

# MANUAL FOR DISTRICT COURT PROBATION OFFICERS

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# **Chapter 1: Probation Overview**

## **1-01 Introduction**

### **A. Authority and Responsibility**

The Michigan Constitution of 1963 provides for a uniform state court system headed by the Michigan Supreme Court. The Constitution provides for the following levels of courts: Michigan Supreme Court, Michigan Court of Appeals, circuit courts, district courts, municipal courts, and probate courts. MCR 8.110 and MCL 600.8271 authorize the chief judge of the court to hire, supervise, and discharge employees of the court.

The district court has exclusive jurisdiction over all civil litigation up to \$25,000.00. MCL 600.8301(1). It also handles garnishment and eviction proceedings. In the criminal area, the district court has jurisdiction over all misdemeanors where punishment does not exceed one year, and arraignment, probable cause conferences, and preliminary examination in felony cases. The district court also sets and accepts bail on felony cases. MCL 600.8311.

### **B. Probation Department Established**

In each district of the district court, the judge or judges of the district may establish a probation department within a district control unit. The necessary and reasonable expense of a probation department shall be borne by the district control unit. MCL 600.8314.

### **C. Function of Probation Department**

#### **1. Purpose of Probation**

Probation, which is granted by the judge, is a sentence that allows the offender to live in the community under the supervision of a probation officer. This decision is made after careful study of the offender's background, behavior, and potential for success. It is based on the philosophy that the rehabilitation of some offenders might be hampered by incarceration and will be supported and encouraged by supervised freedom.

Probation is a desirable disposition in appropriate cases because it maximizes the liberty of the offender while vindicating the authority of the law and protecting the public from further violations. Probation can positively advance the rehabilitation of the offender by continuing normal community contacts such as employment, education, counseling, etc. It can minimize the impact of conviction upon innocent dependents of the offender. Probation avoids the negative effects of incarceration which can severely complicate the offender's reintegration into the community.

## **2. Supervision**

One of the primary functions of the probation department is to supervise probationers to ensure that they comply with the terms and conditions of the court's order. The type and degree of supervision will vary from court to court. In some probation departments it is the probation officer's responsibility to counsel probationers and to act as treatment agents. In other departments the probation officer is only expected to supervise the probationer and the supervision may be extremely limited, such as nonreporting, telephone, or mail report status. The supervision model chosen may depend on the availability of resources, the caseload of the probation officers, the professional training, and the needs of the probationers.

## **3. Case Management**

Some courts view probation officers as case managers. In this function, the probation officer refers the probationer to qualified treatment personnel in the community and introduces the probationer to vocational, educational, and other resources. In the past, the probation officer was depicted as the sole provider of services. However, this philosophy is steadily changing due to a characterization of the probation officer as a community resource manager with extensive knowledge of community agencies and resources.

## **4. Screening and Assessment**

### **a. Authority**

Before imposing sentence for a violation of MCL 257.625(1), (3), (4), (5), (6), (7), or (8) or a local ordinance substantially corresponding to MCL 257.625(1), (3), (6), or (8), the court shall order the person to undergo screening and assessment by the court (in-house assessment) or the office of substance abuse services (out-of-house assessment) to determine whether the person is likely to benefit from rehabilitative services, including alcohol or drug education and alcohol or drug treatment programs. The person shall pay for the costs of the screening, assessment, and rehabilitative services. MCL 257.625b. See also ["5-02 Referral and Screening"](#).

### **b. Purpose**

Screening and assessment determines whether the offender will benefit from rehabilitation services, including alcohol or drug treatment programs, for the purpose of assisting judges in determining the most appropriate sentence. As the number of drunk and impaired driving arrests increases, probation departments are conducting more screening and assessments each year. This increase has a definite impact on the type and degree of supervision that each probation department maintains.

### **c. Fees**

Courts, probation departments, and substance abuse agencies are authorized to collect a screening and assessment fee. MCL 257.625b(5). Fees will vary among courts and agencies. See [“Chapter 5: Substance Screening and Assessment”](#) for details.

### **D. Desired Educational Requirements**

Most courts require probation officers to have graduated from college with a bachelor’s degree in one of the following areas: criminal justice, sociology, psychology, social work, counseling, or a related field.

If the court is a designated screening and assessment agency, probation officers are required to meet the qualifications and assessment procedures established by the Michigan Department of Health and Human Services. See [“Chapter 5: Substance Screening and Assessment” on page 73](#) for details.

### **E. Surety Bond Requirements**

Probation officers are not required to be bonded.

### **F. Other Requirements**

If probation officers will be using the Law Enforcement Information Network (LEIN) to run criminal history or driving records, the LEIN operator’s manual requires that the individual submit to fingerprinting and a background check. [See the LEIN access manual.](#)

If probation officers will be preparing notices or performing other deputy clerk functions, they must be sworn in as deputy court clerks.

### **G. Overview of the Criminal Justice System**

The criminal justice system has three separately organized parts – police, courts, and corrections – each with specific tasks. Each part is dependent upon the others. Review the [Bureau of Justice Statistics Criminal Justice System Flowchart](#) to understand these interactions.

## **1-02 Role of the Probation Officer**

### **A. Statutory Authority**

In all prosecutions for felonies or misdemeanors other than murder, treason, criminal sexual conduct in the first or third degree, armed robbery, and major controlled substance offenses, if the defendant has been found guilty upon verdict or plea and the court determines the defendant is unlikely to again engage in an offensive or criminal course of conduct and the public good does not require that the defendant shall suffer the penalty imposed by law, the court may place the defendant on probation under the charge and supervision of a probation officer. MCL 771.1(1).

### **B. Duties**

#### **1. General**

A district court probation officer, under the general direction of the chief judge, judge, or court administrator, conducts investigations and prepares information to assist the district court judge in determining appropriate sentences of individuals brought before the court. The district court probation officer shall supervise the probationer during the term of probation and may recommend relevant programs for rehabilitation.

#### **2. Specific**

##### **a. Screening and Assessment**

Many probation officers conduct screening and assessments of individuals convicted of driving while intoxicated or driving while impaired. In providing the court with information identifying an individual's involvement with alcohol or drugs, the probation officer must take into consideration any risks involved when recommending treatment versus incarceration. See [“Chapter 5: Substance Screening and Assessment”](#) for details.

##### **b. Presentence Investigation**

One of the principal responsibilities of a probation officer is investigating the background of individuals awaiting sentencing for criminal convictions. Presentence investigations involve reviewing the offender's arrest report, driving record, criminal history, employment record, and other pertinent information. In addition, the probation officer will interview the offender and, possibly, the offender's family, employer, and school authorities. The police, complainant/victim, and others may also be interviewed, if necessary. See [“Chapter 4: Presentence Investigation”](#) for details.



### **c. Sentencing Recommendation**

After the presentence investigation has been conducted, the probation officer must analyze the gathered information. The probation officer assesses the offender's background and character, and makes a determination regarding the probability of future criminal behavior and how to prevent further illegal activities. The probation officer then prepares a report recommending the most appropriate court action.

### **d. Supervision**

The probation officer supervises offenders placed on probation by the district court to ensure compliance with the order of the court. See [“Chapter 7: Probation”](#) for details. MCL 771.1(1).

### **e. Charging Probation Violation**

The probation officer is responsible for bringing charges of probation violation against probationers. A “preponderance of the evidence” is the standard of proof for probation violation hearings in Michigan. MCR 6.445(E)(1). See [“Chapter 7: Probation”](#) for details.

### **f. Bond Investigation**

If probation officers are responsible for bond investigations, they need to be aware of the information considered relevant in establishing bond and conditions of bond, which is listed in MCR 6.106(F)(1). See [“Chapter 2: Pretrial Release”](#) for details.

### **g. Other**

- 1) The probation officer may be required to provide probationers with guidance on personal, financial, and related problems. Probation officers generally refer probationers to outside agencies for counseling.
- 2) The probation officer may be required to assist the probationer in securing employment or entering school, or can refer the probationer to training to improve his or her work skills.
- 3) The probation officer refers probationers to rehabilitation programs and monitors their progress. The probation officer also arranges community service work programs for the probationer.

## **C. Liability**

### **1. Statutory Authority**

Statute indicates that all governmental agencies shall be immune from tort liability in all cases wherein the governmental agency is engaged in the exercise or discharge of a governmental function. MCL 691.1407. For more details on liability protection for the judiciary, see [Sec 5-07, Michigan Trial Court Administration Reference Guide](#).

### **2. Conditions**

Each officer and employee of a governmental agency and each volunteer acting on behalf of a governmental agency shall be immune from tort liability for injuries to persons or damage to property caused by the officer or employee while in the course of employment or service or by a volunteer while acting on behalf of a governmental agency if the following specific conditions are met. MCL 691.1407(2).

#### **a. Acting Within Scope of Authority**

The officer, employee, member, or volunteer must be acting or reasonably believe he or she is acting within the scope of his or her authority. MCL 691.1407(2)(a).

#### **b. Legitimate Governmental Function**

The governmental agency must be engaged in the exercise or discharge of a governmental function. MCL 691.1407(2)(b).

#### **c. No Gross Negligence**

The conduct of the officer, employee, member, or volunteer must not amount to gross negligence that is the proximate cause of the injury or damage. MCL 691.1407(2)(c). “Gross negligence” means conduct so reckless that it demonstrates a substantial lack of concern for whether an injury results. MCL 691.1407(8)(a).

## **D. Ethical Considerations**

Ethics are the principles of conduct governing an individual or group, especially a professional group. Ethical principles help people make appropriate decisions and respond properly in difficult situations. Following the ethical principles of a profession reduces the risk of job loss, criminal charges, and liability for unsuitable behavior. Michigan judicial ethics opinions may be found online at [michbar.org/opinions/ethicsopinions](http://michbar.org/opinions/ethicsopinions). In addition, there is a [Model Code of Conduct for Trial Court Employees](#).

See also the Michigan Association of District Court Probation Officers Code of Ethics below.

**Michigan Association of District Court  
Probation Officers Code of Ethics**

As a member of the Michigan Association of District Court Probation Officers:

I shall be dedicated to provide my professional service to the District Court, to the community in which I reside, and to the offender over whom I have a supervisory responsibility.

I shall uphold the laws of the State of Michigan and of the locale in which I hold office, with dignity, and with awareness of the prestige and stature of the judicial system of which I am an integral part.

I shall strive to be objective in the performance of my duties, respect the inalienable rights of all persons, appreciate the inherent worth of any individual, and hold sacred individual confidences which are disclosed to me without jeopardizing the personal safety of others.

I recognize my office as a symbol of public faith and I accept it as a public trust.

I shall continually attempt to improve my professional standards, by seeking further knowledge and understanding.

I shall cooperate with my peers, as well as with other related agencies.

I shall conduct my personal life with propriety in all phases, will neither accept nor grant favors in connection with my office as a Probation Officer, and will place loyalty to principles above personal gain.

I shall continually strive to achieve these objectives and ideals, dedicating myself to my chosen profession as a Probation Officer.

I recognize that my professional membership in the Michigan Association of District Court Probation Officers may be held as long as I am true to this Code of Ethics.

*Adopted May 26, 1989*

## **E. Arrest Powers**

### **1. Peace Officer**

A peace officer has specific statutory authority to arrest a person on reasonable cause to believe a condition of probation has been violated. However, a probation officer who is not also a sworn member of a law enforcement agency is not a peace officer. See *Authority of officers to make arrests*, 1 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 11:1. Thus, for purposes of arrest, a probation officer who is not a peace officer is a private person. The authority of a private person to arrest is set forth in MCL 764.16. This statute authorizes a private person to make an arrest when a felony has been committed in his or her presence or when the person to be arrested is known to have committed a felony.

A probation officer who wishes to have the power of arrest over probationers should be deputized by a local law enforcement agency.

### **2. Arrest of Parole Violator**

According to MCL 791.239, a Department of Corrections probation officer has statutory authority to arrest a parole violator. However, this authority does not extend to a district court probation officer.

### **3. Conditions in Probation Order; General Rule**

Pursuant to MCL 771.4, the court may provide for the apprehension, detention, and confinement of a probationer accused of violating a probation condition or conduct inconsistent with the public good in its probation order or by general rule. In MCR 6.445(A), on finding probable cause to believe that a probationer has violated a condition of probation, the court may issue a summons or issue a warrant for the arrest of the probationer.

## 1-03 Rules of Confidentiality

### A. Access to Records

All records and reports of investigations made by a probation officer and all case histories of probationers shall be privileged or confidential communications not open to public inspection. Judges and probation officers shall have access to records, reports, and case histories. The probation officer, the assistant director of probation, or the assistant director's representative shall permit the attorney general, the auditor general, and law enforcement agencies to have access to the reports, records, and case histories and shall permit designated representatives of a private contractor that operates a facility or institution that houses prisoners under the jurisdiction of the Department of Corrections to have access to the records, reports, and case histories pertaining to prisoners assigned to that facility. The confidence between the probation officer and the probationer or defendant under investigation shall not be violated. MCL 791.229. See also *Howe v Detroit Free Press*, 440 Mich 203, 216; 487 NW2d 374 (1992).

The only communications of the defendant which are privileged are those made to the probation officer within the scope of his or her statutory responsibility. *People v Burton*, 74 Mich App 215, 225-226; 253 NW2d 710 (1977).

The statutory privilege pursuant to MCL 791.229 precluding discovery of a probation report may be waived. *Howe v Detroit Free Press*, 440 Mich 203, 223; 487 NW2d 374 (1992). See also [“Chapter 8: Records Management”](#).

### B. Releasing Information

The rules of confidentiality require a release of information signed by the probationer or defendant when a probation officer is conferring with other professionals about the individual. Confidentiality limits what can be said when consulting the individual's significant others. It also limits what can be revealed to a witness in the probationer's or defendant's case. Discussing probationers or defendants within earshot of others violates the rules of confidentiality.

See also [“4-05 Disclosing Presentence Investigation Report and Related Records”](#) and [“Chapter 8: Records Management”](#).

## 1-04 Definitions and Terms

**Adjournment** - The postponing of a case or session of court until another time.

**Affidavit** - A written statement of fact that is verified by oath or affirmation.

**Amendments to Probation Order** - Probation officer petitions the court for changes to the probation order.

**Appeal** - A proceeding undertaken to have a decision reconsidered by a higher authority. *Black's Law Dictionary* (10th ed).

**Arraignment** - A hearing by the court in which the defendant is informed of the charges against him or her, is appointed counsel if necessary, and is permitted to plead to the charges. The arraignment portion of the probation revocation process is necessary to assure the probationer due process with regard to the charges of probation violation.

**Bail Bond** - A financial obligation signed by the defendant and those who serve as sureties to guarantee the defendant's future appearance in court.

**Bench Warrant** - An order issued by the court (from the bench) for the arrest of a person for violating a court order.

**Bind Over** - To hold for trial; a finding at a preliminary examination that sufficient evidence exists to require a trial on the charges against the defendant.

**Bond Investigations** - The bond ensures that the defendant appears in court. The bond investigation gives the judge, who sets the bond, all the available information about the defendant to help determine the type and the money value of the bond needed to ensure the defendant's court appearance.

**CCH** - Computerized Criminal History. Maintained by the Michigan State Police and accessible by criminal justice agencies via the Law Enforcement Information Network (LEIN) and by the public via the Internet connection I-CHAT.

**CTN** - Criminal Tracking Number assigned by the prosecuting attorney.

**Circuit Court Misdemeanor** - Includes any offense the statute designates as a misdemeanor which is punishable by more than one year imprisonment. It is processed in circuit court like a felony. Also referred to as a "high court" misdemeanor. See Michigan Court Rules Practice (2d ed) § 6001.2.

**Citation** - The court copy (original) of the ticket; also serves as the original complaint in the case.

**Civil Infraction** - An act or omission prohibited by law which is not a crime, for which civil sanctions may be ordered. Many traffic violations are classified as civil infractions.

**Client Information Release Authorization** - A waiver form for the defendant/probationer to authorize a counselor, social worker, etc., to release information contained in the client's records to the probation officer. The specific type of information must be disclosed in addition to the purpose and the need for the disclosure.

**Cobbs Plea** – A defendant who pleads guilty in reliance upon a judge's preliminary evaluation regarding sentence has an absolute right to withdraw the plea if the judge later determines the sentence must exceed the preliminary evaluation. (*People v Cobbs*, 443 Mich 276; 505 NW2d 208 [1993])

**Complainant** - One who makes a complaint; often interchanged with plaintiff and victim.

**Confidentiality** - Probation records and reports are privileged and confidential according to Michigan statute and case law. MCL 791.229. *Howe v Detroit Free Press*, 440 Mich 203; 487 NW2d 374 (1992). Access is authorized only for judges, probation officers, the attorney general, auditor general, and law enforcement agencies.

**Contempt of Court** - An act which hinders or obstructs a court in the administration of justice or lessens its authority or dignity.

**Controlled Substances Act** - See MCL 333.7401 *et seq.*

**Convict** - To find or adjudge guilty of a criminal offense.

**Crime Victim's Rights Act** - An act to establish the rights of victims of crime and juvenile offenses; to provide for certain procedures; to establish certain immunities and duties; to limit convicted criminals from deriving profit under certain circumstances; to prohibit certain conduct of employers or employers' agents toward victims; and to provide for penalties and remedies. MCL 780.751 *et seq.*

**Defendant** - The person against whom a crime is charged.

**Deferred Judgment of Guilt** – A judge may defer proceedings and impose probation with terms and conditions without entering a judgment of guilt for certain statutory offenses.

**Delayed Sentencing Act** - A judge may delay imposition of sentence for up to one year “[T]he court may delay sentencing the defendant for not more than 1 year to give the defendant an opportunity to prove to the court his or her eligibility for probation or other leniency compatible with the ends of justice and the defendant's rehabilitation.” MCL 771.1(2).

**Destruction of Records** - The act of physically destroying information (including criminal

records) in files, computers, or other depositories. Probation files should be destroyed pursuant to the [State of Michigan Retention and Disposal Schedule, General Schedule #13 - District Courts](#).

