, including the requirement of written consent.

RULE 1.8. CONFLICT OF INTEREST: SPECIFIC RULES INVOLVING CURRENT CLIENTS PROHIBITED TRANSACTIONS.

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed to the client and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is advised in writing that it is appropriate to seek the advice of independent legal counsel concerning the matter and is given a reasonable opportunity to seek the such advice of independent counsel in the transaction; and

(3) the client consents in writing thereto to the essential terms of the transaction and the lawyer's role in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents in writing after consultation, except as permitted or required by these Rrules 1.6 or Rule 3.3.

(c) A lawyer shall not solicit a substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any a substantial gift, from the client, including a testamentary gift, except where the client is related to the donee unless the lawyer or other intended recipient is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, or other person with whom the lawyer or client maintains a close familial relationship.

(d) Prior to the conclusion of Before concluding the representation of a client, a lawyer shall not enter into make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which shall ultimately be the responsibility of the client may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents in writing after consultation;

(2) there is no interference with the lawyer's independentce of professional judgment or with the client-lawyer relationship; and

(3) information relating to the representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or, in a criminal case, an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents in writing after consultation, including the lawyer disclosures of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make enter into an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless without first advising that person first is advised in writing that it is appropriate to seek the advice of independent legal counsel representation is appropriate in connection concerning the matter and is given a reasonable opportunity to seek such advice therewith.

(i) A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation that the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien authorized granted by law to secure the lawyer's fee or expenses,; and (2) contract with a client for a reasonable contingent fee in a civil case, as permitted by Rule 1.5 and MCR 8.121.

(j) While lawyers are associated in a firm, a prohibition in this rule that applies to any of them applies to all of them.

Comment

Business Transactions Between Client and Lawyer. *As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment.*

A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property, or financial transaction with a client. The requirements of paragraph (a) apply even when the transaction in question is not closely related to the subject matter of the representation, e.g., when a lawyer drafting a will learns that the client needs money for unrelated expenses and offers the

client a loan. The rule also applies to lawyers engaged in the sale of goods or services related to the practice of law, such as title insurance and investment services, and to lawyers who wish to purchase property from estates they represent. The rule does not apply, however, to ordinary fee arrangements between a client and a lawyer, although the rule requirements do pertain if a lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. Neither does the rule Paragraph (a) does not, however, apply to standard commercial transactions between the a lawyer and the a client for products or services that the client generally markets to others, for example, such as banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction or when the lawyer's financial interest in the transaction otherwise poses a significant risk that the representation of the client will be materially limited. In such a circumstance, the lawyer must comply not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that rule, the lawyer must disclose the risks associated with the lawyer's dual role of legal adviser and participant in the transaction, for example, the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

If the client is represented by independent counsel in the transaction, the requirement of full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was represented by independent counsel is relevant in determining whether the agreement was fair and reasonable to the client.

***Use of Information Related to Representation.** A lawyer violates the duty of loyalty by using information relating to the representation of a client to the disadvantage of the client. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or recommend that another client make such a purchase. A lawyer does not violate the duty of loyalty, however, if the lawyer uses the information but not to the disadvantage of the client. For example, a lawyer who learns of a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients.*

***Gifts to Lawyers.** A lawyer may accept a gift from a client if the transaction meets general standards of fairness. For example, a simple gift such as a present given presented at a holiday or as a token of appreciation is permitted. If the gift is substantial, however, and effectuation of a substantial the gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice*

that another lawyer can provide. The sole Paragraph (c) recognizes an exception to this rule is where if the client is a relative of the donee or the gift is not substantial.

Literary Rights. *An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i) (j) of this rule.*

Financial Assistance. *Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses. The risk is that clients would be encouraged to pursue lawsuits that they might otherwise not pursue and that such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant precluding a lawyer from lending a client court costs and litigation expenses, however, including expenses related to medical examinations and the costs of obtaining and presenting evidence. Such costs and expenses are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, lawyers should be permitted to pay the court costs and litigation expenses of indigent clients regardless of whether the money will be repaid.*

Person Paying for a Lawyer's Services. *Paragraph (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure. Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company), or a co-client (such as a corporation sued along with one or more of its employees). Third-party payers may have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing. Accordingly, a lawyer is prohibited from accepting or continuing such representation unless the client consents and the lawyer determines that the lawyer's independent professional judgment will not be compromised. See also Rule 5.4(c), which prohibits interference with a lawyer's professional judgment by one who recommends, employs, or pays the lawyer to render legal services for another, and Rule 1.6 , which concerns confidentiality.*

Aggregate Settlements. *Before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement or plea bargain, including what the other clients will receive or pay if the settlement or plea offer is accepted. Lawyers representing a class of plaintiffs or defendants*

must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

***Limiting Liability* and Settling Malpractice Claims**. *Paragraph (h) is not intended to apply to customary qualifications and limitations in legal opinions and memoranda. Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is represented by independent counsel because such agreements are likely to undermine competent and diligent representation. A lawyer is not prohibited from entering into an agreement with a client to arbitrate legal malpractice claims, however, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor is a lawyer prohibited from entering into an agreement to settle a claim or a potential claim for malpractice, although the lawyer must advise the client that it would be appropriate to seek the advice of independent counsel regarding such an agreement and give the client a reasonable opportunity to obtain such advice.*

Family Relationships Between Lawyers. *Paragraph (i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in paragraph (i) is personal and is not imputed to members of firms with whom the lawyers are associated.*

Acquisition of Acquiring Proprietary Interest in Litigation. *Paragraph (ji) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This The general rule, which has its basis in common-law champerty and maintenance, and is designed to avoid giving the lawyer too great an interest in the representation. There also is concern that it is difficult for a client to discharge a lawyer who acquires an ownership interest in the subject of the representation. is subject to sSpecific exceptions to the general rule have developed in decisional law and are continued in these rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (e).*

Client-Lawyer Sexual Relationships with Clients. After careful study, the Supreme Court declined in 1998 to adopt a proposal to amend Rule 1.8 to limit sexual relationships between lawyers and clients. The Michigan Rules of Professional Conduct adequately prohibit representation that lacks competence or diligence, or that is shadowed by a conflict of interest. With regard to sexual behavior, the Michigan Court Rules provide that a lawyer may be disciplined for "conduct that is contrary to justice, ethics, honesty, or good morals." MCR 9.104(3). Further, the Legislature has enacted criminal penalties for certain types of sexual misconduct. In this regard, it should be emphasized that a lawyer bears a fiduciary responsibility toward the client. A lawyer who has a conflict of interest, whose actions interfere with effective representation, who takes advantage of a client's vulnerability, or whose behavior is immoral risks severe sanctions under the existing Michigan Court Rules and Michigan Rules of Professional Conduct.

Staff Comment: Proposed MRPC 1.8 is a similar but shorter version of the proposal that was published for comment on July 2, 2004, in ADM File No. 2003-62. The proposed rule is substantially similar to current MRPC 1.8, although the title has been changed and the accompanying commentary has been expanded considerably. In addition, proposed paragraph (a)(2) would require that a client be advised in writing of the desirability of seeking the advice of independent legal counsel in a transaction, and paragraph (j) clarifies that a prohibition that applies to one lawyer in a firm applies to all lawyers in the firm.

RULE 2.4. LAWYER SERVING AS THIRD-PARTY NEUTRAL.

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator, or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral must inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer must explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, an arbitrator, a conciliator, or an evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, an evaluator, or a decision maker depends on the particular process that is selected by the parties or mandated by a court.

The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals also may be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association, or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution.

Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing

them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

Lawyers who represent clients in alternative dispute resolution are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration, the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Staff Comment: There is no equivalent to proposed MRPC 2.4 in the current Michigan Rules of Professional Conduct. The proposal is virtually identical to the version that was published for comment on July 2, 2004, in ADM File No. 2003-62. The proposed rule is designed to help parties involved in alternative dispute resolution to better understand the role of a lawyer serving as a third-party neutral.

RULE 3.1. MERITORIOUS CLAIMS AND CONTENTIONS.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous. A lawyer may offer a good-faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may so defend the proceeding as to require that every element of the case be established.

Comment

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also has a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good-faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the

client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person. Likewise, the action is frivolous if the lawyer is unable either to make a good-faith argument on the merits of the action taken or to support the action taken by a good-faith argument for an extension, modification, or reversal of existing law.