**Disposition** - Determination of a case, whether by dismissal, plea and sentence, settlement and dismissal, verdict and judgment.

**District Court** - All criminal cases are commenced in district court. Felony cases may be bound over to circuit court after preliminary examination or waiver. Misdemeanors are tried in district court. Civil cases under \$25,000.00 and summary proceedings for possession of real estate constitute most of the civil caseload.

**District Court Magistrate** - In Michigan, a district court magistrate is a quasi-judicial official given the power to set bail, accept bond, accept guilty pleas, and sentence for traffic and other violations, and to conduct informal hearings on civil infractions.

**Docket** - See Register of Actions.

**Expunge** - To destroy; blot out; obliterate; erase. See Destruction of Records.

**FAC** - Failure to answer citation. When a person fails to answer a traffic citation (ticket), the court notifies the Department of State, which enters this information into its computer system. The defendant's license is suspended until the FAC is set aside after the case is disposed of and a fee is paid.

**FCJ** - Failure to comply with judgment imposed for violations of civil infractions that are issued on traffic violations; follows the same procedure as FAC.

**Felony** - A crime punishable by more than one year in the state prison, unless it is specifically stated to be a misdemeanor. Felonies are tried in the circuit court. MCL 750.7.

**Holmes Youthful Trainee Act** - A defendant, between the ages of 17 and 24 years, alleged to have committed a criminal offense may be assigned to youthful trainee status. This assignment may be made by the court of record having jurisdiction over the criminal offense, only with consent of the defendant or the guardian. Youthful trainee status is not a conviction and no civil disabilities may attach to this status. MCL 762.11-.16.

**Inactive Case** - A pending case over which the court has no effective control; a case that is filed in court, but for some reason cannot be processed by the court, such as defendant absconded or was never arraigned.

**Incarceration** - Commitment to jail or prison.

**Interim Bond** - Refers to a bond that is set by a police officer when a person is arrested for a misdemeanor minor offense without a warrant. Any misdemeanor warrant may also have an



interim bond endorsed on it by the issuing judge or district court magistrate. Interim bond allows the individual to be released, but be available for an arraignment.

**Jury** - A body of men and/or women sworn to consider the evidence presented and to deliver a true verdict or decision in a judicial proceeding. There are six jurors for district court in civil and criminal matters. In circuit court there are six jurors for civil matters and twelve for criminal matters.

**LEIN** - Law Enforcement Information Network. A communications and integrated system providing access to a variety of databases, including wanted persons, criminal history records, driver records, and vehicle records.

**Magistrate** - Unless prefaced by the words “district court,” the term magistrate used in the Michigan Code of Criminal Procedure refers to a judge of a court with jurisdiction over the matter discussed.

**MADCPO** - Michigan Association of District Court Probation Officers.

**MCL** - An acronym for “Michigan Compiled Laws,” a series of law books.

**MCR** - An acronym for “Michigan Court Rules.”

**Minor** - A person under the age of 18 years by civil law; a person under the age of 17 years by criminal and juvenile law.

**Minor Offense** - A misdemeanor or ordinance violation for which the permissible imprisonment does not exceed 92 days and the maximum permissible fine does not exceed \$1,000.00. MCL 761.1(k).

**Misdemeanor** - A violation of a penal law of the State of Michigan which is not a felony, or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or by a fine that is not a civil fine. MCL 750.8.

**MJI** – Michigan Judicial Institute; the training department of the State Court Administrative Office.

**Motion** - An application to the court for the purpose of obtaining a certain order or decision in favor of the applicant.

**Municipal Court** - A court in which the authority is confined to the city or community where it is established. Municipal court civil jurisdiction is limited to \$1,500.00. Civil jurisdiction is increased to \$3,000.00 under certain circumstances. A few cities chose to retain this court rather than change to the district court system.

**Nolle Prosequi** – Latin for “not wish to prosecute.” *Black’s Law Dictionary* (10th ed). A formal entry made on the court record by which the prosecutor declares he or she will not further prosecute the case, usually based on some form of agreement. The prosecutor reserves the right to initiate the case again.

**Nolo Contendere/No Contest** - Latin for “I do not wish to contend.” *Black’s Law Dictionary* (10th ed). It is a plea treated as a guilty plea except that it is not an admission of guilt, but an indication of readiness to accept conviction and sentence rather than go to trial. By pleading nolo contendere, the defendant is not required to tell the court what he or she did. This allows the defendant to avoid incriminating testimony in a pending civil action or one that may later be filed against the defendant.

**Notice of Hearing** - Document notifying the scheduling of matters in court. Pursuant to MCR 2.119, notice of hearing must be served at least nine days before the time set for hearing, if served by mail, or at least seven days before the time set for the hearing, if served by delivery pursuant to MCR 2.107(C)(1) or (2).

**Offense** - A crime or ordinance violation.

**Order** - A direction of a court made or entered in writing; one which terminates the action itself, or decides some matter litigated by the parties.

**Ordinance** - A local law or regulation enacted by a municipal government. It has no effect outside that city or village.

**ORI** - Originating agency number. See the [Law Enforcement Information Network Operations Manual](#).

**PACC Charge Code** - A code used by the county prosecutor or attorney general to identify the crimes charged. PACC codes are not assigned to ordinance violations. The number is related to the MCL cite.

**Parole** - Conditional release from prison before the end of sentence; if the parolee observes the conditions, he or she need not serve the balance of the term.

**Peace Officer** - Any public officer or official having authority to arrest to enforce the law and preserve peace; generally includes any sheriff, deputy sheriff, any state or municipal officer, and any state conservation officer.

**Personal Recognizance** - The release that is gained in a criminal case without having to post money or have a surety sign a bond with the court. The court takes the defendant’s word that he or she will appear for a scheduled matter or when advised to appear.

**Petition** - An application made in writing to the court.

**Plaintiff** - In criminal cases, the state or municipality is the plaintiff and is represented by the prosecuting official.

**Plea** - The defendant's response to a criminal charge, such as not guilty, guilty, or nolo contendere.

**Plea Bargaining** - An arrangement between the prosecutor and defense counsel where the defendant agrees to plead guilty to a particular offense in return for the prosecuting attorney's agreement to allow such a plea (usually to a reduced charge) or a promise to dismiss some other offense pending against the defendant.

**Plead** - To answer the indictment, information, complaint and warrant, citation, appearance ticket, etc.; to answer an allegation.

**Preliminary Examination** - A hearing in a felony case before a district court judge at which the prosecution presents evidence (the defendant and his or her counsel being present) from which the district judge decides whether there is probable cause to believe that a crime has been committed and that the defendant committed the crime and to "bind over" or refer the defendant to the circuit court for trial.

**Presentence Investigation** - Investigation of the relevant background of a convicted offender. Usually conducted by a probation officer employed by a court and designated to act as a sentencing guide for the sentencing judge.

**Presentence Report** - Written report prepared by the probation department containing the family and personal history of the accused, evaluation of the crime and its ramifications, and recommendations as to sentencing. Required in all felony cases. Presented to the judge as a guide in determining sentence.

**Presiding Judge** - The judge conducting a hearing or trial. The judge in charge of a case.

**Pretrial Conference** - Hearing in a criminal or civil case between the judge and the attorneys to discuss any matters that can be resolved prior to trial, to assist in expediting or simplifying the trial. Such hearings are usually informal and without clients participating.

**Probable Cause Conferences:** The state and the defendant are entitled to a probable cause conference, unless waived by both parties. MCR 6.108(A). A probable cause conference involves discussions relating to a possible plea agreement, as well as other pretrial matters such as bail and bond modification, possible stipulations, procedural aspects of the case, and other discussions regarding other matters relevant to the case as agreed by the parties. MCR 6.108(C); MCL 766.4(1).

**Probation** - Allowing a person convicted of an offense to remain in the community instead of going to jail or prison as long as the offender fulfills the conditions of the probation. The offender's probation is usually supervised by a probation officer. If a person violates probation, the probation can be revoked and the defendant resentenced.

**Pro Per or Pro Se** - A person who represents himself or herself in court without an attorney.

**Prosecuting Attorney** - A public officer whose duty is to institute and conduct criminal proceedings on behalf of the people.

**PSI** - Presentence investigation.

**Public Defender** - An attorney paid by the county to defend a person who is indigent.

**Quash** - To nullify a conviction or order.

**Record** - The word for word (verbatim) account by the official court reporter/recorder of all proceedings at the trial.

**Register of Actions** - A written list of all important acts performed in court in an individual case from beginning to end. The register of actions (for acts done), the case file (for documents filed), and any transcript of proceedings together form the "record."

**Remand** - To send a case back to the court from which it came for further proceedings. To send a case back to the lower court from which it was appealed, with instructions as to what further proceedings should take place.

**Restraining Order** - An order of the court which is intended to restrain a person's action and preserve the status quo until a hearing can be held to determine if a temporary injunction should be issued.

**SCAO** - State Court Administrative Office.

**Screening and Assessment** - A procedural method in which the sentencing judge shall order and receive the facts pertaining to the defendant's alcohol/drug-related history, prior offenses, and driving record; blood-alcohol concentration results; screening and assessment testing procedures and results; current alcohol/drug dependency; prior alcohol/drug education or treatment; and any assessment recommendations for proposed rehabilitation services.

**Sentence** - Punishment imposed upon a defendant following conviction in a criminal proceeding.

**Show-Cause Order** - An order to appear as directed and present to the court reasons and considerations why certain circumstances should be continued, permitted, or prohibited.

**SID** - State Identification number. A number provided by the Department of State Police based on positive fingerprint identification. It is generated when the law enforcement agency reports an arrest through the prosecutor to the Department of State Police.

**State Case** - Refers to a violation of state law. The term is most often used in district courts and municipal courts to distinguish between local ordinance violations and violations of state statute.

**Statutes** - Laws in the State of Michigan enacted by the state Legislature.

**Stay** - The suspension of a judicial proceeding by court order.

**Subpoena** - A writ or order to compel attendance in a court with a penalty for failure to do so.

**Verdict** - The jury's decision or finding on the issues submitted to it for determination.

**Warrant Recall** - A procedure for removing outstanding warrants from LEIN in order to avoid repeated or mistaken arrests.

**With Prejudice** - A claim dismissed "with prejudice" means the prosecution in a criminal case is forever barred from bringing criminal proceedings on the same claim.

**Without Prejudice** - A claim dismissed "without prejudice" may be the subject of a new criminal proceeding.

**Writ** - A court order giving the authority to require the performance of a specific act.

## **1-05 Michigan Association of District Court Probation Officers**

### **A. History**

The Michigan Association of District Court Probation Officers (MADCPO) was originally founded as the Michigan Association of Probation Services, Inc. (MAPS) in 1970. Prior to 1970, district court probation officers were members of the Michigan Correctional Association. Annual conferences were held for parole, probation, and correctional officers, but conference programming centered around issues applicable to corrections and parole, with little attention given to the specific needs of district court probation.

In late 1969, a group of district court probation officers met to establish their own organization. In 1970, MAPS, Inc. was founded. An annual conference was established to focus on the education and information needs and issues of district court probation. In 1989, the name of the organization was changed to the Michigan Association of District Court Probation Officers.

### **B. Purpose**

The basic mission of the association has greatly expanded over the years in order to conform and adapt to the changing needs of the membership. The association, by way of its members, fosters the notion that probation officers are a viable and integral part of the Michigan judicial system. The association is concerned with enhancing the individual professional status of its members. In addition, members seek involvement in the legislative process in an effort to influence legislation which directly affects the function of the probation officer.

The association participates in a wide variety of functions and decision-making processes that affect the work of probation officers. Members have served in various capacities with the Michigan Court Forms Committee, the Chief Judge/Court Administrators Manual Committee, and the District Court Judges Association, and continue to remain involved in committees. In addition, the association works closely with the Michigan Judicial Institute (MJI) in providing educational programs to probation officers.

The association continues to expand the scope of its influence through increased membership in other related organizations and groups.

### **C. Membership**

Information about membership can be obtained by contacting the regional representative or any association officer, by referring to the association newsletter, by contacting a probation officer who is a member, or by visiting the association's website at [www.madcpo.org](http://www.madcpo.org).

### **D. Directory of Probation Departments**

A directory of probation officers is available at [www.madcpo.org](http://www.madcpo.org).

## **E. Newsletter**

The association publishes newsletters in the fall, winter, and spring of each year and mails them to all probation officers and service providers who request a copy. To receive a copy, contact the current newsletter/directory coeditors.

## **F. Annual Conference**

An annual conference is held in May of each year. Locations vary and are selected by the executive board. In addition to the educational benefits, the conference provides probation officers the opportunity to meet and exchange ideas with their colleagues. An annual general membership meeting is also conducted at the conference, at which time the election of officers, regional representatives, and alternates is held.

# Chapter 2: Pretrial Release

## 2-01 Introduction

### A. Authority and Purpose

A person charged with a crime is entitled to release on his or her personal recognizance or release with conditions (including money bail), unless the individual is alleged to have committed a crime for which pretrial release may be denied. MCR 6.106(A), MCL 765.6.

The purpose of bail is to ensure the defendant's appearance in court and the protection of the public.

### B. Role of Arresting Agency

Pursuant to the Crime Victim's Rights Act, the arresting agency is responsible for providing information to the victim of the reported crime. MCL 780.751 *et seq.* According to MCL 780.755 and MCL 780.815, the law enforcement agency having responsibility for investigating the crime must give the victim notice of the availability of pretrial release for the defendant and other related information.

### C. Role of Probation Officer

When a bail investigation is part of a probation officer's responsibilities, the investigation is conducted to provide the judge or district court magistrate with the information appropriate and necessary to determine the type, amount, and conditions of the bond.

Particular guidelines and procedures for probation officers to follow when conducting bail investigations will vary to meet the needs of each particular jurisdiction. While some courts may require an extensive amount of verified information, others expect a less comprehensive effort to help expedite the process of establishing an appropriate bail. The length and complexity of a bail investigation should be established by an agreement between the court and the probation department.

### D. Role of Court

At the defendant's first appearance before the court, the court must order the defendant be held in custody or released as provided in MCR 6.106. This decision is made after considering various factors, some of which are outlined in MCR 6.106(F)(1).



## 2-02 Bail Investigation

### A. Introduction

Generally, a file is not created until a presentence investigation is requested. However, if probation officers are responsible for bond investigation, a file should be established at this time. A probation officer may be asked to conduct a bail or pretrial services investigation before a defendant's first appearance in court. The investigation should obtain reliable and objective information for the arraigning judicial officer to evaluate a defendant's risk of flight and threat to public safety.

### B. Investigation Procedure

#### 1. Personal Interview

Best practice standards recommend bail investigations include a personal interview of the defendant under the scope of the factors allowed pursuant to MCR 6.106(F). Best practice standards also recommend the defendant be informed that (1) the interview is voluntary and (2) information from the interview will be used to make an appropriate pretrial release decision for the defendant. Interview statements should be verified for accuracy, including personal or telephone contacts with employers, counselors, spouses or family members, landlords, probation/ parole officers, community members, and courts. Criminal and driving histories are also typically reviewed. [See National Association of Pretrial Services Agencies Standard 3.3.](#)

#### 2. Factors Considered

The information considered relevant in establishing a bond and bond conditions is listed in MCR 6.106(F)(1) and includes:

- a. prior criminal record (includes juvenile) (nonpublic record, see [“Chapter 8: Records Management”](#)),
- b. record of court appearances/nonappearances (nonpublic record, see [“Chapter 8: Records Management”](#)),
- c. substance abuse history,
- d. mental condition,
- e. reputation for dangerousness,
- f. seriousness of offense,
- g. probability of conviction,

- h. presence of threats,
- i. employment status and history, insofar as it relates to the ability to post money bail,
- j. availability of responsible members of community to vouch for or monitor the defendant,
- k. ties to the community,
- l. length of residence,
- m. family ties, and
- n. other factors bearing on risk of nonappearance or danger to the public.

Information beyond these factors cannot be used to sanction pretrial detention and is not permissible. The court rule specifically disallows any determination based on race, religion, gender, or economic status.

### **C. Report and Recommendation to Judge**

A written report and recommendation should be provided to the court, prosecutor, and defense attorney before the district court arraignment. The format of this report is not dictated by any statute or court rule. The content and style of the report should reflect the needs and requirements of the parties who will be using it as the case progresses. Similar to probation files, a defendant's pretrial report and file are nonpublic documents. See [Records Retention and Disposal Schedule, General Schedule #13 – District Courts](#).

The report should consider and reflect the factors in MCR 6.106(F) so the judge or district court magistrate has the necessary information for establishing bail. In accordance with court rules, the report should recommend a personal recognizance bond unless it is determined that a recognizance release will not ensure the defendant's appearance or that such release will present a danger to the public. MCR 6.106(C).

## 2-03 Order for Pretrial Release or Custody

### A. Considerations and Statement of Reasons

As specified in MCR 6.106(B)(1), the court may deny pretrial release to a defendant who is charged with murder or treason, criminal sexual conduct in the first degree, armed robbery, kidnapping with the intent to extort if the court finds proof of the defendant's guilt is evident or the presumption great. A court may also deny pretrial release if a defendant is charged with committing a violent felony and (1) at the time of the commission of the violent felony, the defendant was on probation, parole, or released pending trial for another violent felony, or (2) during the 15 years preceding the commission of the violent felony, the defendant had been convicted of two or more violent felonies.