Staff Comment: Proposed MRPC 3.1 is similar to the proposed revision that was published for comment on July 2, 2004, in ADM File No. 2003-62. The proposal makes no changes in the current rule, but modifies the accompanying commentary to clarify that a lawyer is not responsible for a client's subjective motivation.

RULE 3.3. CANDOR TOWARD THE TRIBUNAL.

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(32) fail to disclose to a tribunal controlling legal authority in the jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(43) offer evidence that the lawyer knows to be false.

If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(b) If a lawyer knows that the lawyer's client or other person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to an adjudicative proceeding involving the client, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(bc) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts that are known to the lawyer and that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

This rule governs the conduct of a lawyer who is representing a client in a tribunal. It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, subrule (a) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

As officers of the court, lawyers have special duties to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified, however, by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer. *An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, because litigation documents ordinarily present assertions by the client or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(c), see the comment to that rule. See also the comment to Rule 8.4(b).*

Misleading Legal Argument. *Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(32), an advocate has a duty to disclose directly controlling adverse authority in the jurisdiction which that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.*

False Evidence. *When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.*

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client,

including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(c). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Offering Evidence. *Paragraph (a)(3) requires that a lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this rule if the lawyer offers the evidence for the purpose of establishing its falsity.*

If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness' testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false. A lawyer's knowledge that evidence is false can be inferred from the circumstances. Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

Perjury by a Criminal Defendant. *Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.*

The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence, but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution of relatively recent origin, is that the advocate be entirely

excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution, but makes the advocate a knowing instrument of perjury.

The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify, and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(c).

***Remedial Measures**. If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations, or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the lawyer's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the lawyer advocate should seek to withdraw if that will remedy the situation must take further remedial action. If withdrawal will not remedy the situation or is impossible, from the representation is not permitted or will not remedy the effect of the false evidence, the advocate should lawyer must make such disclosure to the court tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the court tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, the second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.*

The disclosure of a client's false testimony can result in grave consequences to the client, including a sense of betrayal, the loss of the case, or perhaps a prosecution for perjury. However, the alternative is that the lawyer aids in the deception of the court, thereby subverting the truth-finding process that the adversarial system is designed to implement. See Rule 1.2(c). Furthermore, unless it is clearly understood that the lawyer must remediate the disclosure of false evidence, the client could

simply reject the lawyer's counsel to reveal the false evidence and require that the lawyer remain silent. Thus, the client could insist that the lawyer assist in perpetrating a fraud on the court.

Constitutional Requirements. *The general rule–that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client–applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. The obligation of the advocate under these rules is subordinate to such a constitutional requirement.*

Preserving Integrity of Adjudicative Process. *Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating, or otherwise unlawfully communicating with a witness, juror, court official, or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence, or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure, if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding. See Rule 3.4.*

Duration of Obligation*. A practical time limit on the obligation to rectify the presentation of false evidence or false statements of law and fact must be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.*

Refusing to Offer Proof Believed to Be False*. Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may be denied this authority by constitutional requirements governing the right to counsel.*

Ex Parte Proceedings. *Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts that are known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.*

Withdrawal. *Normally, a lawyer's compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if*

the lawyer's compliance with this rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this rule or as otherwise permitted by Rule 1.6.

Staff Comment: The proposed changes in MRPC 3.3 are similar to those in the proposal that was published for comment on July 2, 2004, in ADM File No. 2003-62. The manner in which the current rule would be modified (indicated by overstriking and underlining) includes specifying in paragraph (a)(1) that a lawyer shall not knowingly "fail to correct a false statement of material fact or law," and substituting proposed paragraph (b) for current paragraph (a)(2), which deals with a disclosure that is "necessary to avoid assisting a criminal or fraudulent act by the client."

RULE 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL.

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence; unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party;

(e) during trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party, unless:

(1) the person is a relative or an employee or other agent of a client for the purposes of MRE 801(d)(2)(D); and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improper influence of witnesses, obstructive tactics in discovery procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed. Other law makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

With regard to paragraph (b), it is not improper to pay a witness' expenses or to compensate an expert witness on terms permitted by law. It is, however, improper to pay an occurrence witness any fee for testifying beyond that authorized by law, and it is improper to pay an expert witness a contingent fee.

Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, because the employees may identify their interests with those of the client. See also Rules 4.2 and 4.3.

Staff Comment: Proposed MRPC 3.4 and the accompanying commentary are nearly identical to the current Michigan rule and to the proposed revision that was published for comment on July 2, 2004, in ADM File No. 2003-62. One difference is the clarification in proposed paragraph (f)(1) that a lawyer may not ask someone other than a client to refrain from voluntarily giving relevant information to another party unless the person is "an employee or other agent of a client for the purposes of MRE 801(d)(2)(D)."

RULE 3.5. IMPARTIALITY AND DECORUM OF THE TRIBUNAL.

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;

(b) communicate ex parte with such a person concerning a pending matter, except as permitted by law; or unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication constitutes misrepresentation, coercion, duress or harassment; or

(c)(d) engage in undignified or discourteous conduct toward the tribunal.

Comment

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Michigan Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters, or jurors, unless authorized to do so by law or court order.

A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so, unless the communication is prohibited by law or a court order, but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from undignified or discourteous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge, but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Staff Comment: Proposed MRPC 3.5 is similar to the proposed revision that was published for comment on July 2, 2004, in ADM File No. 2003-62. It differs from the current rule primarily because of the addition of paragraph (c), which addresses the issue of lawyers contacting jurors and prospective jurors after the jury is discharged.

RULE 3.6. TRIAL PUBLICITY (ALTERNATIVE A)

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to the lawyer knows or reasonably should know will be disseminated by means of public communication if the lawyer knows or reasonably should know that it and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer who is participating or has participated in the investigation or litigation of a matter may state without elaboration:

(1) the nature of the claim, offense, or defense involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, also:

(i) the identity, residence, occupation, and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to before trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. Moreover, the confidentiality provisions of Rule 1.6 may prevent the disclosure of information which might otherwise be included in an extrajudicial statement. In addition, sSpecial rules of confidentiality may validly govern proceedings in juvenile, domestic relations, and mental disability proceedings, and perhaps in addition to other types of litigation. Rule 3.4(c) requires compliance with such rules.

For guidance in this difficult area, one may consider the following language adapted from the American Bar Association's Model Rule 3.6:

Rule 3.6 sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been, involved in the investigation or litigation of a case, and their associates.

(a) A statement referred to in Rule 3.6 ordinarily is likely to have such a prejudicial effect a substantial likelihood of materially prejudicing an adjudicative proceeding when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation, or criminal record of a party, of a suspect in a criminal investigation or of a witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents

of any confession, admission, or statement given by a defendant or suspect, or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test, or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(b) Notwithstanding Rule 3.6 and paragraphs (a) (1-5) of this portion of the comment, a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case:

(A) the identity, residence, occupation and family status of the accused;

(B) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(C) the fact, time and place of arrest; and

(D) the identity of investigating and arresting officers or agencies and the length of the investigation.

See Rule 3.8(e) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Staff Comment: Alternative A is a similar but abbreviated version of the proposed revision of MRPC 3.6 that was published for comment on July 2, 2004, in ADM File No. 2003-62. It expands the current rule considerably by moving substantial portions of the current commentary into the rule itself. See, for example, proposed paragraph (b). Paragraph (a) is substantially the same as the current rule, except that the "reasonable lawyer" standard is substituted for the "reasonable person" standard.

RULE 3.6. TRIAL PUBLICITY. (ALTERNATIVE B: STATE BAR OF MICHIGAN PROPOSAL)

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement

that a reasonable person would expect to the lawyer knows or reasonably should know will be disseminated by means of public communication if the lawyer knows or reasonably should know that it and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment proposed by State Bar of Michigan

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. Moreover, the confidentiality provisions of Rule 1.6 may prevent the disclosure of information which might otherwise be included in an extrajudicial statement. In addition, special rules of confidentiality may validly govern proceedings in juvenile, domestic relations, and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

For guidance in this difficult area, one may consider the following language adapted from the American Bar Association's Model Rule 3.6:

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations, mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been, involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly (a) A statement referred to in Rule 3.6 ordinarily is likely to have such a prejudicial effect when it they refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration and the statement relates to. These subjects relate to:

(1) the character, credibility, reputation, or criminal record of a party, of a suspect in a criminal investigation, or of a witness,; or the identity of a witness,; or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or; the existence or contents of any confession, admission, or statement given by a defendant or suspect,; or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test, or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(b) Notwithstanding Rule 3.6 and paragraphs (a)(1-5) of this portion of the comment, a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case:

(A) the identity, residence, occupation and family status of the accused;

(B) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(C) the fact, time and place of arrest; and

(D) the identity of investigating and arresting officers or agencies and the length of the investigation.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(e) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Staff Comment: Alternative B is the proposed revision of MRPC 3.6 that was submitted by the State Bar of Michigan and published for comment on July 2, 2004, in ADM File No. 2003-62. The proposed changes in the current rule are indicated by overstriking and underlining. Alternative B is longer than Alternative A and includes several additional provisions, including proposed paragraph (c), which specifi-

cally would allow a statement "that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client," and proposed paragraph (d), which specifies that a lawyer associated with a lawyer subject to paragraph (a) may not make a statement prohibited by paragraph (a). Alternative B also includes longer accompanying commentary than Alternative A.