#### 1. Custody Order

If the court determines that the defendant may not be released, the court must order the defendant held in custody for a period not to exceed 90 days after the date of the order, excluding delays attributable to the defense, within which trial must begin or the court must immediately schedule a hearing and set bail. MCR 6.106(B)(3). The court must state the reasons for an order of custody on the record and on the form approved by the State Court Administrative Office entitled "Custody Order." See [SCAO-approved form MC 240b, Custody Order.](#)

#### 2. Release Order

According to MCR 6.106(C) and (D), if the defendant is not ordered held in custody, the court must order the pretrial release on personal recognizance or an unsecured appearance bond. A court may only order a conditional release, with or without money bail, if the court determines a personal recognizance bond will not reasonably ensure appearance or the safety of the public. See [SCAO-approved form MC 240, Pretrial Release Order.](#)

In deciding which release to use and what terms and conditions to impose, if any, the court is to consider relevant information, including the following factors that are specified by MCR 6.106(F)(1). While the court must state the reasons for its decision on the record, the court does not have to make a finding on each of the factors. MCR 6.106(F)(2).

- a. Defendant's prior criminal record, including juvenile offenses.
- b. Defendant's record of appearance or nonappearance at court proceedings, or flight to avoid prosecution.
- c. Defendant's history of substance abuse or addiction.
- d. Defendant's mental condition, including character and reputation for dangerousness.

- e. The seriousness of the offense charged, the presence or absence of threats, and the probability of conviction and likely sentence.
- f. Defendant's employment status and history, and financial history insofar as these factors relate to the ability to post money bail.
- g. The availability of responsible members of the community who would vouch for or monitor the defendant.
- h. Facts indicating the defendant's ties to the community, including family ties and relationships, and length of residence.
- i. Any other factors bearing on the risk of nonappearance or danger to the public.

## **B. Conditions of Release**

### **1. Personal Recognizance**

MCR 6.106(C) sets forth required conditions of a personal recognizance bond. These conditions are that the defendant:

- a. will appear as required,
- b. will not leave the state without permission of the court, and
- c. will not commit any crime while released.

### **2. Conditional Release**

The court may only order additional pretrial release conditions if the court determines a personal recognizance bond will not reasonably ensure the appearance of the defendant or the safety of the public. MCR 6.106(D). Some of these conditions include:

- 1) appear as required, not leave the state without permission of the court, and not commit any crime while released,
- 2) make reports to a court agency, as specified by the court or the agency,
- 3) not use alcohol or illicitly use any controlled substance,
- 4) participate in a substance abuse testing or monitoring program,
- 5) participate in a specified treatment program for any physical or mental condition, including substance abuse,

- 6) comply with restrictions on personal associations, place of residence, place of employment, or travel,
- 7) surrender driver's license or U.S. passport,
- 8) comply with a specified curfew,
- 9) continue to seek employment,
- 10) continue or begin an educational program,
- 11) remain in the custody of a responsible member of the community who agrees to monitor the defendant and report any violation of any release condition to the court,
- 12) not possess a firearm or other dangerous weapon,
- 13) not enter specified premises or areas and not assault, beat, molest, or wound a named person or persons,
- 14) comply with any condition limiting or prohibiting contact with any other named person or persons. If an order under this paragraph limiting or prohibiting contact with any other named person or persons is in conflict with another court order, the most restrictive provision of the orders shall take precedence until the conflict is resolved. The court may make this condition effective immediately on entry of a pretrial release order and while defendant remains in custody if the court determines it is reasonably necessary to maintain the integrity of the judicial proceedings or it is reasonably necessary for the protection of one or more named persons.
- 15) satisfy an injunctive order made a condition of release, or
- 16) comply with any other condition, including the requirement of money bail as described in MCR 6.106(E), reasonably necessary to ensure the defendant's appearance and the safety of the public.

### **3. Money Bail**

If the court determines for reasons stated on the record that the defendant's appearance and the safety of the public cannot be assured, money bail with or without the conditions set forth in MCR 6.106(D) may be required. As specified in MCR 6.106(E), the court may require the defendant to post a bond that is executed, at the defendant's option, by either a surety approved by the court, or by the defendant or another who is not a licensed surety. If the defendant opts for a bond without a surety, it must be secured by either a cash deposit or its equivalent for the full bond amount, a cash deposit of 10 percent of the bond amount, or real property. The court has the option whether to offer the 10 percent bond.

#### 4. Alternative Bond Documents

Courts may require or receive alternative documents in lieu of a cash, percent, or surety bond. Receipt of such documents must be documented in the case file. If the court determines that the document should be kept in a location for safe keeping other than the court file, the location of the document should be noted on the register of action. If the case is transferred to another court, such as a bind over to circuit court or a change of venue, the document should be included in the itemization of materials transferred.

- a. Driver's License. The court may require a person to surrender a driver's license as security for the defendant's appearance in court. Upon conclusion of the trial or imposition of sentence, as applicable, the court shall return the license to the defendant unless other disposition of the license is authorized by law. MCL 780.64, MCR 6.106(D)(2)(f).
- b. Guaranteed Appearance Certificate. In lieu of a driver's license, a person may leave a guaranteed appearance certificate with the law enforcement officer or the court. The certificate must contain a printed statement that a surety company authorized to do business in Michigan guarantees the appearance of the person whose signature appears on the card or certificate, and that if the defendant fails to appear in court, the company will pay any fine, costs, or bond forfeiture imposed on the person not to exceed \$200.00. Upon conclusion of the trial or imposition of sentence, as applicable, the court shall return the certificate to the defendant. MCL 257.728.
- c. U.S. Passport. As a condition of bond, the court may require surrender of a U.S. passport. A person without a passport might surrender a refugee travel document, which can serve in lieu of a national passport. It may be useful to acquire signature of the owner of the passport or travel document upon return as receipt. Expired passports or travel documents should be sent to US Immigration, Criminal Alien Program, 333 Mt. Elliott Street, Detroit, MI 48207-4381. For further information, contact US Immigration at 313-568-6049. MCR 6.106(D)(2)(f).

#### 5. LEIN Entry

If the court orders a bond with conditions that are determined to be reasonably necessary for the protection of any named person, the pretrial release order ([SCAO-approved form MC 240](#)) must be sent to the local law enforcement authority for entry into the LEIN system. The court must order cancellation of the bond conditions from LEIN when the bond is revoked or otherwise terminated. MCL 765.6b. Use [SCAO-approved form MC 239, Removal of Entry from LEIN](#).

### **C. Crime Victim's Rights**

The victim of a crime will be given notice that he or she may contact the sheriff to determine whether a defendant has been released from custody pending trial. MCL 780.755, MCL 780.815.

The arraigning judge/district court magistrate can order a no-contact clause as a condition of bond or as a condition of being held in custody. A no-contact order might contain language ordering the defendant to: (1) refrain from making any contact with the victim in person, by mail, by telephone, or through a third party, or (2) leave the home if the parties are living together. If the defendant cannot leave the home for some reason, the bond should contain a warning that any future charges or noncompliance with the conditions of bond could jeopardize his or her liberty. MCL 765.6b, MCR 6.106(D)(2).

If the defendant is charged with a crime involving domestic violence, the arraigning judge/district court magistrate may order the defendant to carry or wear a global positioning system (GPS) device as a condition of release. The judge/district court magistrate also may, with the victim's informed consent, order the defendant to provide the victim with an electronic receptor device capable of receiving the GPS information from the defendant's device. If the judge/district court magistrate orders the GPS device, he or she must also order the defendant not to purchase or possess a firearm. MCL 765.6b.

## **Chapter 3: Court-Appointed Attorney**

### **3-01 Defendant's Right to Court-Appointed Attorney**

#### **A. Authority**

At the arraignment on the warrant or complaint, the court must advise the defendant of the right to a court-appointed attorney at all subsequent court proceedings if he or she wants one and is unable to pay for one. MCL 775.16, MCR 6.005(A).

#### **B. When Entitled**

##### **1. Pretrial Proceedings**

###### **a. Felony Cases**

Even if a defendant waives the assistance of an attorney, the record of each subsequent proceeding (such as the preliminary examination, arraignment, revocation proceedings, hearings, trial, or sentencing) must affirmatively show that the court advised the defendant of the right to an attorney and the defendant waived that right. Before the court begins such proceedings, the defendant must reaffirm that an attorney is not wanted, or if the defendant requests an attorney and is unable to pay for one, the court must appoint one, or if the defendant wants to hire an attorney and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one. MCR 6.005(E).

At the arraignment on the warrant or complaint, the court must advise the defendant of the right to a court-appointed attorney if he or she does not have the money to hire one. The court must also advise the defendant of the right to an attorney at all subsequent court proceedings and, if appropriate, appoint one. MCR 6.104(E), MCR 6.610(H).

###### **b. Misdemeanor Cases**

At the arraignment on the warrant or complaint, the court must advise the defendant of the right to a court-appointed attorney if he or she does not have the money to hire one and if:

- 1) the offense charged requires on conviction a minimum term in jail, or
  - 2) the court determines that it might sentence the defendant to jail.
- MCR 6.610(D) and (E), AO 2003-3.



## **2. Postsentencing Proceedings**

### **a. Probation Violation**

At the arraignment on an alleged probation violation, the court must advise the probationer that he or she is entitled to the assistance of a court-appointed attorney at the hearing and at all subsequent court proceedings, and that one will be appointed if he or she is unable to pay for one. MCR 6.445(B). Even if a probationer charged with probation violation waives the assistance of an attorney, at each subsequent proceeding the court must comply with the advice and waiver procedure in MCR 6.005(E). MCR 6.445(D).

### **b. Postappeal Relief**

If the court imposed a sentence of incarceration on a misdemeanor in district court, even if the incarceration is suspended and if the defendant is indigent, the court must enter an order appointing a lawyer if, within 14 days after sentencing, the defendant files a request for a lawyer or makes a request on the record. MCR 6.625(B).

## **3-02 Investigation to Determine Indigency**

### **A. Role of Judge**

In all Michigan courts, the final decision to provide counsel for an indigent defendant lies with the judge having jurisdiction in the pending case. In some courts, the presiding judge will make a determination of indigency and, based upon information provided, appoint an attorney to represent a defendant. If the court determines the defendant is financially unable to retain counsel, it must promptly appoint an attorney and notify that attorney of the appointment. The court may not permit the defendant to waive the right to be represented without first:

1. advising the defendant of the charge, the maximum possible incarceration for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
2. offering the defendant the opportunity to consult an attorney. MCR 6.005(D).

### **B. Role of Court Staff**

Some courts refer a defendant to an investigator who will examine and verify information contained in a petition for a court-appointed attorney. A recommendation for or against appointment of counsel is then provided to the judge.

## 3-03 Application for Indigency

### A. Authority

If the defendant requests an attorney and claims financial inability to retain one, the court must determine whether the defendant is indigent. MCR 6.005(B), *People v Studaker*, 387 Mich 698, 700-701; 199 NW2d 177 (1972). The appointment of counsel must be consistent with an adopted local administrative order that governs the process for selecting and appointing attorneys to represent indigent defendants. MCR 8.123(B).

### B. Process

The process for determining indigency is in MCR 6.005(B). These factors are a guide for determining indigency and are the minimum amount of information necessary to make an informed decision on the question of indigency. Every court shall require a defendant claiming indigency to submit a sworn statement setting forth his or her financial condition. The following factors shall be considered:

1. the defendant's present assets, employment, earning capacity, and living expenses,
2. the defendant's outstanding debts and liabilities, secured and unsecured,
3. whether defendant has qualified for and is receiving any form of public assistance,
4. availability of any personal or real property owned and whether it would cause undue financial hardship to the defendant or dependents if converted,
5. whether the defendant is incarcerated, and
6. any other circumstances that would impair the ability to pay an attorney fee as would ordinarily be required to retain competent counsel.

### C. SCAO-Approved Forms

The [Request for Court-Appointed Attorney and Order \(MC 222\)](#) can be completed by an indigent defendant to request a court-appointed attorney.

## 3-04 Recovering Expense

### A. Authority

#### 1. Reimbursement After Sentencing

The authority for recovering costs is in MCL 769.1k, MCL 769.3, and MCL 771.3.

Pursuant to MCL 769.1k, if a defendant is found guilty or pleads guilty or nolo contendere, at sentencing the court may order the expenses of providing legal assistance to the defendant. These costs may also be ordered for defendants subject to a deferred judgment of guilt or delayed sentence.

Pursuant to MCL 769.3, costs of prosecution can be ordered as a condition of sentence only if the offense is punishable by either fine or imprisonment. If a charge is punishable only by imprisonment, costs cannot be imposed. *People v Tims*, 127 Mich App 564, 565; 339 NW2d 488 (1983).

Pursuant to MCL 771.3, costs are authorized as a condition of probation only. In addition, costs as a condition of probation are limited by the defendant's ability to pay, if the defendant raises the issue. *People v Music*, 428 Mich 356, 361; 408 NW2d 795 (1987).

According to *People v Neil*, 99 Mich App 677, 680; 299 NW2d 23 (1980), a term or condition of a sentence not expressly authorized by statute is unlawful and must be vacated. See also *People v Cunningham*, 496 Mich 145, 149-150; 852 NW2d 118 (2014). If a defendant is acquitted of the charges, reimbursement for court-appointed attorney fees should not be ordered.

Whenever a trial court attempts to enforce a fee for a court-appointed attorney, the defendant must be given an opportunity to contest the enforcement on the basis of his or her indigency and the trial court must assess the defendant's ability to pay. The court should consider whether the defendant is indigent and unable to pay at that time or whether forced payment would cause a manifest hardship on the defendant or the defendant's family at that time. *People v Jackson*, 483 Mich 271, 292-293; 769 NW2d 630 (2009).

#### 2. Contribution Before Sentencing

In criminal cases, as specified in MCR 6.005(C), the court can order a partially-indigent defendant to contribute toward the costs of defense under a specific plan. The purpose of MCR 6.005(C) is not to authorize reimbursement, but to ensure the defendant is not denied the appointment of an attorney because of partial "ability to pay." [See SCAO-approved form MC 310, Order for Contribution.](#)

## **B. Condition of Probation**

Payment of costs as a condition of probation is seen as reimbursement to the public and not as punishment. *People v Teasdale*, 335 Mich 1, 5-6; 55 NW2d 149 (1952).

If a probationer is ordered to pay costs as part of a sentence of probation, compliance with that order shall be a condition of probation. The court may revoke probation if the probationer fails to comply with the order and if the probationer has not made a good faith effort to comply with the order. In determining whether to revoke probation, the court shall consider the probationer's employment status, earning ability, and financial resources, the willfulness of the probationer's failure to pay, and any other special circumstances that may have a bearing on the probationer's ability to pay. MCL 771.3(8).

The court may continue collecting unpaid fines, costs, and other fees once the probationer is discharged or the probation is revoked. MCL 769.1k(3).

See also ["6-10 Financial Obligations"](#) for details.

# Chapter 4: Presentence Investigation

## 4-01 Authority and Responsibility

### A. Misdemeanor Cases

As directed by the sentencing judge or district court magistrate, a probation officer must conduct a presentence investigation and prepare a report on persons charged with and convicted of a misdemeanor. MCL 771.14.

The defendant in a misdemeanor case may request the preparation of a presentence report. While the sentencing judge has a right to deny a defendant's request for a presentence report in a misdemeanor conviction, there should be a good reason for doing so. Sentencing is of such obvious importance to the criminal justice system that no trial judge, without a clear exposition of his discretionary thinking, should deny a defendant a presentence report and proceed to impose a maximum sentence. Such an act is tantamount to saying that nothing the court can learn from the presentence report can help the defendant. *People v Shackelford*, 146 Mich App 330, 336; 379 NW2d 487 (1985).

### B. Responsibility of Probation Officer

#### 1. Statutory Requirements

Pursuant to MCL 771.14, when the court orders a presentence investigation, the probation officer must inquire into the antecedents, character, and circumstances of the defendant and shall report in writing to the court. The presentence investigation report must include:

- a. an evaluation of and a prognosis for the person's adjustment in the community based on factual information contained in the report,
- b. if requested by a victim, any written impact statement submitted by the victim pursuant to the Crime Victim's Rights Act,
- c. a statement prepared by the prosecuting attorney as to whether any consecutive sentencing is required as authorized by law,
- d. if a person is to be sentenced for a misdemeanor involving the illegal delivery, possession, or use of alcohol or a controlled substance, a statement that the person is licensed or registered pursuant to article 15 of the Public Health Code, MCL 333.1610-333.18838, if applicable, and
- e. diagnostic opinions that are available and not exempt from disclosure pursuant to MCL 771.14(3).

## **2. Michigan Court Rule Requirements**

No court rule applicable to district court establishes requirements for an investigation into a defendant's background and character or a written report to the court. However, at the direction of the district court judge, the probation officer may refer to MCR 6.425 for guidance. If a report is produced, it may include:

- a. a description of the defendant's prior criminal convictions and juvenile adjudications,
- b. a complete description of the offense and the circumstances surrounding it,
- c. a brief description of the defendant's vocational background and work history, including military record and present employment status,
- d. a brief social history of the defendant, including marital status, financial status, length of residence in the community, educational background, and other pertinent data,
- e. the defendant's medical history, substance abuse history, if any, and if indicated, a current psychological or psychiatric report,
- f. information concerning the financial, social, psychological, or physical harm suffered by any victim of the offense, including the restitution needs of the victim,
- g. if provided and requested by the victim, a written victim's impact statement as provided by law,
- h. any statement the defendant wishes to make,
- i. a statement prepared by the prosecutor on the applicability of any consecutive sentencing provision,
- j. an evaluation of and prognosis for the defendant's adjustment in the community based on factual information in the report,
- k. a specific recommendation for disposition, and
- l. any other information that may aid the court in sentencing.

## **C. Referral to Probation Department**

### **1. Procedure**

After a defendant pleads guilty to a charge or is found guilty by court or jury trial, the judge may refer the defendant to the probation department for an investigation and report prior to sentencing. The sentencing date may or may not be set prior to this referral. An

appointment for the presentence interview is usually set at this time. All referrals from the court to the probation department should be made in writing. All referrals are forwarded to the probation department and may contain a number of categories, such as:

- a. bond investigation report.
- b. court-appointed attorney investigation report.
- c. full investigation report.
- d. abbreviated presentence investigation report.
- e. oral report.
- f. alcohol evaluation.

## **2. Basic Information Sheet**

Upon initial contact with the probation department, the defendant will be asked to fill out a basic information sheet (BIS). This form is the backbone of subsequent reports.

### **a. Primary Contents**

The BIS should include the following:

- 1) identification data.
- 2) family history.
- 3) marital history.
- 4) education history.
- 5) employment history.
- 6) economic data.
- 7) military record.
- 8) health history.
- 9) substance abuse/use and any mental health history.
- 10) arrest record, including any prior or pending cases (nonpublic record, see [“8-02 Right to Access Records”](#)).



11) additional information deemed relevant by the probation officer or the defendant.

### **b. Additional Information**

The BIS should be kept up-to-date during the course of the investigation. Any changes in address, phone number, employment, etc., should be included.

The defendant's version of the offense should be included in either the BIS or the record of an interview. Court information, such as court actions, dates, and dispositions, should be recorded on a separate sheet completed by the probation department after the initial contact with the defendant. This information should also be kept up-to-date.

### **c. Completing the BIS**

The BIS should be completed whenever possible by the defendant prior to the interview. The probation officer may need to offer assistance. If, at the time of referral or during the interview, the defendant indicates that he or she is currently, or has recently been, in some type of treatment, the probation officer should have the defendant sign a release of information form. See sample forms in the ["4-09 Appendix"](#). This release gives the probation officer authority to verify the defendant's attendance in treatment before the sentencing date.

## **D. Sex Offenders Registration**

### **1. Authority**

After a defendant is convicted of a sex offense, as defined by MCL 28.722(b), the defendant must register with the Department of State Police. MCL 28.722 *et seq.*

### **2. Definition**

Cases involving individuals who are determined to be tier I, II, or III offenders as defined in MCL 28.722, with some exceptions. The specific tier I misdemeanor offenses are:

750.335a(2)(b) Attempted indecent exposure involving fondling, if victim is a minor  
750.520e Attempted criminal sexual conduct, fourth degree, if victim is age 18 or older

Also included as a tier I offense is a violation of any state law or local ordinance other than a tier II or tier III offense that, by its nature, constitutes a sexual offense against an individual who is a minor. MCL 28.722(s). An offender registered solely because of a single tier I conviction will only be listed on the law enforcement database; he or she will not appear on the public Internet website. MCL 28.728(1), MCL 28.728(4)(c).

### **3. Reporting Requirements**

Registration must be completed before sentencing, entry of the order of disposition, or assignment to youthful trainee status. MCL 28.724(5). Tier I offenders must report annually thereafter (no earlier than the 1st and no later than the 15th of every January) for 15 years. Tier II offenders must report biannually thereafter (no earlier than the 1st and no later than the 15th of every January and July) for 25 years. Tier III offenders must report quarterly thereafter (no earlier than the 1st and no later than the 15th of every January, April, July, and October) for life. MCL 28.725.

### **4. How to Report**

Courts with direct access to LEIN may enter the registration directly. Courts without LEIN access shall send the registration form to the local law enforcement agency or the local Michigan State Police post. A copy of the form shall be given to the defendant.

### **5. Change of Address**

After registered, pursuant to MCL 28.725 the registrant must notify the registering authority immediately after any of the following:

- The offender changes or vacates his or her residence or domicile.
- The offender changes or discontinues his or her employment.
- The offender enrolls as a student or discontinues his or her enrollment as a student at an institution of higher learning.
- The offender changes his or her name.
- The offender plans to temporarily stay for more than seven days at a place other than his or her residence.
- The offender establishes an electronic mail address, instant messaging address, or any other designations used in Internet communication or posting.
- The offender buys any vehicle, begins to regularly operate any vehicle, or discontinues ownership or operation of the vehicle.
- The offender, who is enrolled as a student at an institution of higher education, is present at another location in Michigan, or in another state or in a United States territory or possession, or he or she discontinues studies at that location.

While on probation, the registrant may be provided a change of address form by the probation officer; however, it is the registrant's responsibility to notify the local law enforcement agency in which the new address is located. Courts with LEIN access will have the ability to enter the address change.

### **E. Protection Against Possible Exposure to HIV, HBV, and HCV**

Since the probation officer will be meeting with the defendant to gather presentence information, the probation officer could possibly contract an infection from the defendant.

Pursuant to the same statutes that require the court to order human immunodeficiency virus (HIV) testing for defendants charged with certain crimes, there are provisions for certain professionals who may be exposed to an infection as a result of their work with an infected person.

If a county employee or court employee who, while performing his or her official duties or otherwise performing the duties of his or her employment, determines that he or she has sustained a percutaneous, mucous membrane, or open wound exposure to the blood or body fluids of an arrestee or probationer may request that the arrestee or probationer be tested for HIV infection, HBV infection, or HCV infection pursuant to MCL 333.5204 only if he or she has received training in the transmission of bloodborne diseases under the rules governing exposure to bloodborne diseases in the workplace promulgated by the occupational health standards commission or incorporated by reference under the Michigan Occupational Safety and Health Act, MCL 408.1001-408.1094. For details on procedure, see [“7-09 Protection Against Possible Exposure to HIV, HBV, HCV”](#).

## 4-02 Types and Contents of Presentence Investigation Reports

### A. Full Presentence Investigation Report

The full investigation report is a complete investigation of the defendant's background. All records such as police, medical, work, school, etc., will be included and verified in addition to releases of information. The probation officer will include his or her evaluation, plan, program, and sentence recommendation. The four sections in a full investigation report are: (1) defendant's interview, (2) investigation, (3) evaluation, and (4) sentence recommendation.

#### 1. The Interview

The interview is a face-to-face meeting between the defendant and the presentence investigator. The BIS should be reviewed at this time, clarifying all information and obtaining fuller responses, if necessary. Using the BIS as a guide, the investigator should develop a full history of the defendant's background, taking additional notes as necessary. The defendant's version of the incident should be included. The defendant is not entitled to have an attorney present at the interview. *People v Daniels*, 149 Mich App 602, 609-610; 386 NW2d 609 (1986); *People v Shively*, 45 Mich App 658, 664-665; 206 NW2d 808 (1973).

#### 2. The Investigation

- a. The most important part of the investigation is to verify all statements made at the interview and all information on the BIS as fully as possible. The probation officer will decide whether to include or exclude any information necessary to determine the appropriate sentence. If appropriate, the probation officer should contact employers, schools, and medical and treatment facilities using the signed releases of information.
- b. Police arrest records and driving records should be obtained.
- c. The record should indicate whether the defendant was represented by an attorney in prior cases. MCR 6.610(F)(2) provides that unless a defendant who is entitled to appointed counsel is represented by an attorney or has waived the right to an attorney, a subsequent charge or sentence may not be enhanced because of this conviction and the defendant may not be incarcerated for violating probation or any other condition imposed in connection with this conviction. However, both the United States Supreme Court and the Michigan Supreme Court have found that the use of uncounseled misdemeanor convictions in later sentencing does not violate the Constitution, so long as there is no violation of the right to counsel. See *Nichols v United States*, 511 US 738, 746-747; 114 S Ct 1921; 128 L Ed 2d 745 (1994); *People v Reichenbach*, 459 Mich 109, 123-124; 587 NW2d 1 (1998). See also Other Acts of defendant – Prior convictions without the benefit of counsel, 2 Gillespie Michigan Criminal Law & Procedure (2d ed) § 22:21.
- d. After completing the investigation, a written report should be submitted to the sentencing

court. MCL 771.14(1). The written report should include the police version of the offense, the defendant's version, the victim's version, and the detailed background history of the defendant and the investigation. Any information which cannot be verified should be noted as such. There is a presumption that the information in the report is accurate unless the defendant raises an effective challenge to the report. *People v Lloyd*, 284 Mich App 703, 705-706; 774 NW2d 347 (2009).

### **3. Evaluation, Plan, and Program**

This section of the full investigation report is the presentence investigator's own assessment of the defendant. The investigator: (1) evaluates the data obtained in the interview and investigation, (2) formulates a plan of action for rehabilitating the defendant, and (3) determines a program for implementing the rehabilitation plan. These plans follow the previous sections of the written report and justify the final section, which is the sentence recommendation.

### **4. Sentence Recommendation**

The last section of the presentence report is a sentence recommendation. There are a variety of sentencing options available to the court, but all include at least financial penalties, probation or jail. If probation is to be part of the sentence recommendation, any special clauses and terms of probation should be included. Either directly before or after the actual specific recommendation, a short explanation justifying the recommendation should be inserted. For details, see ["Chapter 6: Sentencing"](#).

## **B. Abbreviated Presentence Investigation Report**

### **1. General Contents**

The abbreviated presentence report, which is usually a shortened form of the full investigation report, consists of the: (1) basic information sheet (BIS), (2) defendant's interview, and (3) written recommendation to the judge.

Because of high caseloads and time constraints, many courts have designed abbreviated presentence investigation reports to capture the most basic and pertinent information needed by the judge. Some examples of this wide variety of specially-designed report are in the ["4-09 Appendix"](#).

### **2. When Used**

This report is generally used when: (1) time is limited, (2) a defendant has been on probation before and another more complete presentence investigation report is available for the probation officer's inspection, or (3) the judge is familiar with the defendant's background. It may also be used to determine if a defendant is to be assigned youthful trainee status, or if a judgment of guilt is to be deferred or a sentence is to be delayed.

### **3. Limitations**

The judge should be made fully aware of the limitations of this type of report. A thorough investigation probably has not been conducted and not all information has been verified. There may be some records or reports that have not been obtained.

## **C. Oral Report**

### **1. General Contents**

An oral report is usually an informal request for information which is obtained from a brief interview with the defendant, followed by a check on the defendant's employment status, traffic and criminal records, ability to pay fines and costs, etc. The basic information sheet should be filled out, the defendant interviewed about the incident involved, and some points verified by telephone. If available, the arresting officer should be consulted. The defendant should be informed that sentencing will occur that day and the information requested is essential. The probation officer will present a summary of the information and make a verbal recommendation for sentencing.

### **2. When Used**

The oral report is generally used when the judge intends to sentence a defendant the same day the oral report is requested.

### **3. Limitations**

MCL 771.14 requires that a presentence investigation report contain a written recommendation for disposition. Since the presentence investigation report is not optional in felony cases, an oral report will never be ordered in these instances. However, since the sentencing judge has the option of ordering a presentence investigation report for misdemeanor cases, an oral report is permissible as an alternative.

## **D. Restitution**

### **1. When Determined**

If there was a victim in the case, restitution should be addressed during the time the probation officer is preparing the presentence report and determined prior to sentencing. The victim should be interviewed either by phone or in person, if requested. This will help determine the seriousness of the offense, and give another view of the defendant.

“Victim” is defined in MCL 780.826 and means an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a misdemeanor. In limited circumstances set forth in this section, a victim includes a sole

proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of a misdemeanor.

“Misdemeanor” is defined in MCL 780.826 and means a violation of a state law or a local ordinance that is punishable by imprisonment for not more than one year or a fine that is not a civil fine, but that is not a felony. Full restitution must be ordered to the victim or the victim’s estate if a defendant is convicted of a misdemeanor, and for an offense that is resolved by assignment to youthful trainee status, by a delayed sentence or a deferred judgment of guilt, or in any other way that is not an acquittal or unconditional dismissal. See MCL 780.826(2), and an exception in (8). If the defendant is to be sentenced to jail as well as pay restitution, the commitment to jail should indicate the amount of restitution due so the sheriff can comply with MCL 780.830a, which allows a deduction of 50 percent of any amount over \$50.00 received by the defendant while incarcerated to be paid toward restitution. The sheriff is required to notify both the defendant and the court in writing of all deductions and payments, with payment to the court once the accumulated deductions exceed \$100.00.

## **2. Determining Validity and Amount**

Restitution should not be on the probation order unless the amount is specific and has been verified by proof from medical bills, work loss statements from employers, repair bills, etc. Restitution may be ordered for the deductible amount in insurance paid losses. An insurance company requesting restitution should submit proof of payment. Restitution may be ordered in cases involving welfare fraud, Michigan Unemployment Insurance Agency fraud, and the Crime Victim Compensation Board. Proof of fraud or victim compensation amounts are readily verifiable. See MCL 780.766.

## **3. Ordering Restitution**

The judgment of sentence must contain a dollar amount of restitution. MCR 6.425, 6.427, and 6.610. If, despite diligent efforts, restitution is still unknown at the time of sentencing, the court should not delay sentencing or order restitution “to be determined.” Instead, the court should order whatever amount has been established (which may be zero dollars) and inform the parties and victim(s) that they may come back at any time on a motion to amend the restitution order based upon new or updated information, as provided in MCR 6.430.

Any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney. MCR 6.425, 6.610.

The court may amend an order of restitution on a motion by the prosecuting attorney, the victim, or the defendant based on new information related to the injury, damages, or loss. MCL 780.826(19) and MCR 6.430.

An order of restitution remains in effect until satisfied in full. An order of restitution is a judgment and may be enforced by the prosecutor, victim, a victim's estate, or any other person or entity named in the order to receive restitution in the same manner as a judgment in a civil action, including a lien against all property of the defendant. MCL 780.826(13). The court may also enforce any noncompliance with an order to pay financial obligations through its contempt power. MCL 600.1701(e).

Unless the court orders otherwise, the defendant is required to pay the full amount of restitution immediately. The court may allow a defendant to make regularly-scheduled restitution payments. MCL 780.826(10). If two or more payments are missed, the court is required to order an employed defendant to execute a wage assignment to pay the restitution. MCL 780.826(15). Obtaining a completed wage assignment order at the time of sentencing may facilitate execution of the assignment as needed. The court may not revoke probation for the nonpayment of restitution unless it determines that the person willfully failed to comply with the order. See MCL 780.826(14).

The person may not be incarcerated for failure to pay restitution as ordered unless the court determines that the defendant has the resources to pay the ordered restitution and has not made a good-faith effort to do so. MCL 780.826(14). If a probationer is required to serve a jail term, the county sheriff may deduct 50 percent of any amount received by the defendant over \$50.00 for payment of restitution. MCL 780.830a.

## **E. Reimbursement for Emergency Response**

Pursuant to MCL 769.1f, the court may order a person convicted of specified offenses to reimburse a state or local unit of government for emergency response expenses. Reimbursement shall be a condition of probation, but is not restitution and is not treated as restitution for purposes of priority of payment. MCL 775.22.

### **1. When Determined**

Reimbursement for emergency response should be addressed during the time the probation officer is preparing the presentence report and determined prior to sentencing.

### **2. Determining Validity and Amount**

The expenses for which reimbursement may be ordered include salaries or wages, such as overtime pay, of law enforcement personnel, fire department, and emergency medical service personnel, including volunteers, the cost of medical supplies lost or expended by the fire department and emergency medical service personnel, the salaries, wages, or other compensation, including, but not limited to, overtime pay of prosecution personnel for time spent investigating and prosecuting the crime or crimes resulting in conviction, and the cost of extraditing a person from another state to this state. MCL 769.1f(2).

A local unit of government may elect to be reimbursed for expenses pursuant to this section



or a local ordinance, or a combination of this section and a local ordinance. A local unit of government may not be fully reimbursed more than once for any expense incurred by that local unit of government. MCL 769.1f(8).

If police, fire department, or emergency medical service personnel from more than one unit of government incurred expenses as described in MCL 769.1f(2), the court may order the person convicted to reimburse each unit of government for the expenses it incurred. MCL 769.1f(3).

### **3. Reimbursement as Condition of Probation**

If the person convicted is placed on probation, any reimbursement ordered under this section shall be a condition of that probation. MCL 769.1f(5).

### **4. Ordering Reimbursement**

When entering the judgment of sentence, the court may order the defendant to reimburse the expenses for emergency response as allowed by MCL 769.1f. If the court is going to order reimbursement, it must have the information regarding the expenses at or before sentencing so that the reimbursement may be properly ordered.

### **5. Enforcing Reimbursement**

The court may revoke probation if the person fails to comply with the order and if the person has not made a good-faith effort to comply with the order. In determining whether to revoke probation, the court shall consider the person's employment status, earning ability, number of dependents and financial resources, the willfulness of the person's failure to pay, and any other special circumstances that may have a bearing on the person's ability to pay. MCL 769.1f, MCL 771.3(6).

An order for reimbursement pursuant to MCL 769.1f may be enforced by the prosecuting attorney or the state or local unit of government named in the order to receive the reimbursement in the same manner as a judgment in a civil action. MCL 769.1f(6).

A person shall not be jailed for a violation of probation for failure to make a reimbursement payment as ordered under MCL 769.1f unless the court determines that the person has the resources to pay the ordered reimbursement and has not made a good-faith effort to do so. MCL 769.1f(7).

## **F. Reimbursement for Fines, Costs, and Statutory Assessments**

### **1. When Determined**

Reimbursement for fines, costs (including minimum state costs), and statutory assessments should be addressed when the probation officer is preparing the presentence report.

Financial sanctions, including additional costs incurred in compelling the defendant's appearance, may be ordered on a deferred judgment of guilt case or when a plea is entered and sentence is imposed or delayed. MCL 769.1k. The crime victim assessment must be ordered on a deferred judgment of guilt case when the person is granted youthful trainee status, or when a plea is entered and sentence is imposed or delayed. MCL 780.905.

## **2. Reimbursement as Condition of Probation**

If the person convicted is placed on probation, any fines, costs, and assessments ordered shall be a condition of that probation. MCL 771.3, MCL 759.1f(5).

## **3. Enforcing Reimbursement**

Payment of fines, costs (including minimum state costs), and other assessments contained in the order of probation may be enforced by a wage assignment. MCL 771.3(2)(f). If the probationer is in prison, the court may submit an order to remit prisoner funds to the Michigan Department of Corrections. The Michigan Department of Corrections will deduct 50 percent of any amount a prisoner receives in a month that exceeds \$50.00. MCL 769.1l. [See SCAO-approved form MC 288.](#)

Fines, costs (including minimum state costs), and other assessments ordered may be collected at any time, regardless of whether the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation. MCL 769.1k.