RULE 5.4. PROFESSIONAL INDEPENDENCE OF A LAWYER.

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate, or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price pursuant to the provisions of Rule 1.17; and

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof, or one who occupies a position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

The provisions of this rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

This rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

A lawyer does not violate this rule by affiliating with or being employed by an organization such as a union-sponsored prepaid legal services plan, provided the structure of the organization permits the lawyer independently to exercise professional judgment on behalf of a client.

Staff Comment: Proposed MRPC 5.4 is similar to the proposed revision that was published for comment on July 2, 2004, in ADM File No. 2003-62. It differs from the current rule primarily because of the addition of proposed paragraph (a)(4), which specifically allows a lawyer to "share court-awarded legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter."

RULE 5.5. UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW.

(a) A lawyer shall not: (a) practice law in a jurisdiction where doing so violates in violation of the regulation of the legal profession in that jurisdiction;, or assist another in doing so.

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law. A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by law or these rules, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another jurisdiction of the United States and not disbarred or suspended from practice in any jurisdiction may provide temporary legal services in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer or a person the lawyer is assisting is authorized by law to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not covered by paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another jurisdiction of the United States and not disbarred or suspended from practice in any jurisdiction may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized by law to provide in this jurisdiction.

Comment

A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by law, order, or court rule to practice for a limited purpose or on a restricted basis. See, for example, MCR 8.126, which permits, under certain circumstances, the temporary admission to the bar of a person who is licensed to practice law in another jurisdiction, and Rule 5(E) of the Rules for the Board of Law Examiners, which permits a lawyer who is admitted to practice in a foreign country to practice in Michigan as a special legal consultant, without examination, provided certain conditions are met.

Paragraph (a) applies to the unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, Llimiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This rule Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for it their work. See Rule 5.3.

Likewise it does not prohibit A lawyers from providing may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law, for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

Other than as authorized by law or this rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

There are occasions in which a lawyer admitted to practice in another jurisdiction of the United States and not disbarred or suspended from practice in any jurisdiction may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an

unreasonable risk to the interests of clients, the public, or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not indicate whether the conduct is authorized. With the exception of paragraphs (d)(1) and (d)(2), this rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted here to practice generally.

There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction and, therefore, may be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any jurisdiction of the United States, including the District of Columbia and any state, territory, or commonwealth. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice and is in good standing to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who, while technically admitted, is not authorized to practice because, for example, the lawyer is on inactive status or is suspended for nonpayment of dues.

Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice, such as MCR 8.126, or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a law or court rule of this jurisdiction requires that a lawyer who is not admitted to practice in this jurisdiction obtain admission pro hac vice before appearing before a tribunal or administrative agency, this rule requires the lawyer to obtain that authority.

Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice under MCR 8.126. Examples of such conduct include meetings with a client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage temporarily in this jurisdiction in conduct related to pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits

conduct by lawyers who are associated with that lawyer in the matter but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction, provided that those services are in or are reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction and the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice under MCR 8.126 in the case of a court-annexed arbitration or mediation, or otherwise if required by court rule or law.

Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction if they arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not covered by paragraphs (c)(2) or (c)(3). These services include both legal services and services performed by nonlawyers that would be considered the practice of law if performed by lawyers.

Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors indicate such a relationship. The lawyer's client previously may have been represented by the lawyer or may reside in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work may be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship may arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of the corporation's lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise, as developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally uniform, foreign, or international law.

Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another jurisdiction of the United States and is not disbarred or suspended from practice in any jurisdiction may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as to provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with

the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. This paragraph applies to in-house corporate lawyers, government lawyers, and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by statute, court rule, executive regulation, or judicial precedent.

A lawyer who practices law in this jurisdiction is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may be required to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, such disclosure may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

Paragraphs (c) and (d) do not authorize lawyers who are admitted to practice in other jurisdictions to advertise legal services to prospective clients in this jurisdiction. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

Staff Comment: Proposed MRPC 5.5 is essentially the same proposal that was published for comment on July 2, 2004, in ADM File No. 2003-62. Both the rule and the accompanying commentary are much longer than the current rule and commentary. The rule sets specific guidelines for out-of-state lawyers who are appearing temporarily in Michigan, and is intended to work in conjunction with MRPC 8.5. See, also, MCR 8.126 and MCR 9.108(E)(8).

RULE 5.7. RESPONSIBILITIES REGARDING LAW-RELATED SERVICES.

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Comment

When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed, and regardless of whether the law-related services are performed through a law firm or a separate entity. This rule identifies the circumstances in which all the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, this rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made, preferably in writing, before law-related services are provided or before an agreement is reached for provision of such services.

The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances, the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the rule cannot be met. In such a case, a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls, comply in all respects with the Rules of Professional Conduct.

A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical, or environmental consulting.

When a lawyer is obliged to accord the recipients of such services the protections of those rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the rules addressing conflicts of interest, and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

When the full protections of all the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external

to the rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest, and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

RULE 6.6. NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS.

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this rule.

Comment

Legal services organizations, courts, and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services, such as advice or the completion of legal forms, that will help persons address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics, or pro se counseling programs, a client-lawyer relationship may or may not be established as a matter of law, but regardless there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

A lawyer who provides short-term limited legal services pursuant to this rule must secure the client's consent to the scope of the representation. See Rule 1.2. If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

Because a lawyer who is representing a client in the circumstances addressed by this rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

If, after commencing a short-term limited representation in accordance with this rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

Staff Comment: There is no equivalent to proposed MRPC 6.6 in the current Michigan Rules of Professional Conduct. The proposal is substantially the same as the proposal that was published for comment as MRPC 6.5 on July 2, 2004, in ADM File No. 2003-62. The proposed rule addresses concerns that a strict application of conflict-of-interest rules may deter lawyers from volunteering to provide short-term legal services through nonprofit organizations, court-related programs, and similar other endeavors such as legal-advice hotlines.

RULE 8.5. JURISDICTION DISCIPLINARY AUTHORITY; CHOICE OF LAW.

(a) **Disciplinary Authority**. A lawyer licensed admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of whether where the lawyer's is engaged in practice elsewhere conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be who is licensed to practice in another jurisdiction and who is admitted to practice in this jurisdiction is subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) **Choice of Law**. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct; a lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Comment

In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 5.5. A lawyer admitted to practice in Michigan pro hac vice is subject to the disciplinary authority of this state for actions and inactions occurring during the course of the representation of a client in Michigan.

If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.

Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal where the general authority of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.

Disciplinary Authority. *It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this rule. The fact that a lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer in civil matters.*

Choice of Law. *A lawyer potentially may be subject to more than one set of rules of professional conduct that impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.*

Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interests of clients, the profession, and those who are authorized to regulate the profession. Accordingly, paragraph (b) provides that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct; makes the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions; and protects from discipline those lawyers who act reasonably in the face of uncertainty.

Paragraph (b)(1) provides, as to a lawyer's conduct relating to a proceeding pending before a tribunal, that the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet

pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred or, if the predominant effect of the conduct is in another jurisdiction, the lawyer shall be subject to the rules of that jurisdiction. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be either where the conduct occurred, where the tribunal sits, or in another jurisdiction.

When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear initially whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct actually did occur. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this rule.

If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct and should avoid proceeding against a lawyer on the basis of inconsistent rules.

The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties, or other agreements between regulatory authorities in the affected jurisdictions provide otherwise.

Staff Comment: Proposed MRPC 8.5 is similar to the proposed revision that was published for comment on July 2, 2004, in ADM File No. 2003-62. It differs considerably from the current rule, primarily by the addition of a separate section on choice of law. The proposed rule specifically gives discipline authorities jurisdiction to investigate and prosecute the ethics violations of attorneys temporarily admitted to practice in Michigan. The rule is intended to work in conjunction with MRPC 5.5. See, also, MCR 8.126 and MCR 9.108(E)(8).

The staff comments that appear throughout this proposal are intended to provide explanation, but are not authoritative constructions by the Court.

A copy of this order will be given to the Secretary of the State Bar of Michigan and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposals may be sent to the Clerk of the Michigan Supreme Court in writing or electronically by March 1, 2010, at P.O. Box 30052, Lansing, Michigan 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2009-06. Your comments and the comments of others will be posted at www.courts.michigan.gov/supremecourt/resources/administrative/index.htm

Order Entered December 15, 2009:

PROPOSED AMENDMENT OF RULES 5.105, 5.125, 5.201, 5.501, 5.801, and 5.802 OF THE MICHIGAN COURT RULES and PROPOSED ADOPTION OF NEW RULE 5.208 OF THE MICHIGAN COURT RULES (TO REPLACE RULES 5.306 and 5.503)

On order of the Court, this is to advise that the Court is considering amendments of Rules 5.105, 5.125, 5.201, 5.501, 5.801, and 5.802 of the Michigan Court Rules and considering adoption of new Rule 5.208 (to replace Rules 5.306 and 5.503) of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Because the statutory changes that gave rise to many of these proposed rule amendments will take effect April 1, 2010, and because the Court desires whenever it is possible to coordinate the effective dates of new statutory language with corresponding court rule changes, the Court is deviating slightly from its typical publication and adoption schedule in this matter. The period for public comment remains three full months following the month in which the order is published for comment. Thus, the public comment period will expire April 1, 2010. However, the proposed rules will also be considered by the Court at its next scheduled public administrative hearing (set for January 27, 2010) so that it may consider whether to preliminarily adopt the rules to enable practitioners and judges to become familiar with them before the proposed effective date of April 1, 2010. The Court will then have the option to consider any changes that may be suggested during the public comment period at a subsequent administrative conference. This procedure maximizes the opportunity for commenters to submit comments, provides as much notice as possible to those who will be using the revised rules, and affords the Court sufficient flexibility to ensure that the final rules are adopted as timely as possible and with the full benefit of a standard public comment period.

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 are indicated by underlining and deletions are indicated by strikeover.]

RULE 5.105. MANNER AND METHOD OF SERVICE.

(A) [Unchanged.]

(B) Method of Service.

(1)-(3) [Unchanged.]

(4) E-mail. Unless otherwise limited or provided by this court rule, parties to a civil action or interested persons to a proceeding may agree to service by e-mail in the manner provided in and governed by MCR 2.107(C)(4).

(C) Petitioner, Service Not Required. For service of notice of hearing on a petition, the petitioner, although otherwise an interested person, is presumed to have waived notice and consented to the petition, unless the petition expressly indicates that the petitioner does not waive notice and does not consent to the granting of the requested prayers without a hearing. Although a petitioner or a fiduciary may in fact be an interested

person, the petitioner need not indicate, either by written waiver or proof of service, that the petitioner has received a copy of any paper required by these rules to be served on interested persons.

(D) Service on Persons Under Legal Disability or Otherwise Legally Represented. In a guardianship or conservatorship proceeding, a petition or notice of hearing asking for an order that affects the ward or protected individual must be served on that ward or protected individual if he or she is 14 years of age or older. In all other circumstances, service on an interested person under legal disability or otherwise legally represented must be made on the following:

(1) The guardian of an adult, conservator, or guardian ad litem of a minor or other legally incapacitated individual, except with respect to:

(a) a petition for commitment or

(b) a petition, account, inventory, or report made as the guardian, conservator, or guardian ad litem.

(2) The trustee of a trust with respect to a beneficiary of the trust, except that the trustee may not be served on behalf of the beneficiary on petitions, accounts, or reports made by the trustee as trustee or as personal representative of the settlor's estate.

(3) The guardian ad litem of any ~~unascertained or unborn~~ person, including an unascertained or unborn person, except as otherwise provided in subrule (D)(1).

(4)-(6) [Unchanged.]

For purposes of service, an emancipated minor without a guardian or conservator is not deemed to be under legal disability.

(E) [Unchanged.]

RULE 5.125. INTERESTED PERSONS DEFINED.

(A) [Unchanged.]

(B) Special Conditions for Interested Persons.

(1)-(2) [Unchanged.]

(3) Trust as Devisee. If either a trust or a trustee is a devisee, the trustee is the interested person. If no trustee has qualified, the interested persons are the ~~current~~ qualified trust beneficiaries described in MCL 700.7103(g)(i) and the nominated trustee, if any.

(4)-(5) [Unchanged.]

(C) Specific Proceedings. Subject to subrules (A) and (B) and MCR 5.105(E), the following provisions apply. When a single petition requests multiple forms of relief, the petitioner must give notice to all persons interested in each type of relief:

(1) The persons interested in an application or a petition to probate a will are the

(a) devisees,

(b) nominated trustee and ~~current~~ qualified trust beneficiaries described in MCL 700.7103(g)(i) of a trust createdunder the will,

(c) heirs,

(d) nominated personal representative, and

(e) trustee of a revocable trust described in MCL ~~700.7501(1)~~700.7605(1).

(2) The persons interested in an application or a petition to appoint a personal representative, other than a special personal representative, of an intestate estate are the

(a) heirs,

(b) nominated personal representative, and

(c) trustee of a revocable trust described in MCL ~~700.7501(1)~~700.7605(1).

(3) The persons interested in a petition to determine the heirs of a decedent are the presumptive heirs.

(4) The persons interested in a petition of surety for discharge from further liability are the

(a) principal on the bond,

(b) co-surety,

(c) devisees of a testate estate,

(d) heirs of an intestate estate,

(e) qualified trust beneficiaries, as referred to in MCL 700.7103(g)(i),

~~(e)~~(f) protected person and presumptive heirs of the protected person in a conservatorship, and

~~(f)~~(g) claimants.

(5) [Unchanged.]

(6) The persons interested in a proceeding for examination of an account of a fiduciary are the:

(a) devisees of a testate estate, and if one of the devisees is a trustee or a trust, the persons referred to in MCR 5.125(B)(3),

(b) heirs of an intestate estate,

(c) protected person and presumptive heirs of the protected person in a conservatorship,

(d) ward and presumptive heirs of the ward in a guardianship,

(e) claimants,

(f) settlor of a revocable trust,

(g) if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual, those persons who are entitled to be reasonably informed, as referred to in MCL 700.7603(2),ul;0

(h) current trustee,

~~(f)~~ (i) current qualified trust beneficiaries described in MCL 700.7103(g)(i), for~~in~~ a trust accounting, and

~~(g)~~(j) other persons whose interests would be adversely affected by the relief requested, including insurers and sureties who might be subject to financial obligations as the result of the approval of the account.

(7)-(31) [Unchanged.]

(32) Subject to the provisions of Part 3 of Article VII of the Estates and Protected Individuals Code, the persons interested in the modification or termination of a noncharitable irrevocable trust are:

(a) the qualified trust beneficiaries affected by the relief requested,

(b) the settlor,

(c) if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual, the settlor's representative, as referred to in MCL 700.7411(6);

(d) the trust protector, if any, as referred to in MCL 700.7103(n),

(e) the current trustee, and

(f) any other person named in the terms of the trust to receive notice of such a proceeding.

~~(32)~~(33) Subject to the provisions of Part 3 of Article VII of the Estates and Protected Individuals Code, the~~The~~ persons interested in a proceeding affecting a trust other than those already covered by subrules (C)(6), and (C)(28), and (C)(32) are:

(a) the qualified trust beneficiaries affected by the relief requested,

(b) the holder of a power of appointment affected by the relief requested,

~~(b)~~(c) the current trustee,

~~(c)~~(d) in a proceeding to appoint a trustee, the proposed ~~successor~~ trustee, ~~if any, and~~

~~(d) other persons whose interests are affected by the relief requested.~~

(e) the trust protector, if any, as referred to in MCL 700.7103(n),

(f) the settlor of a revocable trust, and

(g) if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual, those persons who are entitled to be reasonably informed, as referred to in MCL 700.7603(2).

(D)-(E) [Unchanged.]

RULE 5.201. APPLICABILITY.

Except for MCR 5.204 and MCR 5.208, which apply in part to trustees and trusts, rules~~Rules~~ in this subchapter contain requirements applicable to all fiduciaries except trustees and apply to all estates except trusts.