## 4-03 Investigation

### A. Constitutional Limitations

The United States Supreme Court and Michigan Supreme Court have found it essential that a sentence, and therefore a presentence report, be based on accurate information. *Townsend v Burke*, 334 US 736, 739-740; 68 SCt 1252; 92 L Ed 1690 (1948), *People v Malkowski*, 385 Mich 244; 188 NW2d 559 (1971), *People v Pulley*, 411 Mich 523, 529-530; 309 NW2d 170 (1981).

#### 1. Polygraph Test

Polygraph test results should not generally be considered for purposes of sentencing. *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). A court may neither solicit nor consider polygraph examination results for sentencing. *People v Towns*, 69 Mich App 475; 245 NW2d 97 (1976), and the consideration of polygraph results is generally considered error that requires resentencing. *People v Allen*, 49 Mich App 148; 211 NW2d 533 (1973).

#### 2. Past Convictions

##### a. Violation of Right to Counsel

A sentence may not be influenced by a defendant's past convictions obtained in violation of the right to counsel. The United States Supreme Court has found this to be "misinformation of constitutional magnitude." *United States v Tucker*, 404 US 443, 447-448; 92 SCt 589; 30 LEd2d 592 (1972). When conducting a presentence investigation, a probation officer should ask a defendant if he or she had an attorney at the time of the plea(s) or trial(s) resulting in conviction and incarceration. The report should note any case in which the defendant apparently was unrepresented so the sentencing court may consider the constitutionality of the conviction(s) and decide whether the conviction(s) should be taken into account in the current sentencing proceeding.

##### b. Waiver of Right to Counsel

The Michigan Supreme Court has declared that a defendant who claims a denial of the right to counsel in a past conviction has a right to a hearing on that question. *People v Moore*, 391 Mich 426, 440-441; 216 NW2d 770 (1974).

##### c. Convictions in Foreign Countries

Evidence of a foreign conviction may be considered at sentencing if the court is convinced that the defendant was afforded due process in the foreign court. *People v Galvan*, 226 Mich App 135, 135; 572 NW2d 49 (1997).

## **B. Importance of Relevancy and Reliability**

### **1. When Preparing the Report for Sentencing**

The presentence report must contain reliable information relevant to the defendant's character, attitude, and activities because it provides support for the judge's sentencing decision. The presentence investigator must seek reliable sources, verify information, and evaluate on the basis of experience, common sense, accuracy, and validity. *See People v Eason*, 435 Mich 228, 239; 458 NW2d 17 (1990); see also *People v Jackson*, 487 Mich 783, 801-802; 790 NW2d 340 (2010). According to case law, it is improper for a probation officer to inject personal opinion that the defendant is guilty of a charge where he or she has not been found guilty. *People v Winhoven*, 65 Mich App 522; 237 NW2d 575 (1975).

### **2. When Using the Report at Sentencing**

- a. The sentence imposed by a judge must be based only upon knowledge or evaluation of the defendant. Therefore, a sentencing judge may not consider a personal impression that the defendant is protecting a codefendant or assume a defendant is guilty of other crimes without proof of said conduct. *People v Anderson*, 391 Mich 419, 421-422; 216 NW2d 780 (1974), *People v Davis*, 41 Mich App 683, 691; 200 NW2d 779 (1972). A sentencing court may consider defendant's other criminal conduct, even if not convicted. A court may properly consider defendant's criminal conduct even for offenses that defendant was acquitted of, if there are facts to demonstrate defendant committed the offense. *People v Granderson*, 213 Mich App 673, 679; 538 NW2d 471 (1995).
- b. A sentencing judge may not increase the defendant's sentence on the assumption that he has not fully confessed to the criminal behavior. However, the sentencing court may consider a defendant's lack of remorse. *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003).

## **C. Fundamental Elements to Consider During Investigation**

### **1. Criminal History and Driving Records**

In order to obtain an accurate, comprehensive evaluation of a defendant for sentencing purposes, the probation officer should include in the presentence investigation report the defendant's criminal record (if one), traffic history, the police report, the offender's version of the current offense, a victim summary statement, and any other pending charges or allegations of criminal conduct. See MCR 6.425. Access to criminal history records and dissemination of information contained within the records is controlled by Law Enforcement Information Network (LEIN) Administrative Rules and federal regulations. Title 28 of the United States Code. The following are some guidelines and limitations regarding the inclusion of this information in the presentence report.

- a. Any admissions a defendant makes to a probation officer regarding criminal conduct should be included in a presentence report. However, if these statements are later denied in court, a judge should not consider them as true in imposing sentence. *People v Hildabridle*, 45 Mich App 93, 96; 206 NW2d 216 (1973). Pending charges and other allegations of criminal conduct may be included in the presentence report. However, if the defendant denies any allegations, the court may only consider them if presented with further information establishing their validity. *Id.*; see also *People v Coulter*, 205 Mich App 453, 456-457; 517 NW2d 827 (1994).
- b. The Michigan Supreme Court in *People v McFarlin*, 389 Mich 557, 575; 208 NW2d 504 (1973), made clear that a judge may consider a defendant's juvenile record in sentencing and that such records are often important in determining sentences. Probate courts (now family division of the circuit court pursuant to MCL 600.1021) and the Michigan Department of Health and Human Services have a duty to provide information to the Department of Corrections about a defendant's prior record as a juvenile. MCL 791.228. MCR 6.425(A) now expressly provides that the presentence report should include a description of defendant's prior juvenile adjudications.
- c. The defendant may object to consideration of prior felony, misdemeanor, or juvenile convictions obtained without counsel or a valid waiver. The defendant must present prima facie evidence that the prior conviction challenged is constitutionally invalid. This can be demonstrated by showing the judge's register of actions entry or transcript that acknowledges an absence of counsel in the presentence report itself. The burden then shifts to the prosecution to show the constitutionality of the conviction. *People v Moore*, 391 Mich 426, 440-441; 216 NW2d 770 (1974). See also *People v Carpentier*, 446 Mich 19, 29-30; 521 NW2d 195 (1994); *People v Zinn*, 217 Mich App 340; 551 NW2d 704 (1996).
- d. If a defendant was previously sentenced pursuant to the Holmes Youthful Trainee Act (MCL 762.11 *et seq.*) or had a judgment of guilt deferred under the Substance Abuse Act (MCL 333.7411), the Spouse Abuse Act (MCL 769.4a), the Michigan Penal Code (MCL 750.430[8]), the Liquor Control Code (MCL 436.1703), health professional practicing under influence of drugs or alcohol (MCL 750.430), as a victim of human trafficking (MCL 750.451c), mental health court (MCL 600.1095), veterans court (MCL 600.1206), or the drug treatment court (MCL 600.1070), this information should also be included in the report, if available.
- e. Pending but unadjudicated charges against a defendant may be included in the presentence report and considered in fixing sentence, so long as the fact of reliance upon them is placed on the record. Pending charges, even those dropped pursuant to a plea bargain, may be considered by the sentencing court and may provide an accurate and adequate basis for imposing sentence. See *People v Coulter*, 205 Mich App 453, 456; 517 NW2d 827 (1994); see also *People v Golba*, 273 Mich App 603, 614; 729 NW2d 916 (2007).

- f. When a person has been convicted of domestic violence, or when a prior conviction of domestic violence is included in a criminal history record, federal law prohibits the person from possessing, carrying, or purchasing a firearm or ammunition. 18 USC 922(g)(9).

The definition of domestic violence in the federal code includes all misdemeanor convictions that involve the use or attempted use of physical force or threat of use of a deadly weapon, by a current or former spouse, parent, or guardian of the victim; by a person with whom the victim shares a child in common; by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian; or by a person similarly situated to a spouse, parent, or guardian of the victim. 18 USC 921(a)(33)(A). A person must have been represented by counsel or knowingly and intelligently waived the right to counsel, and same for jury. The presence of a conviction meeting these requirements would result in a condition of probation prohibiting the defendant from possessing, carrying, or purchasing a firearm or ammunition. 18 USC 921(a)(33)(B).

## **2. Psychiatric Reports**

The Michigan Supreme Court has held that a psychiatric report from the Center for Forensic Psychiatry evaluating the defendant's present mental health is required before a guilty but mentally ill defendant may be sentenced to probation. (*People v McLeod*, 407 Mich 632, 658; 288 NW2d 909 (1980)). See also MCL 771.14(2)(g) indicating that a presentence report should contain diagnostic opinions, if available and not otherwise exempted from disclosure. However, the requirement in *McLeod* does not extend to sentencing where the defendant will be imprisoned and not placed on probation. *People v Linzey*, 112 Mich App 374, 380; 315 NW2d 550 (1981).

## **3. Privileged and Confidential Information Obtained from Professionals**

The probation officer needs to know the rules of confidentiality when gathering privileged information for the presentence investigation report and how these rules pertain to the disclosure of that information once it is compiled in the report. See [“4-05 Disclosing Presentence Investigation Report and Related Records”](#) and [“Chapter 8: Records Management”](#) for more details on disclosure of confidential information.

A defendant interviewed during a presentence investigation must be informed that the law protects certain kinds of records kept by doctors, schools, accountants, etc., regarding whatever is pertinent. In order to compile a complete report to aid a judge in sentencing, access to this privileged information is important.

For more information on confidential relationships, see [“1-03 Rules of Confidentiality”](#) and [“4-03 Investigation”](#) below.

### **a. Seeking Privileged Information from Confidential Relationships**

When privileged information is sought from someone who has a confidential relationship with the defendant, the probation officer needs permission to obtain the information. A defendant should be asked to sign a waiver giving confidential sources permission to release or disclose privileged information to the probation officer. A form for this should be developed in each probation department. Sample forms are in the Section 4 Appendix. The release form must specifically indicate the individual understands that he or she has the right to deny access to privileged information and that he or she knowingly relinquishes that right.

If privileged information is included in a report without a waiver, a defense attorney may be able to prevent a judge from considering the privileged information in sentencing based on the statute that grants the privilege barring its use.

Confidential relationships recognized by Michigan statute are numerous and, therefore, only the most common are listed below.

- Accountants MCL 339.732.
- Attorneys MCL 767.5a.
- Confessions to clergy MCL 600.2156.
- Fiduciaries MCL 700.1212.
- Husband and wife MCL 600.2162.
- Marriage counselors MCL 333.18117.
- Physicians MCL 600.2157.
- Polygraphs MCL 338.1728.
- Psychiatrists (See MCL 330.1750(3); see also *Saur v Probes*, 190 Mich App 636, 638; 476 NW2d 496 (1991).)
- Psychologists MCL 333.18237.

Whenever information is required from any of the above sources, it is best to first check the statute to determine if a privilege is involved and, if so, whether a means for obtaining the information is provided, either through waiver or court order.

### **b. Exceptions to Release of Privileged Information**

Sometimes privileged information cannot be released to the probation officer even with the consent of the individual concerned. This is because **privileges** exist without there being a confidential relationship as defined above. Generally these privileges protect government records pertaining to children, for example, adoptions, illegitimate births, and training school records. Because the government believes it would be harmful to both children as a class and the public if such information was available, the law usually does not allow disclosure, even if the person described in the records consents.

### **c. Access to Public Assistance Records**

In order to determine a defendant's ability to pay fines, costs, and restitution, the probation officer will need to determine whether a defendant receives public assistance and the amount received. This information is open to inspection by officials in connection with their official acts according to MCL 400.64.

### **d. Freedom of Information Act**

The Freedom of Information Act greatly facilitates the gathering of information from government agencies only (this does not apply to court records). This information is available to the general public. The statute provides that failure of a government agency employee to promptly furnish the information may result in an award of attorneys' fees, costs, and disbursements to an individual who files an action to compel disclosure. MCL 15.231.

## **4. Confidential Information Obtained from Defendant**

MCL 791.229, which governs circuit court probation officers, provides that unless otherwise provided by law, "all records and reports of investigations made by a probation officer, and all case histories of probationers shall be privileged or confidential communications not open to public inspection." While district court probation offices created pursuant to MCL 600.8314 are not part of the Bureau of Probation, the statute provides some guidance relating to how documents and communications with a probationer should be treated. The relationship between the defendant and the probation officer should be based on mutual trust so that the defendant can be comfortable talking with the probation officer about personal problems. Assurances of confidentiality are one way to foster and gain trust in this relationship. While conversations between the probation officer and the defendant may be considered confidential in many situations, the probation officer must forego confidentiality if public safety is endangered.

If a probation officer makes a promise of confidentiality (implied or expressed), then any information acquired through further questioning may not be used in a violation or subsequent criminal proceeding. Otherwise, the information gathered can be used. *Minnesota v Murphy*, 465 US 420, 432; 104 S Ct 1136; 79 L Ed 2d 409 (1984). For more details on the release of confidential information, see ["1-03 Rules of Confidentiality"](#), ["4-05 Disclosing Presentence Investigation Report and Related Records"](#), and ["Chapter 8: Records Management"](#).

## **5. Blood Testing for HIV and Other Diseases**

Human immunodeficiency virus (HIV) and other communicable diseases have had a significant impact on the criminal justice system. Probation officers may come in contact with persons who have communicable diseases. It is important to have knowledge of the following laws and their impact on the criminal justice system.



MCL 333.5131 and MCL 333.5133 state that all reports, records, and data pertaining to testing, care, treatment, reporting, and research associated with a communicable disease or infection are confidential. Any person who releases test results in compliance with the law is immune from civil or criminal liabilities or administrative penalties for the release of that information. The test results for the presence of a communicable disease or infection, and the fact that a test was ordered, are subject only to physician-patient privilege laws. See [“6-01 Determining Sentence”](#) for more information on the responsibilities of the court.

## **6. Fingerprinting**

If proof does not exist that fingerprints were taken prior to the time of arraignment of a person on a complaint for a felony or a misdemeanor (punishable by imprisonment for more than 92 days), a district court magistrate or judge must order that fingerprints be taken. See [SCAO-approved form MC 233](#). The order will either: (1) order the person to submit himself or herself to the police agency that arrested the person or obtained the warrant for the arrest of the person so that the person’s fingerprints can be taken, or (2) order the person committed to the custody of the sheriff for the taking of the fingerprints. MCL 764.29.

**Note:** MCL 28.243 provides in subsection (3) that fingerprints are not required at arrest for violations of MCL 257.904(3)(a), or a local ordinance substantially corresponding to section 904(3)(a), operating without a license, first offense. (MCL 28.243 now uses the term “biometric data” which is defined by MCL 28.241a(b) to include fingerprint images.)

## **7. Assessments**

Pursuant to MCL 257.625b(5), before imposing sentence for a violation of MCL 257.625(1), (3), (4), (5) (6), (7), or (8), or a local ordinance substantially corresponding to subsections (1), (3), (6), or (8), the court shall order the defendant to undergo screening and assessment by a person or agency designated by the Michigan Department of Community Health to determine whether he or she is likely to benefit from rehabilitative services, including alcohol or drug education and alcohol or drug treatment programs. Except as otherwise provided in MCL 257.625b(5), the court may order the defendant to participate in and successfully complete one or more appropriate rehabilitative programs. If the person has one or more prior convictions, the court shall order the person to participate in and successfully complete one or more appropriate rehabilitative programs as part of the sentence. The defendant shall pay the costs of the screening and rehabilitative services as part of the sentence. This assessment can be included as a portion of the presentence report. There are several screening and assessment tools that can be used for evaluation. See [“Chapter 5: Substance Screening and Assessment”](#) for more information.

## **8. Crime Victim’s Rights**

Victims have certain rights established by Article I, Section 24 of the Michigan

Constitution and the Crime Victim's Rights Act. There are certain actions that a presentence interviewer/probation officer should consider during investigation. Const 1963, art 1, §24, MCL 780.824. A parent, guardian, or custodian of a minor victim or a victim who is mentally or emotionally unable to participate in the legal process may exercise the rights of the victim, unless the parent, guardian, or custodian is the defendant or is incarcerated.

**a. Victim Impact Statement**

Pursuant to MCL 780.823 and 780.824, the victim has the right to submit or make a written or oral impact statement to the probation officer for use by that officer in preparing a presentence investigation report concerning the defendant. The victim's written statement shall, upon the victim's request, be included in the presentence investigation report. A victim impact statement letter should be sent to and filled out by the victim(s) prior to a probation officer's interview. See also MCL 771.14(2)(b). Pursuant to MCR 6.425(A)(1)(g), if provided and requested by the victim, a victim's written impact statement as provided by law shall be included for sentencing regarding information concerning the financial, social, psychological, or physical harm suffered by any victim of the offense, including the restitution needs of the victim.

**b. Effect on Sentencing Recommendation**

In determining a sentencing recommendation, the probation officer should assess the relationship of the victim and the defendant. If the victim wishes not to have contact with the defendant, the probation officer may include this as a recommended condition of probation.

**c. Determining Restitution**

During an investigation, it is essential to contact the victim and determine injuries or losses for which the victim may receive compensation. In determining restitution, the probation officer should refer to MCL 780.826.

For crimes resulting in physical or psychological injury, the following costs, whether incurred or reasonably expected to be incurred, may be included in the calculation of restitution:

- 1) medical services.
- 2) physical therapy and rehabilitation.
- 3) medical and psychological treatment for victim's family members.
- 4) homemaking and child-care expenses.
- 5) federal, state, and local tax deductions or credits which are lost due to the death of a victim, if the deceased victim could have been claimed as a dependent.

If homemaking or child-care services are provided without charge, restitution may include the amount which would be charged for those services in the area. MCL 780.766(4)(e), 780.794(4)(e), 780.826(4)(e).

Calculation of amounts not yet incurred but reasonably expected to be incurred will present challenges to probation officers. Simple scenarios, such as monthly counseling sessions which will last for a predetermined duration, will be relatively straightforward. But future expenses which may go on for an unknown period of time, or which may vary in amount over time, will be more complicated. Especially complex will be the value of tax benefits not realized, since the value of future deductions is dependent upon the future income of the parents or guardians.