RULE 5.208. NOTICE TO CREDITORS, PRESENTMENT OF CLAIMS. (this entire proposed rule is new).

(A) Publication of Notice to Creditors; Contents. Unless the notice has already been given, the personal representative must publish, and a special personal representative may publish, in a newspaper, as defined by MCR 2.106(F), in a county in which a resident decedent was domiciled or in which the proceeding as to a nonresident was initiated, a notice to creditors as provided in MCL 700.3801. The notice must include:

(1) The name, and, if known, last known address, date of death, and date of birth of the decedent;

(2) The name and address of the personal representative;

(3) The name and address of the court where proceedings are filed; and

(4) A statement that claims will be forever barred unless presented to the personal representative, or to both the court and the personal representative within 4 months after the publication of the notice.

(B) Notice to Known Creditors and Trustee. A personal representative who has published notice must cause a copy of the published notice or a

similar notice to be served personally or by mail on each known creditor of the estate and to the trustee of a trust of which the decedent is settlor, as defined in MCL 700.7605(1). Notice need not be served on the trustee if the personal representative is the trustee.

(1) Within the time limits prescribed by law, the personal representative must cause a copy of the published notice or a similar notice to be served personally or by mail on each creditor of the estate whose identity at the time of publication or during the 4 months following publication is known to, or can be reasonably ascertained by, the personal representative.

(2) If, at the time of the publication, the address of a creditor is unknown and cannot be ascertained after diligent inquiry, the name of the creditor must be included in the published notice.

(C) Publication of Notice to Creditors and Known Creditors by Trustee. A notice that must be published under MCL 700.7608 must include:

(1) The name, and, if known, last known address, date of death, and date of birth of the trust's deceased settlor;

(2) The trust's name or other designation;

(3) The date the trust was established;

(4) The name and address of each trustee serving at the time of or as a result of the settlor's death;

(5) The name and address of the trustee's attorney, if any

and must be served on known creditors as provided in subrule (B) above.

(D) No Notice to Creditors. No notice need be given to creditors in the following situations:

(1) The decedent or settlor has been dead for more than 3 years;

(2) Notice need not be given to a creditor whose claim has been presented or paid;

(3) For a personal representative:

(a) The estate has no assets;

(b) The estate qualifies and is administered under MCL 700.3982, MCL 700.3983, or MCL 700.3987;

(c) Notice has previously been given under MCL 700.7608 in the county where the decedent was domiciled in Michigan.

(4) For a trustee, the costs of administration equal or exceed the value of the trust estate.

(E) Presentment of Claims. A claim shall be presented to the personal representative or trustee by mailing or delivering the claim to the personal representative or trustee, or the attorney for the personal representative or trustee, or, in the case of an estate, by filing the claim with the court and mailing or delivering a copy of the claim to the personal representative.

(F) A claim is considered presented

(1) on mailing, if addressed to the personal representative or trustee, or the attorney for the personal representative or trustee, or

(2) in all other cases, when received by the personal representative, or trustee or the attorney for the personal representative or trustee or in the case of an estate when filed with the court.

For purposes of this subrule (F), personal representative includes a proposed personal representative.

~~RULE 5.306 .NOTICE TO CREDITORS, PRESENTMENT OF CLAIMS.~~

~~(A) Publication of Notice to Creditors; Contents. Unless the notice has already been given, the personal representative must publish, and a special personal representative may publish, in a newspaper, as defined by MCR 2.106(F), in a county in which a resident decedent was domiciled or in which the proceeding as to a nonresident was initiated, a notice to creditors as provided in MCL 700.3801. The notice must include:~~

~~(1) The name, and, if known, last known address, date of death, and date of birth of the decedent;~~

~~(2) The name and address of the personal representative;~~

~~(3) The name and address of the court where proceedings are filed; and~~

~~(4) A statement that claims will be forever barred unless presented to the personal representative, or to both the court and the personal representative within 4 months after the publication of the notice.~~

~~(B) Notice to Known Creditors and Trustee. A personal representative who has published notice must cause a copy of the published notice or a similar notice to be served personally or by mail on each known creditor of the estate and to the trustee of a trust of which the decedent is settlor, as defined in MCL 700.7501(1). Notice need not be served on the trustee if the personal representative is the trustee.~~

~~(1) Within the time limits prescribed by law, the personal representative must cause a copy of the published notice or a similar notice to be served personally or by mail on each creditor of the estate whose identity at the time of publication or during the 4 months following publication is known to, or can be reasonably ascertained by, the personal representative.~~

~~(2) If, at the time of publication, the address of a creditor is unknown and cannot be ascertained after diligent inquiry, the name of the creditor must be included in the published notice.~~

~~(C) No Notice to Creditors. No notice need be given to creditors in the following situations:~~

~~(1) The estate has no assets;~~

~~(2) The estate qualifies and is administered under MCL 700.3982, MCL 700.3983, or MCL 700.3987;~~

~~(3) The decedent has been dead for more than 3 years;~~

~~(4) Notice has previously been given under MCL 700.7504 in the county where the decedent was domiciled in Michigan.~~

~~Notice need not be given to a creditor whose claim has been presented or paid.~~

~~(D) Presentment of Claims. A claim shall be presented to the personal representative by mailing or delivering the claim to the personal repre-~~

~~sentative, or the personal representative's attorney, or by filing the claim with the court and mailing or delivering a copy of the claim to the personal representative.~~

~~(E) A claim is considered presented~~

~~(1) on mailing, if addressed to the personal representative or the personal representative's attorney, or~~

~~(2) in all other cases, when received by the personal representative or the personal representative's attorney or when filed with the court.~~

~~For purposes of this subrule, personal representative includes a proposed personal representative.~~

RULE 5.501. TRUST PROCEEDINGS IN GENERAL

(A) Applicability. This subchapter applies to all trusts as defined in MCL ~~700.1107(m)~~700.1107(n), including a trust established under a will and a trust created by court order or a separate document.

(B) Unsupervised Administration of Trusts. Unless an interested person invokes court jurisdiction, the administration of a trust shall proceed expeditiously, consistent with the terms of the trust, free of judicial intervention and without court order, approval, or other court action. Neither registration nor a proceeding concerning a trust results in continued supervisory proceedings.

(C) Commencement of Trust Proceedings. A proceeding concerning a trust is commenced by filing a petition ~~in the court where the trust is or could be properly registered~~. Registration of the trust is not required for filing a petition.

(D) Appointment of Trustee not Named in Creating Document. An interested person may petition the court for appointment of a trustee when there is a vacancy in a trusteeship. ~~the order, will, or other document creating a trust does not name a trustee or when the person named in the creating document is either not available or cannot be qualified as trustee. The petitioner must give notice of hearing on the petition to the interested persons.~~ The court may issue an order appointing as trustee the person nominated in the petition or another person. The order must state whether the trustee must file a bond or execute an acceptance.

(E) Qualification of Trustee. A trustee appointed by an order of the court~~,~~ or nominated as a trustee in a will that has been admitted to probate ~~or nominated as a successor in a document other than a will that created a trust~~ shall qualify by executing an acceptance indicating the nominee's willingness to serve. The trustee must serve the acceptance and order, if any, on the then known ~~current~~ qualified trust beneficiaries described in MCL 700.7103(g)(i) and, in the case of a testamentary trustee, on the personal representative of the decedent estate, if one has been appointed. No letters of trusteeship shall be issued by the court. The trustee or the attorney for the trustee may establish the trustee's incumbency by executing an affidavit to that effect, identifying the trustee and the trust ~~document~~ and indicating that any required bond has been filed with the court and is in force.

(F) Transitional Rule. A trustee of a trust under the jurisdiction of the court before April 1, 2000, may request an order of the court closing court

supervision and the file. On request by the trustee or on its own initiative, the court may order the closing of supervision of the trust and close the file. The trustee must give notice of the order to all current trust beneficiaries. Closing supervision does not preclude any interested trust beneficiary from later petitioning the court for supervision. Without regard to whether the court file is closed, all letters of authority for existing trusts are canceled as of April 1, 2000, and the trustee's incumbency may be established in the manner provided in subrule (E).

~~RULE 5.503 NOTICE TO CREDITORS BY TRUSTEE OF REVOCABLE INTER VIVOS TRUST.~~

~~(A) Place of Publication, Proof. A notice that must be published under MCL 700.7504 must be published in a newspaper as defined by MCR 2.106(F) in the county in which the settlor was domiciled at the time of death. No proof of publication need be filed in connection with unsupervised administration of a trust.~~

~~(B) When Notice is not Required. The trustee of a revocable inter vivos trust is not required to give notice to creditors in the following situations:~~

~~(1) The costs of trust administration equal or exceed the value of the trust estate, or~~

~~(2) The settlor has been dead for more than 3 years.~~

RULE 5.801. APPEALS TO OTHER COURTS.

(A) Right to Appeal. An interested person aggrieved by an order of the probate court may appeal as provided by this rule.

(B) Orders Appealable to Court of Appeals. Orders appealable of right to the Court of Appeals are defined as and limited to the following:

(1) a final order affecting the rights or interests of a party to a civil action commenced in the probate court under MCR 5.101(C);

~~(1)~~(2) a final order affecting the rights or interests of an interested person in a proceeding involving a decedent estate, the estate of a person who has disappeared or is missing, a conservatorship or other protective proceeding, the estate of an individual with developmental disabilities, or an inter vivos trust or a ~~testamentary~~ trust created under a will. These are defined as and limited to orders resolving the following matters:

(a) appointing or removing a personal representative, conservator, ~~or~~ trustee, or trust protector as referred to in MCL 700.7103(n), or denying such an appointment or removal;

(b) admitting or denying to probate of a will, codicil, or other testamentary instrument;

(c) determining the validity of a governing instrument;

~~(c)~~(d) interpreting or construing a ~~testamentary~~ governing instrument ~~or inter vivos trust~~;

~~(d)~~(e) approving or denying a settlement ~~of a contest~~ relating to ~~an inter vivos trust or a testamentary~~ a governing instrument;

(f) reforming, terminating, or modifying or denying the reformation, termination or modification of a trust;

(g)granting or denying a petition to consolidate or divide trusts;

~~(e)~~(h) discharging or denying the discharge of a surety on a bond from further liability;

~~(f)~~(i) allowing, ~~or rejecting~~disallowing, or denying a claim~~s~~;

~~(g)~~(j) assigning, selling, leasing, or encumbering any of the assets of an estate or trust;

~~(h)~~(k) authorizing or denying the continuation of a business;

~~(i)~~(l) determining special allowances in a decedent's estate such as a homestead allowance, an exempt property allowance, or a family allowance~~, or right to remain in a dwelling~~;

~~(j)~~(m) authorizing or denying rights of election;

~~(k)~~(n) determining heirs, ~~or~~ devisees, or beneficiaries;

~~(l)~~(o) determining title to or ~~claims to~~rights or interests in property;

~~(m)~~(p) authorizing or denying partition of property;

~~(n)~~(q) authorizing or denying specific performance;

~~(o)~~(r) ascertaining survivorship of parties;

~~(p)~~(s) granting or denying a petition to bar a mentally incompetent or minor wife from dower in the property of her living husband;

~~(q)~~(t) granting or denying a petition to determine *cy pres;*

~~(r)~~(u) directing or denying the making or repayment of distributions;

~~(s)~~(v) determining or denying a constructive trust;

~~(t)~~(w)determining or denying an oral contract relating to a will;

~~(u)~~(x) allowing or disallowing an account, fees, or administration expenses;

~~(v)~~(y)surcharging or refusing to surcharge a fiduciary or trust protector as referred to in MCL 700.7103(n);

~~(w)~~(z)determining or directing payment or ~~authorizing federal estate tax~~ apportionment of taxes;

~~(x)~~(aa) distributing proceeds recovered for wrongful death under MCL 600.2922;

~~(y) determining or directing payment of inheritance taxes~~;

~~(z)~~(bb) assigning residue;

(~~aa~~cc) granting or denying a petition for instructions;

(~~bb~~dd)authorizing disclaimers;~~.~~

(ee) allowing or disallowing a trustee to change the principal place of a trust's administration;

~~(2)~~(3)other appeals as may be hereafter provided by statute.

(C)-(F) [Unchanged.]

RULE 5.802. APPELLATE PROCEDURE; STAYS PENDING APPEAL .

(A) Procedure. Except as modified by this subchapter, chapter 7 of these rules governs appeals from the probate court.

(B) Record.

(1) An appeal from the probate court is on the papers filed and a written transcript of the proceedings in the probate court or on a record settled and agreed to by the parties and approved by the court. ~~The appeal is not de novo.~~

(2) The probate register may transmit certified copies of the necessary documents and papers in the file if the original papers are needed for

further proceedings in the probate court. The parties shall not be required to pay for the copies as costs or otherwise.

(C) [Unchanged.]

Staff Comment: These proposed changes, submitted by the Probate and Estate Planning Council of the State Bar of Michigan and the Michigan Probate Judges Association, have been designed so that the rules would conform to recently-enacted statutory changes creating the Michigan Trust Code. The proposed amendments would correct and insert cross-references to the applicable statutory provisions, and make other technical changes. In addition, proposed new MCR 5.208 would incorporate the notice requirements for both decedent estates and trusts currently contained in MCR 5.306 and MCR 5.503, and would replace those rules.

The staff comment is not an authoritative construction by the 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 these proposals may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2010, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2009-26. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered February 16, 2010:

PROPOSED AMENDMENT OF RULE 8.120 OF THE MICHIGAN COURT RULES.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 8.120 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

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 are indicated by underlining and deletions are indicated by strikeover.]

RULE 8.120. LAW STUDENTS AND RECENT GRADUATES; PARTICIPATION IN LEGAL AID CLINICS, DEFENDER OFFICES, AND LEGAL TRAINING PROGRAMS.

(A)-(C) [Unchanged.]

(D) Scope; Procedure.

(1) A member of the legal aid clinic, in representing an indigent person, is authorized to advise the person and to negotiate and appear on the person's behalf in all Michigan courts except the ~~Court of Appeals and the~~ Supreme Court.

(2) Representation must be conducted under the supervision of a state bar member. Supervision by a state bar member includes the duty to examine and sign all pleadings filed. It does not require the state bar member to be present

(a) while a law student or graduate is advising an indigent person or negotiating on the person's behalf, or

(b) during a courtroom appearance of a law student or graduate, except in a criminal or juvenile case exposing the client to a penalty of more than 6 months.

(3) A law student or graduate may not appear in a case in a Michigan court without the approval of the judge ~~of that court~~ or a majority of the panel of judges to which the case is assigned. If the judge or a majority of the panel grants approval, the judge or a majority of the panel may suspend the proceedings at any stage if the judge or a majority of the panel ~~he or she~~ determines that the representation by the law student or graduate

(a) is professionally inadequate, and

(b) substantial justice requires suspension.

In the Court of Appeals, a request for a law student or graduate to appear at oral argument must be submitted by motion to the panel that will hear the case. The panel may deny the request or establish restrictions or other parameters for the representation on a case-by-case basis.

(4) A law student or graduate serving in a prosecutor's, county corporation counsel's, city attorney's, or Attorney General's program may be authorized to perform comparable functions and duties assigned by the prosecuting attorney, county attorney, city attorney, or Attorney General, except that

(a) the law student or graduate is subject to the conditions and restrictions of this rule; and

(b) the law student or graduate may not be appointed as an assistant prosecutor, assistant corporation counsel, assistant city attorney, or assistant Attorney General.

Staff Comment: Under this proposal, a law student or recent law graduate who is a member of a legal aid clinic would be eligible to appear on behalf of a client in the Court of Appeals. The appearance would require the same protections that now exist, i.e., supervision by a licensed attorney who signs all pleadings, and approval by a majority of the judges of the assigned panel.

The staff comment is not an authoritative construction by the 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 these proposals may be sent to the Supreme Court Clerk in writing or electronically by June 1, 2010, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov.

When filing a comment, please refer to ADM File No. 2009-25. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

YOUNG, J. (*concurring*). I share the concerns Justice MARKMAN raises about the extension of the "student advocate" program to the Court of Appeals. Were it not for the fact that the judges of the Court of Appeals expressed an interest in having this proposal published for comment, I would have opposed it. The quality of advocacy by *licensed* attorneys at both the Court of Appeals and the Supreme Court remains a concern even without extending the ability to appear before an appellate court to unlicensed persons. (I note that some jurisdictions require special qualification for licensed attorneys to appear in appellate courts.) My agreement to publish this proposal in no way ensures that I will ultimately support its enactment. However, I am interested in seeing the responses to the issues Justice MARKMAN raises from those who support the student advocate program.