In cases where costs will continue to accrue, courts should enter an order with a specific amount of restitution. "Open" orders should not be entered. As costs continue to accrue, the restitution order should be amended, periodically if necessary, and always state a specific amount.

In all cases, the court is obliged to order amounts which are "reasonably determined" or "reasonably expected to be incurred," despite the difficulty of calculating those amounts. MCL 780.826.

For crimes resulting in death or serious impairment of a body function, the court may order up to three times the amount otherwise allowed as restitution. MCL 780.766(5), MCL 780.826.

#### **d. Notice to Prosecuting Official**

After arraignment, the court is responsible for notifying the prosecuting official of the names and addresses of victims. MCL 780.816. See [SCAO-approved form DC 255](#).

#### **e. Confidentiality of Impact Statement**

If a victim has requested his or her victim's impact statement be included in the presentence investigation report, it will be made available to the defendant unless exempted from disclosure by the court as specified by MCL 771.14(3) and MCR 6.425(B) and (C). See also ["4-05 Disclosing Presentence Investigation Report and Related Records"](#). MCL 780.823(1)(e), MCL 780.824.

### **9. Medical Marihuana Use**

Michigan voters approved the medical use of marihuana in November 2008. MCL 333.26421-.26430. Persons using marihuana to alleviate a debilitating medical condition may obtain a physician certification and register with the Michigan Department of Community Health. The person is then issued a registry identification card. However, medical and recreational marihuana possession and use are still illegal under federal law.

See the Controlled Substances Act, 21 USC 801 *et seq.* If it is determined during the presentence investigation that a defendant has been issued a registry identification card for this purpose, it must be made known, especially where a defendant is placed on probation with a condition of monitoring for drug use. See [“5-02 Referral and Screening”](#) and [“7-01 General Procedures”](#).

## **10. Defendant’s Statement**

The probation officer should get a statement from the defendant as part of the presentence report. The statement may be either written or oral, depending on local practice. There are disadvantages and advantages to both. The presentence investigation report should inform the judge of any discrepancies between the defendant’s statement and the police report.

### **D. Waiver of Updated Presentence Report at Resentencing**

A defendant or prosecutor may waive the right to an updated presentence report at resentencing when each believes the previously prepared report is accurate. *People v Hemphill*, 439 Mich 576, 582; 487 NW2d 152 (1992). A defendant may waive preparation of an updated report at resentencing even though a previously prepared presentence report may contain inaccurate information. Basing a sentence on such information could jeopardize the sentencing unless updated.

## 4-04 Presentence Report

### A. Purpose

After a defendant pleads guilty to a charge or is found guilty by the court or jury, the judge may refer the defendant to the probation department for an investigation and report prior to sentencing. MCL 771.14(1). The presentence report provides the sentencing judge with a recommended sentence supported by documentation which aids the judge in fashioning a just sentence.

### B. Contents

MCL 771.14(2) specifies those components which must be included in all felony presentence reports and any misdemeanor presentence reports which have been requested by the court (two of the components apply only to felony cases). If the court has not requested the probation officer prepare a written report, these components, while not required, are highly recommended. Other recommended components are outlined in case law.

#### 1. Required or Recommended Components of the Report

Components of the report established by MCL 771.14(2) include:

- a. an evaluation of and a prognosis for the person's adjustment in the community based on factual information contained in the report,
- b. if requested by a victim, any written impact statement submitted by the victim pursuant to MCL 780.823 and MCL 780.824,
- c. a specific written recommendation for disposition based on the evaluation and other information as prescribed by the court,
- d. a statement prepared by the prosecuting attorney as to whether any consecutive sentencing is required as authorized by law,
- e. if a person is to be sentenced for a misdemeanor involving the illegal delivery, possession, or use of alcohol or a controlled substance, a statement that the person is licensed or registered pursuant to article 15 of the Public Health Code, MCL 333.16101-333.18838, if applicable, and
- f. diagnostic opinions that are available and not exempted from disclosure by MCL 771.14(3).

## 2. Recommended Components

While MCR 6.425 is not specifically applicable to district court cases, it is recommended that it be considered when developing the presentence report. MCR 6.425 provides that the presentence report must, depending on the circumstances, include:

- a. a description of the defendant's prior criminal convictions and juvenile adjudications,
- b. a complete description of the offense and the circumstances surrounding it,
- c. a brief description of the defendant's vocational background and work history, including military record and present employment status,
- d. a brief social history of the defendant, including marital status, financial status, length of residence in the community, educational background, and other pertinent data,
- e. the defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report,
- f. information concerning the financial, social, psychological, or physical harm suffered by any victim of the offense, including the restitution needs of the victim,
- g. if provided and requested by the victim, a written victim's impact statement as provided by law,
- h. any statement the defendant wishes to make,
- i. a statement prepared by the prosecutor on the applicability of any consecutive sentencing provision,
- j. an evaluation of and prognosis for the defendant's adjustment in the community based on factual information in the report,
- k. a specific recommendation for disposition, and
- l. any other information that may aid the court in sentencing.

## 3. Optional

The presentence report may include:

- a. A juveniles record that has been automatically expunged by operation of law may still be considered at sentencing. *People v Smith*, 437 Mich 293, 304; 470 NW2d 70 (1991).
- b. The conclusions or opinions of the probation officer. A sentencing court is allowed to consider the facts underlying uncharged offenses, pending charges, and acquittals and these may be included in the presentence report. *People v Coulter*, 205 Mich App 453, 456; 517 NW2d 827 (1994).

## 4. Prohibited

The presentence report shall not include any address or telephone number for the home, workplace, school, or place of worship of any victim or witness, or a family member of any victim or witness, unless an address is used to identify the place of the crime or to impose conditions of release from custody that are necessary for the protection of a named

individual, or any other information prohibited from disclosure pursuant to the William Van Regenmorter Crime Victim Rights Act. MCL 780.751 *et seq.*, MCR 6.610(F)(1)(b).

## **5. Updating Reports**

A presentence report must be current and updated. *People v Triplett*, 407 Mich 510, 515; 287 NW2d 165 (1980). A report is deficient if it is so old that it does not reflect changed circumstances. *People v Crook*, 123 Mich App 500, 503; 333 NW2d 317 (1983). The defendant is entitled to be sentenced on the basis of a presentence report prepared specifically for the offense for which the defendant is being sentenced. *People v Anderson*, 107 Mich App 62, 65; 308 NW2d 662 (1981); *People v McKeever*, 123 Mich App 533, 539; 332 NW2d 596 (1983). If a complete report has been prepared within the past three years, that report may be submitted along with a supplemental report. Mich Admin Code, R 791.9910(3). Supplemental reports should reflect new information and relevant changes.

If, before sentencing, a presentence investigation report is amended by the supervisor of the probation officer who prepared the report or by another person with the authority to amend a presentence investigation report, the probation officer may request the court strike his or her name from the report and the court shall comply with that request. MCL 771.14(4).

## **C. Sentence Recommendation**

The presentence report must contain a specific sentence recommendation. *People v Green*, 123 Mich App 563, 658; 332 NW2d 610 (1983), MCL 771.14(2). A simple recommendation of incarceration or that the defendant not be placed on probation is sufficient. *People v Joseph*, 114 Mich App 70, 78; 318 NW2d 609 (1982).

### **1. Sentencing Guidelines**

Statutory sentencing guidelines apply only to felony offenses for which the penalty prescribed is an indeterminate sentence, and the sentencing court retains jurisdiction in imposing an offender's sentence. MCL 769.34.

### **2. Plea Agreement**

The judge may not initiate or participate in discussions aimed at reaching a plea or sentence agreement. *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993). The judge also is not bound by defense-prosecution sentence bargains until they are accepted at sentencing. See *People v Williams*, 464 Mich 174, 179-180; 626 NW2d 899 (2001). Sentence bargaining may result in a sentence agreement between the defendant and prosecutor that the defendant will plead guilty in exchange for: (1) a specific sentence disposition, or (2) a sentence recommendation by the prosecutor.

At the request of a party, a judge may state on the record the length of sentence that appears to be appropriate for the charged offense or a reduced charge offered by the prosecutor,

based on the information then available to the judge. However, the judge is not bound by that preliminary evaluation and may later determine, based on additional facts that come to light, the sentence is inappropriate. A defendant who pleads guilty in reliance upon the judge's preliminary evaluation regarding sentence has an absolute right to withdraw the plea if the judge later determines that the sentence must exceed the preliminary evaluation. *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993).

### **3. Factors in Determining Sentence**

In determining what sentence to impose, the following should be considered:

- a. the possibility of reforming the defendant,
- b. the protection of society,
- c. the disciplining of the offender, and
- d. the likelihood of deterring others from committing like offenses.

Although the sentence must be individualized, the judge should consider the sentences of similarly-situated defendants who have committed similar crimes, so as to avoid a "significantly disproportionate" sentence. *People v Smith*, 482 Mich 292, 302; 754 NW2d 284 (2008). See ["6-01 Determining Sentence"](#) for more information on determining sentence.

### **D. Release of Privileged Information**

See ["1-03 Rules of Confidentiality"](#), ["4-05 Disclosing Presentence Investigation Report and Related Records"](#), and ["Chapter 8: Records Management"](#).



## **4-05 Disclosing Presentence Investigation Report and Related Records**

### **A. Authority**

The presentence report must be disclosed prior to sentencing. MCL 771.14(5), MCR 6.610(F)(1)(b).

### **B. Right to Access**

The court must provide unredacted 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. The prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, may retain a copy of the report or an amended report. If the presentence report is not made available 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, are 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. MCL 771.14(6), MCR 6.610(F)(1)(b). At the time of sentencing, either party may challenge, on the record, the accuracy or relevancy of any information in the presentence investigation report.

### **C. Records, Reports, and Case Histories**

Statutes and court rules do not provide much guidance on the creation or distribution of a presentence report upon conviction of a misdemeanor or ordinance violation cognizable in the district court. Therefore, the information in this section is provided as guidance. Probation officers should seek specific direction from the judge.

#### **1. Exemptions from Disclosure**

Upon request, an address or telephone number that would reveal the location of a victim or witness or a family member of a victim or witness shall be exempted from disclosure unless an address is used to identify the place of the crime or to impose conditions of release from custody that are necessary for the protection of a named individual. MCL 771.14(2), MCR 6.610(F)(1)(b).

The sentencing judge may exempt from disclosure to the defendant parts of the presentence report that might seriously disrupt a program of rehabilitation. The sentencing judge may also exempt from disclosure sources of information that have been obtained on a promise of confidentiality. When a part of the report is not disclosed, the court must advise the defendant and the defendant's attorney that information has not been disclosed and state on the record the reason for nondisclosure. MCL 771.14(3).

## **2. Disclosure of Presentence Investigation Report**

### **a. Review by Parties**

The court must provide unredacted 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. The prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, may retain a copy of the report or an amended report. 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 the defendant believes should be considered in imposing sentence. MCL 771.14(7), MCR 6.610(F)(1)(b).

Upon request, an address or telephone number that would reveal the location of a victim or witness or a family member of a victim or witness shall be exempted from disclosure unless an address is used to identify the place of the crime or to impose conditions of release from custody that are necessary for the protection of a named individual. MCR 6.610(F)(1)(b).

### **b. Nondisclosure**

Although MCR 6.425(B) does not apply to district court, it is a good practice to observe the restrictions in this rule. Therefore, when part of a presentence investigation report is not disclosed, the court should 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 should also provide the parties with a written or oral summary of the nondisclosure information and give them an opportunity to comment. The court's decision to exempt part of the report from disclosure is subject to appellate review.

## **3. Responsibility of Probation Officer**

Probation officers have a dual responsibility of protecting the public and promoting the rehabilitation of offenders. While the information which a probation officer has obtained and maintained in the probation file is confidential material, some materials may be released in certain instances. See ["4-03 Investigation"](#).

The presentence investigation report contains numerous pieces of information about an offender's background, such as his or her education, social and medical history, and work experience. A probation file may also consist of other reports written by counselors,

psychologists, and case workers. Therefore, a large amount of personal and confidential information is maintained by the probation officer that should not be disclosed arbitrarily.

#### **a. Releasing Conviction Information on Defendant**

When conviction information is a matter of **public record**, probation officers may disclose this information to noncriminal justice agencies or other persons as long as agency regulations are observed. **Information obtained via LEIN may not be disclosed to noncriminal justice agencies or persons.** Dissemination of criminal history record information (CHRI) obtained via LEIN is controlled by MCL 28.214, Criminal Justice Information Systems (CJIS) Policy Council Rules, and Chapter 1, Title 28 of the Code of Federal Regulations. Title 28 was developed to ensure the constitutional rights and privacy of individuals with CHRI, and to control the collection and dissemination of such information. Criminal Justice Information Systems (CJIS) Field Services is required by Title 28 to ensure that its requirements are satisfied by security standards. Misdemeanor and felony violations were created in 1998 with amendments to MCL 28.214 for disclosure of information from LEIN in a manner not authorized by law or rule.

Title 28 limits the dissemination of nonconviction data directly or through an intermediary to criminal justice agencies for criminal justice purposes or employment, or other individuals and agencies as authorized by statute, executive order, or court rule. LEIN administrative rule 28.5208 provides that, except as permitted by law, information from LEIN shall not be disseminated to an unauthorized agency, entity, or person. However, nonpublic information may be released for public safety purposes consistent with the LEIN rules and applicable laws. Pursuant to LEIN administrative rule 28.5201, LEIN access is generally restricted to governmental agencies that need to access such information or a nongovernmental agency that is statutorily vested with arrest powers and whose primary function is the administration of criminal justice. A private person may receive verbal information from a law enforcement agency as to whether or not a warrant ordering an arrest has been issued by a court and entered into either LEIN or National Crime Information Center (NCIC) files, if proper identification is provided.

#### **b. Releasing Nonpublic Information**

In providing required notice to victims, the probation officer may furnish information or records to victims that would otherwise be closed to public inspection. MCL 780.752a, 780.781a, 780.811b.

#### **c. Releasing Background Information on Defendant**

Probation officers may also disclose an offender's background to criminal justice agencies on a need-to-know basis, provided the inquiry is related to an ongoing investigation. Courts generally base the decision to disclose information about an offender's background on the nature of the offender's crime and on the probation officer's opinion for potential harm.

#### **d. Releasing Privileged and Confidential Information**

MCL 791.229 provides that, “[e]xcept as otherwise provided by law, all records and reports of investigations made by a probation officer, and all case histories of probationers shall be privileged or confidential communications not open to public inspection.” The presentence report itself is a confidential document that is subject to a claim of privilege. See 5A Michigan Court Rules Practice (2d ed) § 6425.4. However, the confidential nature of the document may give way to other considerations in certain cases. *People v Rohn*, 98 Mich App 593, 599; 296 NW2d 315 (1980), overruled on other grounds by *People v Perry*, 460 Mich 55, 594 NW2d 477 (1999).

Additionally, the “privilege” in MCL 791.229 does not extend to all communications, but is instead limited to communications made within the scope of the probation officer’s responsibilities. *People v Burton*, 74 Mich App 215, 225-226; 253 NW2d 710 (1977). “The privilege established by MCL § 791.229 . . . is designed to encourage unfettered communication between the probation officer and the accused in the presentencing phase of a criminal case.” *Howe v Detroit Free Press, Inc*, 440 Mich 203, 226-227; 487 NW2d 374 (1992).

#### **D. Probationer’s Statements**

Any statements a defendant makes to a probation officer about criminal conduct should be included in the report. However, if these statements are later denied in court, a judge should not consider them true when imposing sentence. *People v Hildabridle*, 45 Mich App 93, 95; 206 NW2d 216 (1973). See [“4-03 Investigation”](#) for more information.

#### **E. Crime Victim’s Rights**

##### **1. Personal and Other Information**

A presentence investigation report shall not include any address or telephone number for the home, workplace, school, or place of worship of any victim or witness, or a family member of any victim or witness, unless an address is used to identify the place of the crime or to impose conditions of release from custody that are necessary for the protection of a named individual, or any other information prohibited from disclosure pursuant to the William Van Regenmorter Crime Victim Rights Act. MCL 780.751 *et seq.*, MCR 6.610(F)(1)(b).

##### **2. Victim Impact Statement**

If a victim has requested his or her victim impact statement be included in the presentence investigation report, it will be made available to the defendant unless exempted from disclosure by the court as specified in MCL 771.14(3). MCL 780.823(1)(e), MCL 780.824. See [“4-03 Investigation”](#). See also [“1-03 Rules of Confidentiality”](#) and [“Chapter 8: Records Management”](#).

## 4-06 Challenges to Investigation and Report

### A. Authority

Any information contained in the presentence report may be challenged as inaccurate and irrelevant. *People v Lloyd*, 284 Mich App 703, 705; 774 NW2d 347 (2009).

### B. What Can Be Challenged

Prior felony and misdemeanor convictions may be objected to as unconstitutionally obtained in violation of the right to counsel. *People v Roseberry*, 465 Mich 713, 718-719; 641 NW2d 558 (2002); *People v Moore*, 391 Mich 426, 440-441; 216 NW2d 770 (1974); *People v Schneider*, 132 Mich App 214; 347 NW2d 21 (1984). See also [“4-03 Investigation”](#).

See also [“6-12 Sentencing Hearing”](#).

#### 4-07 In-Chamber Conferences

The judge may conduct in-chamber conferences. *People v Pulley*, 411 Mich 523, 532; 309 NW2d 170 (1981). The judge may not confer ex parte with the prosecutor in the absence of defense counsel. *People v Von Everett*, 110 Mich App 393, 396; 313 NW2d 130 (1981). The judge may confer with defense counsel in the absence of the defendant unless the defendant is prejudiced. *People v Pulley*, 411 Mich 523, 532; 309 NW2d 170 (1981).