MARKMAN, J. (*dissenting*). I would not publish the proposed amendments to MCR 8.120, allowing law students to argue before the Michigan Court of Appeals. An ongoing responsibility of this Court by its supervision of the Michigan State Bar, the Attorney Grievance Commission, and the Attorney Discipline Board, as well as by its final appellate review of the decisions of all other courts in this state, is to enhance the quality of legal representation. I do not believe that extending authority to law students to argue before our second-highest court carries out this responsibility. Rather, I believe this achieves the opposite result. It is not to disparage the outstanding law schools of Michigan, or the caliber of their students, to observe that law students have not yet completed their education or learned their profession, they have not yet been judged competent to practice law through the examination process of our state, they have not yet undertaken an oath promising to comply with standards of conduct of the legal profession, and they have garnered none of the experience and perspective that, with very few exceptions, characterizes lawyers who are participants in our appellate process.

In addition to this overriding concern, I have the following specific difficulties with the proposed amendments:

(1) These amendments delegate Michigan's standards of professional competency and character for lawyers from the people of this state acting through the elected Justices of this Court, to public and private law schools.

(2) I view as meaningless the requirement that "a majority of the panel of judges to which the case is assigned" must first approve the student's representation. Given that the proposed amendments are premised upon the proposition that students are eligible to participate in appellate argument, what conceivable basis would a judge have for determining that second-year student John or Mary Doe could not participate in an appeal? Would such judge be expected to review the student's grades, or consult with his or her professors, or scrutinize the student's LSAT scores? Unlike in the case of a member of the Bar, there would be no background investigations available, no character assess-

ments, no disciplinary histories, no previous court appearances, and no private sources of evaluation, such as Martindale-Hubbell ratings.

(3) Disproportionately, the clients of these law students would be indigent persons who would effectively become 'guinea pigs' in an experiment allowing non-lawyers to participate in a process in which, in my judgment, there is the greatest need for trained and experienced lawyers.

(4) Law student representation may well afford additional grounds for unsuccessful criminal appellants to raise claims of constitutionally ineffective assistance of counsel, regardless of the validity of such arguments.

(5) Standards for law student participation in the appellate process that rely upon student grades, as do the proposed amendments: (a) fail to distinguish between the disparate grading policies of different law schools; (b) risk intruding the Justices of this Court in scrutinizing this grading process; and (c) threaten the integrity of the grading process by incentivizing more lenient grading standards in order not to deprive students of their eligibility to participate in appellate arguments.

(6) The premise of current rules pertaining to law student participation in "legal aid clinics, defender offices, and legal training programs" is that as potential penalties increase, the amount of supervision should increase, see e.g., MCR 8.120(D)(2)(b), and that in the most serious cases an actual lawyer should be present. It seems anomalous then, under the proposed amendments, that law students should now be allowed to participate in the most serious cases in the Court of Appeals with a diminished opportunity for further appeal, under circumstances in which even the presence of a member of the bar would have the least possible effect in rectifying a serious error made during oral argument by the student.

(7) However much assistance and supervision law students receive from professors, or members of the bar, in preparing for appellate argument, in the end what they say in court, and what they say in response to questioning from judges, carries enormous and often irreparable consequences for their 'clients.' Given the relatively small number of Court of Appeals decisions that are eventually heard on appeal by the Michigan Supreme Court, I believe the stakes are too great to allow parties in the Court of Appeals to be represented by law students.

(8) Finally, I am concerned about the blurred sense of professional, ethical, and disciplinary accountability between law students and supervising lawyers as to appeals pursued under the amended rule. I am concerned that the law student is not subject to standards otherwise applicable to all lawyers, and I would be equally concerned that, if the student *is* deemed to be subject to these standards, the impact upon the student of being found to be in violation would be damaging on a long-term basis.

Order Entered March 16, 2010:

PROPOSED AMENDMENT OF RULE 6.201 OF THE MICHIGAN COURT RULES.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.201 of the Michigan Court Rules. Before

determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

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 are indicated by underlining and deletions are indicated by strikeover.]

RULE 6.201. DISCOVERY.

(A) Mandatory Disclosure. In addition to disclosures required by provisions of law other than MCL 767.94a, a party upon request must provide all other parties:

(1) the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview; the witness list may be amended without leave of the court no later than 28 days before trial;

(2) any written or recorded statement, including electronically recorded statements, pertaining to the case by a lay witness whom the party may call at trial, except that a defendant is not obliged to provide the defendant's own statement;

(3) the curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion;

(4) any criminal record that the party may use at trial to impeach a witness;

(5) a description or list of criminal convictions, known to the defense attorney or prosecuting attorney, of any witness whom the party may call at trial; and

(6) a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial, including any document, photograph, or other paper, with copies to be provided on request. A party may request a hearing regarding any question of costs of reproduction. On good cause shown, the court may order that a party be given the opportunity to test without destruction any tangible physical evidence.

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

(1) any exculpatory information or evidence known to the prosecuting attorney;

(2) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation;

(3) any written or recorded statements, including electronically recorded statements, by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial;

(4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and

(5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

(C)-(J) [Unchanged.]

(K) Except as otherwise provided in MCR 2.302(B)(6), electronic materials are to be treated in the same manner as nonelectronic materials under this rule.

Staff Comment: This amendment requires prosecutors to provide to defendants any electronic recording made by governmental agencies pertaining to the case known to the prosecutor.

The staff comment is not an authoritative construction by the 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 these proposals may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2010, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-38. Your comments and the comments of others will be posted at <http://www.courts.mi.gov/supremecourt/resources/administrative/index.htm. than grants and denials of leave to appeal from the Court of Appeals) of general interest to the bench and bar of the state.

Order Entered March 22, 2010:

PROPOSED ADMINISTRATIVE ORDER NO. 2010-X.

PROPOSAL TO RESCIND ADMINISTRATIVE ORDER NO. 2003-7 AND ADOPT ADMINISTRATIVE ORDER NO. 2010-X (CASEFLOW MANAGEMENT GUIDELINES).

On order of the Court, this is to advise that the Court is considering adopting the following proposed order and rescinding Administrative Order 2003-7. 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 be considered at a public hearing by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website, www.courts.michigan.gov/supremecourt.

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 proposals in their present form.

[This proposal is based on Administrative Order No. 2003-7. Additions are shown in underlining and deletions are shown in strikeover.]

The management of the flow of cases in the trial court is the responsibility of the judiciary. In carrying out that responsibility, the judiciary must balance the rights and interests of individual litigants, the limited resources of the judicial branch and other participants in the justice system, and the interests of the citizens of this state in having an effective, fair, and efficient system of justice.

Accordingly, on order of the Court,

A. The State Court Administrator is directed, within available resources, to:

1. assist trial courts in implementing caseflow management plans that incorporate case processing time guidelines established pursuant to this order;

2. gather information from trial courts on compliance with caseflow management guidelines; and

3. assess the effectiveness of caseflow management plans in achieving the guidelines established by this order.

B. Trial courts are directed to:

1. maintain current caseflow management plans consistent with case processing time guidelines established in this order, and in cooperation with the State Court Administrative Office;

2. report to the State Court Administrative Office caseflow management statistics and other caseflow management data required by that office; and

3. cooperate with the State Court Administrative Office in assessing caseflow management plans implemented pursuant to this order.

Trial courts are directed to report caseflow management statistics and data to enable the State Court Administrative Office to assist trial courts in improving caseflow management. The State Court Administrative Office does not intend to use these data in a punitive fashion or to publish these data for public review.

On further order of the Court, the following time guidelines for case processing are provided as goals for the administration of court caseloads. These are only guidelines and are not intended to supersede procedural requirements in court rules or statutes for specific cases, or to supersede reporting requirements in court rules or statutes. The Court does not encourage or condone the practice of trial courts dismissing cases for the sole reason that the case is likely to exceed the guideline. In addition, these guidelines do not supplant judicial discretion if, for good cause shown, a specific case of any type requires a time line that extends beyond the maximum permitted under these guidelines.

Note: The phrase "adjudicated" refers to the date a case is reported in Part 2 of the caseload report forms and instructions. Aging of a case is suspended for the time a case is inactive as defined in Parts 2 and 4 of the caseload report forms and instructions. Refer to these specific definitions for details.

Matters Submitted to the Judge. Matters under submission to a judge or judicial officer should be promptly determined. Short deadlines should be set for presentation of briefs and affidavits and or production of transcripts. Decisions, when possible, should be made from the bench of within a few days of submission; otherwise a decision should be rendered no later than 35 days after submission.

Probate Court Guidelines.

1. *Estate, Trust, Guardianship, and Conservatorship Proceedings*. 75% of all contested matters should be adjudicated within 182 days from the date of the filing of objection~~; 90% within 273 days;~~ and 100% within 364 days~~ except for individual cases in which the court determines exceptional circumstances exist and for which a continuing review should occur.~~

2. *Mental Illness Proceedings; Judicial Admission Proceedings*. 90% of all petitions should be adjudicated within ~~14~~7 days from the date of filing and 100% within 28 days.

3. *Civil Proceedings*. 75% of all cases should be adjudicated within 364 days from the date of case filing~~; 95% within 546 days;~~ and 100% within 728 days~~ except for individual cases in which the court determines exceptional circumstances exist and for which a continuing review should occur.~~

~~4. *Miscellaneous Proceedings*. 100% of all petitions should be adjudicated within 35 days from the date of filing.~~

District Court Guidelines.

1. *Civil Proceedings.*

a. General Civil. 90% of all general civil and miscellaneous civil cases should be adjudicated within 273 days from the date of case filing~~; 98% within 364 days; and 100% within 455 days except for individual cases in which the court determines exceptional circumstances exist and for which a continuing review should occur.~~

b. Summary Civil. 100% of all small claims, landlord/tenant, and land contract actions should be adjudicated within 126 days from the date of case filing except, in those cases where a jury is demanded, actions should be adjudicated within 154 days from the date of case filing.

2. *Felony, Misdemeanor, and Extradition Detainer Proceedings.*

a. Misdemeanor. 90% of all statute and ordinance misdemeanor cases, including misdemeanor drunk driving and misdemeanor traffic, should be adjudicated within 63 days from the date of first appearance~~; 98% within 91 days; and 100% within 126 days.~~

b. Felony and Extradition/Detainer. ~~100~~80% of all preliminary examinations in felony, felony drunk driving, felony traffic, and extradition/detainer cases should be ~~commenced~~concluded within 14 days of arraignment and 100% within 28 days~~ unless good cause is shown~~.

3. *Civil Infraction Proceedings*. 90% of all civil infraction cases, including traffic, nontraffic, and parking cases, should be adjudicated within 35 days from the date of filing~~; 98% within 56 days;~~ and 100% within 84 days.

Circuit Court Guidelines.

1. *Civil Proceedings*. 75% of all cases should be adjudicated within 364 days from the date of case filing~~; 95% within 546 days;~~ and 100% within

728 days~~ except for individual cases in which the court determines exceptional circumstances exist and for which a continuing review should occur~~.

2. *Domestic Relations Proceedings.*

a. Divorce Without Children. 90% of all divorce cases without children should be adjudicated within ~~91~~182 days from the date of case filing~~; 98% within 273 days;~~ and 100% within 364 days.

b. Divorce With Children. 90% of all divorce cases with children should be adjudicated within ~~245~~301 days from the date of case filing~~; 98% within 301 days;~~ and 100% within 364 days.

c. Paternity. 90% of all paternity cases should be adjudicated within 147 days from the date of case filing and 100% within 238 days.

~~d. Responding Interstate for Registration. 100% of all incoming interstate actions should be filed within 24 hours of receipt of order from initiating state.~~

~~e.~~d. Responding Interstate Establishment. 90% of all incoming interstate actions to establish support should be adjudicated within 147 days from the date of case filing and 100% within 238 days.

~~f.~~e. Child Custody Issues, Other Support, and Other Domestic Relations Matters. 90% of all child custody, other support, and other domestic relations issues not listed above should be adjudicated within 147 days from the date of case filing and 100% within 238 days.

3. *Delinquency Proceedings*. Where a minor is being detained or is held in court custody, 90% of all original petitions or complaints should have adjudication and disposition completed within 84 days from the authorization of the petition and 100% within 98 days. Where a minor is not being detained or held in court custody, 75% of all original petitions or complaints should have adjudication and disposition completed within 119 days from the authorization of the petition~~; 90% within 182 days;~~ and 100% within 210 days.

4. *Child Protective Proceedings*. Where a child is in out-of-home placement (foster care), 90% of all original petitions should have adjudication and disposition completed within 84 days from the authorization of the petition and 100% within 98 days. Where a child is not in out-of-home placement (foster care), 75% of all original petitions should have adjudication and disposition within 119 days from the authorization of the petition~~; 90% within 182 days;~~ and 100% within 210 days.

5. *Designated Proceedings*. 90% of all original petitions should be adjudicated within 154 days from the designation date and 100% within 301 days. Minors held in custody should be afforded priority for trial.

6. *Juvenile Traffic and Ordinance Proceedings*. 90% of all citations should have adjudication and disposition completed within 63 days from the date of first appearance~~; 98% within 91 days;~~ and 100% within 126 days.

7. *Adoption Proceedings.*

a. Petitions for Adoption. 90% of all petitions for adoption should be finalized or otherwise concluded within 287 days from the date of filing and 100% within 364 days.

b. Petitions to Rescind Adoption. 100% of all petitions to rescind adoption should be adjudicated within 91 days from the date of filing.

8. *Miscellaneous Family Proceedings.*

a. Name Change. 100% of all petitions should be adjudicated within ~~91~~126 days from the date of filing.

b. Safe Delivery. 100% of all petitions should be adjudicated within 273 days from the date of filing.

c. Personal Protection. 100% of all petitions filed ex parte should be adjudicated within 24 hours of filing. 90% of all petitions not filed ex parte should be adjudicated within 14 days from the date of filing and 100% within 21 days.

d. Emancipation of Minors. 100% of all petitions should be adjudicated within 91 days from the date of filing.

e. Infectious Diseases. 100% of all petitions should be adjudicated within 91 days from the date of filing.

f. Parental Waiver. 100% of all petitions should be adjudicated within 5 days from the date of filing.

9. *Ancillary Proceedings.*

a. Guardianship and Conservatorship Proceedings. 75% of all contested matters should be adjudicated within 182 days from the date of filing~~; 90% within 273 days;~~ and 100% within 364 days.

b. Mental Illness Proceedings; Judicial Admission. 90% of all petitions should be adjudicated within ~~14~~7 days from the date of filing and 100% within 28 days.

10. *Criminal Proceedings*. 90% of all felony cases should be adjudicated within ~~91~~154 days from the date of entry of the order binding the defendant over to the circuit court~~; 98% within 154 days;~~ and 100% within 301 days. Incarcerated persons should be afforded priority for trial.

11. *Appellate, Administrative Review, and Extraordinary Writ Proceedings.*

a. Appeals from Courts of Limited Jurisdiction. 100% of all appeals to circuit court from courts of limited jurisdiction should be adjudicated within 182 days from the filing of the claim of appeal.

b. Appeals from Administrative Agencies. 100% of all appeals to the circuit court from administrative agencies should be adjudicated within 182 days from the filing of the claim of appeal.

c. Extraordinary Writs. 98% of all extraordinary writ requests should be adjudicated within 35 days from the date of filing and 100% within 91 days.

~~12. *Matters Submitted to the Judge.* Matters under submission to a judge or judicial officer should be promptly determined. Short deadlines should be set for presentation of briefs and affidavits and for production of transcripts. Decisions, when possible, should be made from the bench or within a few days of submission; otherwise a decision should be rendered no later than 35 days after submission.~~

Staff Comment: This proposal would update the guidelines contained in Administrative Order 2003-7. The following list summarizes the changes that would be made by the proposed order.

1. Add to the beginning of the order language about good cause for delays and remove related language from specific case categories.

2. Move to the beginning of the order language about matters submitted to judge (this language currently exists at the end of the order).

3. Eliminate all interim guidelines, leaving only initial and final guidelines.

4. Decrease time for adjudicating 90% of mental illness petitions from 14 to 7 days. This time frame would apply to probate and circuit courts.

5. Eliminate guidelines for miscellaneous cases in probate court.

6. Decrease the percentage for preliminary examinations within 14 days from 100% to 80%. Add a 100% guideline for conclusion within 28 days. Extend the goals to include both commencement and conclusion of the examination.

7. Increase the time for adjudicating 90% of divorce cases without children from 91 to 182 days.

8. Increase the time for adjudicating 90% of divorce cases with children from 245 to 301 days.

9. Eliminate guidelines for responding interstate registration cases.

10. Increase the time for adjudicating name change from 91 to 126 days.

11. Increase the time for adjudicating 90% of felony cases from 91 to 154 days.

The staff comment is not an authoritative construction of the 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 these proposals may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2010, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-08. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

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