Two judges may confer regarding a defendant whom both judges are going to sentence. *People v Sexton*, 113 Mich App 145, 146; 317 NW2d 323 (1982). The judge may meet with the victim although the practice is “unwise.” *People v Rodriguez*, 124 Mich App 773; 335 NW2d 690 (1983).

The judge may meet with the probation officer outside the presence of defense counsel; however, counsel must have access to any information which was disclosed at that conference. *People v Beal*, 104 Mich App 159, 166-167; 304 NW2d 513 (1980); *People v Mills*, 145 Mich App 126, 130; 377 NW2d 361 (1985).

## **4-08 Suggested Internal Procedures**

The presentence interview should include relevant questions, moving from general to more specific areas of inquiry. Asking open-ended questions helps gain more insight into the defendant's character and behavior. The interview should also be conducted in a nonjudgmental manner with persistence and directness on the part of the probation officer. The basic procedure in the investigation prior to meeting with the defendant is to:

- create a file on the defendant,
- obtain a police report,
- review the basic information sheet (BIS),
- read the register of actions,
- check the local criminal record/index (automated or manual alphabetical),
- check the juvenile records,
- review the traffic and criminal histories,
- compile all information to begin basis for presentence investigation report, and
- obtain a victim impact statement, if applicable.

## **4-09 Appendix**

[Referral](#)

[Waiver of Privilege Against Disclosure](#)



# Chapter 5: Substance Screening and Assessment

## 5-01 Introduction

### A. Authority

District court probation officers are designated by the Michigan Department of Licensing and Regulatory Affairs (LARA), Bureau of Community & Health Systems, to perform substance use disorder screening and assessment activities<sup>1</sup> provided that the court has trained staff.

### B. Purpose

Screening and assessment may include interviews, assessment instruments and other diagnostic information. The object of screening and assessment is to determine whether the offender is likely to benefit from rehabilitative services, including alcohol or drug education/treatment programs. See also [“Chapter 4: Presentence Investigation”](#).

### C. Training and Credentialing

In order for a district court probation department to be designated by LARA to conduct substance use disorder screening and assessments, staff must have received training and credentialing from a nationally recognized substance use disorder (SUD) credentialing organization or the Michigan Certification Board for Addiction Professionals (MCBAP), are working towards a credential (developmental plan) and have undertaken training, or are supervised by an individual with an accepted credential. See also [SCAO Communication, dated June 16, 2020](#).

### D. Role of Probation Officer

The role of a probation officer who is qualified to conduct screening and assessment is to determine whether a person will benefit from rehabilitative services, including alcohol or drug education/treatment programs. Before the sentencing date of a probationer, the probation officer recommends to the sentencing judge a course of action to be followed. Probation officers do not perform clinical diagnosis or develop treatment plans.

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<sup>1</sup> As required or suggested in MCL 257.624a(3); 257.624b(1); 257.625b(5); MCL 259.185(10); MCL 324.80185(2); MCL 324.81134(18); MCL 324.82141(2); MCL 333.7408a(3), MCL 333.7411(6); MCL 436.1703(1); MCL 462.353(9).

## 5-02 Referral and Screening

### A. Order for Evaluation

The order for evaluation is issued by the sentencing judge at the time of conviction. See [SCAO-Approved form MC 211, Order for Substance Abuse Evaluation](#). When a defendant enters a plea of guilty to a charge for: (1) operating a vehicle while intoxicated (OWI), (2) operating a vehicle or water vessel while visibly impaired (OVWI), (3) person under 21 operating a vehicle with any bodily alcohol content, (4) operating a vehicle with presence of drugs in body (OWPD), (5) operating a vehicle OWI, OVWI, OWPD with occupant under 16 in vehicle, (6) operating a water vessel with a blood alcohol content of .10 percent or more, or (7) operating a water vessel while under the influence of intoxicating liquor or a controlled substance or both, the judge is required to order screening and assessment or a substance abuse evaluation. MCL 257.625b. Court staff such as a court clerk, probation clerk, or probation officer should then complete the order for evaluation form, scheduling the screening and/or assessment. The defendant signs the order and is provided a copy.

NOTE: Michigan voters approved the medical use of marijuana in November 2008. (MCL 333.26421-.26430; Michigan Admin Code R 333.101-.133). Persons using marijuana to alleviate a debilitating medical condition may obtain a physician certification and register with the Michigan Department of Licensing and Regulatory Affairs. MCL 333.26426; see also MCL 333.26423 (defining “department” as the Department of Licensing and Regulatory Affairs). The person is then issued a registry identification card. However, marijuana possession and use are still illegal under federal law. See *Ter Beek v City of Wyoming*, 495 Mich 1, 12; 846 NW2d 531 (2014). If it was determined during the presentence investigation that a defendant has been issued a registry identification card for this purpose, this fact should be included in an order for substance abuse screening and the subsequent report. See also [“4-03 Investigation”](#) and [“7-01 General Procedures”](#).

### B. Court Screening

Court screening is performed by designated court staff, such as a probation officer from the court’s probation department. Some courts have their own assessment officers or a person under contract who conducts all screening and assessments for the court. Another term used to describe court screening is “in-house assessments.”

### C. Community Screening

Community screening is performed by community agencies licensed by the Michigan Department of Health and Human Services. Another term for community screening is “out-of-house assessments.” A list of community agencies is available through local substance abuse coordinating agencies.

## **D. Screening and Assessment Instruments**

There are several screening and assessment instruments available to the court and probation officers. The following instruments are currently recognized in the substance abuse field:

1. ADE Needs/Risk.
2. Addition Severity Index (ASI).
3. Michigan Alcohol Screening Test (MAST).
4. Driver Risk Inventory (DRI).
5. Alcohol Use Inventory (AUI).
6. Substance Abuse Subtle Screening Inventory (SASSI).

## 5-03 Assessment

### A. Report of Substance Abuse Assessment

A report of substance abuse assessment (or a summary of the report on [SCAO-approved form MC 212, Summary of Substance Abuse Assessment Report](#)) must be completed and available for the sentencing judge before sentencing on all OWI, OWPD, OVWI, and drunk boating and ORV offenses. Screening and assessment reports should include a recommendation which determines whether the individual assessed would benefit from rehabilitative services, including alcohol and drug education/treatment. As part of the sentence, the judge may order the person to participate in and successfully complete one or more appropriate rehabilitative programs, such as a Victim Impact Panel, Alcohol Highway Safety Education, out-patient, intensive out-patient, in-patient, or residential. MCL 771.3. See also e.g., MCL 257.625b(5) (screening and assessment for OWI); MCL 324.81134(18) (screening and assessment for ORV under the influence); MCL 259.185 (OWI Aircraft); MCL 324.80185(OWI Motorboat); MCL 324.81134(OWI ORV); MCL 324.82141(OWI Snowmobile); MCL 333.7411(6); MCL 462.353 (OWI Locomotive).

### B. Costs

The defendant must pay all costs for screening and assessment and rehabilitative services. Courts can require a screening and assessment fee if the screening and assessment is conducted by designated court staff. Costs vary among courts, probation departments, and substance abuse agencies. See e.g., MCL 257.625b(5); MCL 324.81134(18).

### C. Confidentiality

#### 1. Function

Information in the record of a person undergoing screening and assessment, additional counseling, or treatment for substance abuse and mental health problems is confidential. MCL 330.1261, MCL 330.1285, MCL 330.1748. Confidentiality protects the individual from the release of unauthorized information. Individuals must sign a release of information or consent form authorizing the release of information specific to the court case. See the Section 5 Appendix for a sample form.

#### 2. Release Form

The release must specify what information is authorized for release or the information cannot be released. Release forms should include the individual's full name, address, date of birth, the name of the agency and person conducting screening and assessment services, and specific dates of use. See MCL 330.1262; MCL 330.1285(b); MCL 330.1748.

### **3. Witness**

The release must be dated and signed by both the individual and a witness. The witness is responsible for ensuring that a client is competent to give informed consent before signing the release. R330.7003, Michigan Department of Health and Human Services, Rights of Recipients of Health and Substance Abuse Services, R330.6013[5][a]-[c], Michigan Department of Health and Human Services, Guardianship for Recipients of Mental Health Services. If the witness does not feel the client is competent, see R330.6001(3) and (4). If a guardian signs for the individual, there must be a letter of authority on file.

### **4. Exceptions**

Release forms are not necessary for designated court staff to provide a copy of the assessment to the judge and for probation transfers.

## **5-04 Appendix**

[Client Information Release Authorization](#)

# Chapter 6: Sentencing

## 6-01 Determining Sentence

### A. Proper Considerations

As a general rule, the sentencing judge has certain basic considerations, which include:

1. the possibility of reforming the individual,
2. the protection of society,
3. the disciplining of the offender, and
4. the likelihood of deterring others from committing like offenses.

Each sentence should be individualized, but should also reflect sentences for similar crimes. *People v Smith*, 482 Mich 292, 302; 754 NW2d 284 (2008). See also [“4-04 Presentence Report”](#).

### B. Improper Considerations

As a general rule, the judge may not:

1. penalize the defendant for refusing to plead guilty.  
*People v Jackson*, 474 Mich 996, 996; 707 NW2d 597 (2006).
2. consider the defendant’s refusal to admit guilt.  
*People v Jackson*, 474 Mich 996, 996; 707 NW2d 597 (2006).
3. penalize the defendant for exercising the right to a trial.  
*People v Jackson*, 474 Mich 996, 996; 707 NW2d 597 (2006).
4. penalize the defendant for demanding a jury trial.  
*People v Brown*, 294 Mich App 377, 389; 811 NW2d 531 (2011).
5. penalize the defendant for exercising the right against self-incrimination.  
*People v Anderson*, 391 Mich 419; 216 NW2d 780 (1974).
6. ask the defendant to take a polygraph, or to consider the results of a polygraph, unless the defendant freely consents. *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009).

7. augment a sentence on the basis of a belief that the defendant lied under oath. *People v Kahley*, 277 Mich App 182, 188; 744 NW2d 194 (2007).
8. consider a prior felony or misdemeanor conviction, where defendant was entitled to counsel, conviction if the conviction was obtained without the benefit of counsel or a valid waiver of counsel. *People v Reichenbach*, 459 Mich 109, 124; 587 NW2d 1 (1998).
9. impose a sentence that is premised on the basis of race, religion, or national origin. *People v Gjidodo*, 140 Mich App 294, 301; 364 NW2d 698 (1985).
10. set a sentence in accord with any local sentencing policy, because a sentence must be individualized. *People v Chapa*, 407 Mich 309, 311; 284 NW2d 340 (1979).
11. use speculative legislatively-authorized early release provisions to justify augmenting a sentence. *People v Fleming*, 428 Mich 408, 425; 410 NW2d 266 (1987).
12. consider the effect of disciplinary credits, which the defendant may or may not receive. *People v Stack*, 156 Mich App 564, 566; 402 NW2d 7 (1986).
13. sentence in violation of public policy. In *People v Baum*, the court held that it violated public policy to require the defendant to remain out of state during the period of probation. *People v Baum*, 251 Mich 187, 189; 231 NW 95 (1930).

## **C. Additional Considerations**

### **1. Drunk-Driving Law**

See the Criminal Sentencing/Administrative Consequences Chart in the [“6-14 Appendix”](#).

#### **a. Trial Procedures**

##### **1) Time Lines for Case Processing of Misdemeanor**

- a) Except as otherwise stated in MCL 257.625b, the defendant must be arraigned within 14 days of arrest. MCL 257.625b(1).
- b) A pretrial must be held within 35 days, or 42 days in multi-county districts where there is only one judge. Either side may have one 14-day adjournment. The defendant must attend the pretrial. MCL 257.625b(2).
- c) The case must be disposed of within 77 days of the date the issued or reissued arrest warrant is served, whichever is later. “Final disposition” refers to a plea or finding of guilt, not sentencing. Statutory exceptions for not meeting the disposition time frame include: (1) the unavailability of the defendant, material evidence, or witnesses; (2) interlocutory appeals; or (3) other exceptional circumstances. Docket



congestion cannot be an excuse. The court shall not dismiss a case or impose any other sanction for failing to comply with any of these time limits.  
MCL 257.625b(3).

## **2) Plea Taking**

The court need only advise the defendant that licensing sanctions will be determined based upon the master driving record maintained by the Michigan Secretary of State.  
MCL 257.625b(4).

## **3) Second and Third Offenses**

- a) Prior convictions for drunk driving as indicated in MCL 257.625(11)(c).
- b) If the prosecuting attorney intends to seek an enhanced sentence, second- or third-offense status must be charged in the complaint or information. MCL 257.625(15).

Prior convictions are established at sentencing by one or more of the following: (1) a copy of a judgment of conviction, (2) an abstract of conviction, (3) a transcript of a prior trial or a plea taking or sentencing proceeding, (4) a copy of a court register of actions, (5) a copy of the defendant's driving record, (6) information contained in a presentence report, or (7) an admission by the defendant. MCL 257.625(17).

## **b. Sentencing**

### **1) Conviction**

A person convicted of attempted OWI, OVWI, or OWPD shall be punished as if the offense has been completed. MCL 257.204b.

### **2) License Sanctions**

License sanctions are based on the master driving record maintained by the Secretary of State and are imposed administratively by the Secretary of State as indicated by statute. The court does not order licensing sanctions. MCL 257.319, MCL 257.320a, MCL 257.625b(4).

### **3) Vehicle Immobilization**

Vehicle immobilization is based upon the master driving record kept by the Secretary of State and is imposed by the court. Immobilization may not begin until after a jail sentence is served. Minimum and maximum days of immobilization are based on the number of prior convictions. MCL 257.625(11)(e), MCL 257.904d.

#### **4) Criminal penalties MCL 257.625.**

The criminal penalties for OWI are laid out in MCL 257.625. The court shall impose a criminal penalty for a conviction of an attempted violation of the Michigan Vehicle Code or a local ordinance substantially corresponding to a provision of the Michigan Vehicle Code as if the offense had been completed. MCL 257.204b(2). See the Criminal Sentencing/Administrative Consequences Chart in the [“6-14 Appendix”](#). A prior conviction means any conviction pursuant to MCL 257.625(25)(b) and MCL 257.625m(7).

### **c. Conviction Occurring During a Period of Suspension, Revocation, or Denial**

#### **1) License Sanctions**

A person convicted of or receiving a civil infraction determination for the unlawful operation of a motor vehicle or a moving violation reportable pursuant to MCL 257.732 that occurred during a period of suspension, revocation, or denial receives license sanctions based on the master driving record maintained by the Secretary of State and imposed by the Secretary of State as indicated by statute. The court does not order licensing sanctions. MCL 257.904(10), (11), (12), (13).

#### **2) Vehicle Immobilization**

Vehicle immobilization is based upon the master driving record kept by the Secretary of State and is imposed by the court. Immobilization may not begin until after a jail sentence is served. Minimum and maximum days of immobilization are based on the number of prior convictions. MCL 257.625(11)(e), MCL 257.904d.

## **2. Testing for HIV, Hepatitis B Infection, and Venereal Disease**

### **a. Authority**

The authority for testing for disease/infection is MCL 333.5129. A model protocol and forms for this procedure were developed by the Michigan Department of Public Health. See copies of the forms in the [“6-14 Appendix”](#). See also [SCAO-approved form MC 234, Order for Counseling and Testing for Disease/Infection](#).

### **b. Definition**

If the defendant is bound over to circuit court for one of the following violations, and if the district court determines there is reason to believe the violation involved sexual penetration or exposure to body fluid of the defendant, the court must order defendant to be examined or tested. MCL 333.5129(3). These include cases involving an individual arrested and charged with violating MCL 750.145a, 750.338, 750.338a, 750.338b, 750.448, 750.449, 750.449a, 750.450, 750.452, 750.455, 750.520b, 750.520c, 750.520d,

750.520e, 750.520g, 333.7404, or a local ordinance prohibiting prostitution, solicitation, gross indecency, or the intravenous use of a controlled substance. Specific titles are as follows.

- 333.7404 Use of controlled substance or controlled substance analogue
- 750.145a Accosting, enticing, soliciting child for immoral purposes
- 750.338 Gross indecency; between male persons
- 750.338a Gross indecency; between female persons
- 750.338b Gross indecency; between male & female persons
- 750.448 Soliciting and accosting
- 750.449 Admitting to place for purpose of prostitution
- 750.449a Engaging services for purpose of prostitution, lewdness, or assignation, offer to engage; penalty
- 750.450 Aiders and abettors
- 750.452 House of ill-fame, keeping, maintaining
- 750.455 Pandering
- 750.520b First-degree criminal sexual conduct
- 750.520c Second-degree criminal sexual conduct
- 750.520d Third-degree criminal sexual conduct
- 750.520e Fourth-degree criminal sexual conduct
- 750.520g Assault with intent to commit criminal sexual conduct

### **c. Responsibility of the Court**

#### **1) At Arraignment**

If an individual has been arrested and charged with violating one of the statutes mentioned above, the judge or district court magistrate responsible for setting the individual's conditions of release pending trial shall distribute to the individual the information on disease/infection required to be distributed by county clerks pursuant to MCL 333.5119(1). The judge or district court magistrate shall recommend that the individual obtain additional information and counseling at a local health department testing and counseling center regarding disease/infection. Counseling under this subsection shall be voluntary on the part of the individual. MCL 333.5129(2).

#### **2) Upon Bind Over**

If a defendant is bound over to the circuit court and the district court determines there is reason to believe the offense involved sexual penetration or the exposure to a body fluid of the defendant, the district court shall order that the defendant be examined or tested for disease/infection and receive treatment or, at a minimum, the required information. MCL 333.5129(3).

### **3) Upon Conviction**

If a defendant is convicted of violating any of the above statutes, the court shall order, at conviction, that the defendant be examined or tested for disease/infection. Also, if a defendant is assigned to youthful trainee status rather than being convicted, the court shall order the defendant be tested. MCL 333.5129(4).

Upon conviction or assignment to youthful trainee status for any of the above mentioned statutes, the court shall also order the defendant to receive counseling including, at a minimum, information regarding treatment, transmission, and protective measures.

### **4) Notice to Victims**

If the victim (or person with whom the defendant engaged in sexual penetration during the course of the crime) consents, the court shall provide the person or agency administering the test with the name, address, and telephone number of the victim. After the defendant is tested, the persons or agency administering the test shall immediately provide the test results to the victim. MCL 333.5129(5).

### **5) Keeping Records Confidential**

The test results or any other research information obtained by the testing agency shall be transmitted to the court and, after the defendant is sentenced, made part of the court record. However, the records shall be confidential and shall be disclosed only to the defendant, the local health department, the Department of Community Health, and the victim, except as otherwise provided by law. MCL 333.5129(6).

If the defendant is placed in the custody of the Department of Corrections, the court shall transmit a copy of the defendant's test results and any other medical information to the Department of Corrections. The statute does not address convictions by the district courts which result in jail terms. MCL 791.229 makes circuit court probation records nonpublic. In *Howe v Detroit Free Press*, 440 Mich 203, 212; 487 NW2d 374 (1992), the Michigan Supreme Court applied this statute to district court matter without expressly considering whether or not MCL 791.229 applies to district courts.

#### **d. SCAO-Approved Forms**

The following forms will be used by the district court in conjunction with testing and counseling for disease/infection:

- 1) [Order for Counseling and Testing for Disease/Infection \(MC 234\)](#).
- 2) [Assignment to Youthful Trainee Status \(MC 242\)](#).

The following form may be used depending on the local practice of the court:

- 1) [Judgment of Sentence, Commitment to Jail \(MC 219\)](#).

The following form may be used as determined necessary:

- 1) [Order for Vehicle Immobilization \(MC 267\)](#).

### **3. Professional Licensing Reporting**

Within 21 days after the date a person licensed or registered under article 15 of the public health code (MCL 333.16101 to 333.18838) is convicted of a misdemeanor involving the illegal delivery, possession, or use of alcohol or a controlled substance or a felony, the clerk of the court entering the conviction must report the conviction to the Department of Community Health on [a form prescribed and furnished by that department](#).

This includes chiropractors, acupuncturists, dentistry, audiology, marriage and family therapy, medicine, midwifery, nursing, nursing home administration, optometry, osteopathic medicine and surgery, speech-language pathology, pharmacology, physical therapy, podiatric medicine and surgery, counseling psychology, applied behavior analysis, occupational therapy, dietetics and nutrition, sanitarians, social work, respiratory care, and veterinary medicine.

## 6-02 Delayed Sentence

MCL 771.1(2) allows the sentencing judge to delay sentences for up to one year in cases where probation may be appropriate. The statute provides:

In an action in which the court may place the defendant on probation, the court may delay sentencing the defendant for not more than 1 year to give the defendant an opportunity to prove to the court his or her eligibility for probation or other leniency compatible with the ends of justice and the defendant's rehabilitation, such as participation in a drug treatment court under chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to MCL 600.1082. When sentencing is delayed, the court shall enter an order stating the reason for the delay upon the court's records. The delay in passing sentence does not deprive the court of jurisdiction to sentence the defendant at any time during the period of delay. See also *People v Smith*, 496 Mich 133, 140; 852 NW2d 127 (2014) (discussing MCL 771.1).

Probation is one of many options available to a judge as part of a sentence. When sentence is delayed, the court should enter an [Order Delaying Sentence \(SCAO-approved form MC 294\)](#) and may order supervision during the period of delay. However, the court should not use the [Order of Probation \(SCAO-approved form MC 243\)](#).

MCL 771.1 specifically authorizes a court to place a person on probation for violating a local ordinance. Therefore, the court may delay sentence after conviction for a violation of a local ordinance.

A defendant placed on a delayed sentence may be referred to the drug treatment court program pursuant to MCL 600.1070(1)(c), a veterans treatment court program pursuant to MCL 600.1206(1)(c), or a mental health treatment court pursuant to MCL 600.1095(1)(b)(iii).

## 6-03 Holmes Youthful Trainee Act

### A. Authority and Definition

MCL 762.11 and MCL 762.13 provide the sentencing judge with the means for ordering rehabilitative treatment and/or custodial supervision for up to two years in district court or up to three years in circuit court for:

1. persons charged with offenses other than
  - a. a felony for which the maximum punishment is life imprisonment,
  - b. a major controlled substance offense, or
  - c. a traffic offense, or
  - d. criminal sexual conduct in violation of MCL 750.520b-e (except 520d[1][a] and 520e[1][a]), or an assault with an attempt to commit one of the foregoing; and
2. juveniles over 15 years of age who have been waived from circuit court, without proceeding to an adjudication of guilt and a criminal conviction. Additionally, an individual previously required to register as a sex offender or an individual who engaged in an offense that the court determines has a factor set forth in the referenced criminal sexual conduct statutes may not qualify for youthful trainee status. MCL 762.11(3).

A defendant placed on youthful trainee status may be referred to a drug treatment court program pursuant to MCL 600.1070. MCL 762.13(1)(b). The defendant may also be referred to a veterans' treatment court or mental health court. See MCL 600.1203 (veterans' treatment court), MCL 600.1093(2)(a) (mental health court).

### B. Conditions

1. The offense must have been committed on or after the individual's 17th birthday but before his or her 24th birthday. If the offense was committed on or after the individual's 21st birthday but before his or her 24th birthday, the individual shall not be assigned to youthful trainee status without the consent of the prosecuting attorney. MCL 762.11(1).
2. The individual must consent to being placed on youthful trainee status. MCL 762.11(1).
3. The individual must plead guilty. MCL 762.11(1).
4. Upon violation of any term of probation, the court may terminate the youth's trainee status, enter an adjudication of guilt, and proceed with sentencing as provided by law. The court must terminate the youth's trainee status if the individual pleads guilty or is convicted of

the specified crimes listed in MCL 762.12(2). Credit must be given against the sentence for time served as a youthful trainee in a county jail. MCL 762.12. The court, as a condition of a commitment to the county jail or a condition of probation, may authorize work release or release for education purposes. MCL 762.13(4), MCL 771.3(2)(a). The rights accorded probationers subject to revocation should also be applied to youths under youthful trainee status. See *People v Webb*, 89 Mich App 50, 53; 279 NW2d 573 (1979). In that case, no hearing was held prior to the time defendant's trainee status or probation was revoked. "A defendant had a constitutional right to a hearing prior to the termination of his trainee status and in the absence of a hearing, the criminal case against him cannot be reinstated."

5. An assignment to the status of youthful trainee shall not be deemed to be a conviction of a crime and such person shall suffer no civil disability, right or privilege following his or her release from such status because of such assignment as a youthful trainee. MCL 762.14(1).
6. All proceedings relative to the disposition of the criminal charge and to the assignment as a youthful trainee shall be closed to public inspection, but open to the courts of the state, the Department of Corrections, the Department of Health and Human Services, law enforcement personnel in the performance of their duties, and prosecuting attorneys. MCL 762.14(4). Also, in providing required notice to victims, the probation officer may furnish information or records to victims that would otherwise be closed to public inspection. MCL 780.752a, MCL 780.781a, MCL 780.811b.

### C. SCAO-Approved Forms

The following forms should be used in conjunction with placement on youthful trainee status.

- 1) [Assignment to Youthful Trainee Status \(MC 242\)](#) – A copy of this form must be sent by the clerk of the court to the Michigan State Police Criminal Justice Information Center to create a criminal history record as required by MCL 769.16a.
- 2) [Order of Probation \(MC 243\)](#) – As a local option, this form can be modified to show that youthful trainee status has been assigned to an offender.
- 3) [Motion and Order for Discharge from Probation \(MC 245m and MC 245o\)](#) – A copy of this form shall be sent by the clerk of the court to the Michigan State Police Criminal Justice Information Center to create a criminal history record as required by MCL 769.16a.



## **6-04 Deferred Judgment of Guilt**

### **A. Controlled Substances, Public Health Code**

#### **1. Authority and Definition**

MCL 333.7411 gives the authority to defer proceedings and impose probation with terms and conditions without a judgment of guilt for certain offenders charged with possession or use of certain drugs. A defendant placed on probation under a deferred judgment of guilt may be referred to a drug treatment court program pursuant to MCL 600.1070(1)(c), a veterans' treatment court under MCL 600.1203(1)(c), or mental health court under MCL 600.1093(1)(b)(iii).

#### **2. Conditions**

- a. The defendant must plead guilty or be found guilty of the offense, but no judgment of guilt is entered. MCL 333.7411(1).
- b. The defendant must consent to this status, but the prosecutor does not. MCL 333.7411(1).
- c. The only persons eligible are those with no prior drug convictions who are charged with possession of controlled substances pursuant to MCL 333.7403 (2) (a) (iv), (b), (c) or (d) or use of controlled substance pursuant to MCL 333.7404, or those charged either the first or second time with possession of imitation controlled substances pursuant to MCL 333.7341. MCL 333.7411(1).
- d. The defendant must be placed on probation by the judge. MCL 333.7411(1).
- e. The judge may require an instruction program on misuse of drugs or a rehabilitation program. MCL 333.7411(5).
- f. Jail time is allowable.
- g. Discharging the defendant and dismissing charges after successfully completing any conditions of probation is mandatory and without adjudication of guilt. MCL 333.7411(1).
- h. There may be only one discharge and dismissal afforded to an offender under this status. MCL 333.7411(1).
- i. Upon fulfillment of the terms and conditions of probation, the Michigan State Police Criminal Justice Information Center shall retain a nonpublic record of an arrest and discharge or dismissal. MCL 333.7411(3). This record shall be furnished to a court

or police agency upon request for the purpose of showing that the defendant in a criminal action involving the possession or use of a controlled substance or an imitation controlled substance has previously used this status. A person subjected to a civil fine for a first violation of MCL 333.7341(4) is not considered to have previously been convicted of an offense under this status. During the term of probation, the records maintained by the Criminal Justice Information Center and the court are public.

- j. If a term or condition of probation is violated, the court may enter an adjudication of guilt and sentence the defendant. MCL 333.7411(1).

## **B. Spouse Abuse Act**

### **1. Authority and Definition**

MCL 769.4a gives the authority to defer proceedings and impose probation with terms and conditions without a judgment of guilt for certain offenders charged with assault upon a spouse, former spouse, or household member. A defendant placed on probation under a deferred judgment of guilt may be referred to a drug treatment court program pursuant to MCL 600.1070. MCL 769.4a(3). The defendant may also be referred to a veterans' treatment court or mental health court. See MCL 600.1203(2)(b)(ii) (veterans' treatment court), MCL 600.1093(2)(b)(ii) (mental health court).

### **2. Conditions**

- a. The defendant must plead guilty or be found guilty of the offense but no judgment of guilt is entered. MCL 769.4a(1).
- b. The defendant and the prosecuting attorney, in consultation with the victim, must consent to this status. MCL 769.4a(1).
- c. The only persons eligible are those with no prior convictions for assaultive crimes as defined in MCL 769.4a(1), (8).
- d. The defendant must be placed on probation by the judge. MCL 769.4a(1).
- e. The judge may require the defendant to participate in and pay for a mandatory counseling program, and/or participate in a drug treatment court program. MCL 769.4a(3).
- f. The judge may order imprisonment within the period of probation for not more than the maximum penalty authorized for the underlying offense. MCL 769.4a(3).
- g. Discharging the defendant and dismissing charges after successfully completing any conditions of probation is mandatory and without adjudication of guilt. MCL 769.4a(5).

- h. If a term or condition of probation is violated, the court may enter an adjudication of guilt. MCL 769.4a(2).
- i. There may be only one discharge and dismissal afforded to an offender under this status. MCL 769.4a(1).
- j. Upon fulfillment of the terms and conditions of probation, the Michigan State Police Criminal Justice Information Center shall retain a nonpublic record of an arrest and discharge or dismissal. This record shall be furnished to a court or police agency upon request for the purpose of showing that a defendant in a criminal action pursuant to MCL 750.81 or 750.81a has already once availed himself or herself of this section. MCL 769.4a(7). In addition, in providing required notice to victims, the probation officer may furnish information or records to victims that would otherwise be closed to public inspection. (MCL 780.752a, 780.781a, 780.811b). During the term of probation, the records maintained by the Criminal Justice Information Center and the court are closed to the public, except as otherwise allowed by law. MCL 769.4a(6).

## **C. Health-Care Professionals**

### **1. Authority and Definition**

MCL 750.430(9) gives the authority to defer proceedings and impose probation with terms and conditions without a judgment of guilt for licensed health-care professionals charged with engaging in the practice of his or her health profession with a bodily alcohol content of .05 or more, or while under the influence of a controlled substance causing a visible impairment to his or her ability to safely and skillfully engage in the practice of his or her health profession. A licensed health-care professional means an individual licensed or registered pursuant to article 15 of the Public Health Code, MCL 333.16101-333.18838. MCL 750.430(10). A defendant placed on probation under a deferred judgment of guilt may be referred to the drug treatment court program pursuant to MCL 600.1070. MCL 750.430(9).

### **2. Conditions**

- a. The defendant must be convicted pursuant to MCL 750.430.
- b. The defendant and the prosecuting attorney must consent to this status. MCL 750.430(9).
- c. The only persons eligible are those with no prior convictions pursuant to MCL 750.430(9).
- d. The individual's conduct must not have resulted in physical harm or injury to the patient. MCL 750.430(9).

- e. The terms and conditions of probation may include participation in a drug treatment court program pursuant to MCL 600.1060-600.1082. MCL 750.430(9). The defendant may also be referred to a veterans' treatment court or mental health court. See MCL 600.1203(2)(b)(iii) (veterans' treatment court), MCL 600.1093(2)(b)(iii) (mental health court).
- f. The defendant shall be ordered to participate in the health professional recovery program established in MCL 333.16167. MCL 750.430(9).
- g. Discharging the defendant and dismissing charges after successfully completing any conditions of probation is mandatory and without adjudication of guilt. MCL 750.430(9).
- h. If a term or a condition of probation is violated, the court may enter an adjudication of guilt. MCL 750.430(9).
- i. There may be only one discharge and dismissal afforded to an offender under this status. MCL 750.430(9).
- j. Upon fulfillment of the terms and conditions of probation, the Michigan State Police Criminal Justice Information Center shall retain a nonpublic record of an arrest and discharge or dismissal. This record shall be furnished to a court or police agency upon request for the purpose of showing that a defendant in a criminal action pursuant to MCL 750.430 has already once availed himself or herself of this section. During the term of probation, the records maintained by the Criminal Justice Information Center and the court are nonpublic and remain nonpublic unless the court enters a judgment of guilt. MCL 750.430.

## **D. Liquor Control Code**

### **1. Authority and Definition**

MCL 436.1703 gives authority to defer proceedings and impose probation with terms and conditions without a judgment of guilt for a person who has not previously been convicted of or received a juvenile adjudication for a violation of that section. A deferred judgment of guilt is discretionary by the court if the defendant meets the statutory requirements.

### **2. Conditions**

- a. The defendant must plead guilty to the offense but no judgment of guilt is entered. MCL 436.1703(3).
- b. The only persons eligible are those with no prior convictions of this section, being a minor who purchases, consumes or possesses alcoholic liquor or attempts to purchase, consume or possess alcoholic liquor, or have any bodily alcohol content. MCL 436.1703(3).

- c. The defendant must be placed on probation. MCL 436.1703(3).
- d. The court may require participation in substance abuse prevention services or substance abuse treatment and rehabilitation services, community service, and to undergo substance abuse screening and assessment at the defendant's expense, payment of costs including minimum state cost and the cost of probation oversight.  
MCL 436.1703(1)(a), (3).
- e. In the case of a minor who is under 18 years of age and unemancipated, the parent, guardian, or custodian may request a random or regular preliminary breath test as part of the probation. MCL 436.1703(5).
- f. Jail time is not allowable. MCL 436.1703.
- g. Discharging the defendant and dismissing the charges after successfully completing any conditions of probation is mandatory and without adjudication of guilt.  
MCL 436.1703(3).
- h. If a term or condition of probation is violated, the court may enter an adjudication of guilt. MCL 436.1703(3).
- i. There may be only one discharge and dismissal afforded to an offender under this status.  
MCL 436.1703(3).
- j. Upon placement on deferred sentence and probation, the court shall notify the Michigan Department of State of the deferred sentence and it shall retain a nonpublic record.  
MCL 436.1703(3).
- k. While on deferred sentence and probation, the court shall retain a nonpublic record.  
MCL 436.1703(3).
- l. Upon fulfillment of the terms and conditions of probation, the court shall notify the Department of State of the discharge and dismissal. The court and the department shall retain a nonpublic record of the plea and of the discharge or dismissal. This record shall be furnished to a court, prosecutor, or police agency upon request for the purpose of determining if an individual has already utilized this status. The record shall also be available to the Department of Corrections, a prosecutor, or a law enforcement agency upon request if the individual is an employee or applicant for employment of the requesting agency only to determine whether an employee has violated his or her conditions of employment or whether an applicant meets criteria for employment.  
MCL 436.1703(3).

### **3. Ordinance Violations**

Deferred proceedings are allowed under MCL 436.1703 only for violations of this statute. Deferred proceedings are not allowed for a violation of a substantially corresponding local ordinance.

## **E. Human Trafficking**

### **1. Authority and Definition**

MCL 750.451c gives authority to defer proceedings and impose probation with terms and without a judgment of guilt for individuals who have been charged with certain prostitution-related offenses and the offense was committed as a direct result of the individual being a victim of a human trafficking violation. A human trafficking violation means a violation under MCL 750.462a *et seq.* A defendant placed on probation under a deferred judgment of guilt may be referred to a drug treatment court program pursuant to MCL 600.1070.

### **2. Conditions**

- a. The defendant committed a violation of MCL 750.448, 750.449, 750.450, or 750.462 as a direct result of the defendant being a victim of a human trafficking violation. MCL 750.451c(2).
- b. The defendant has not been convicted previously of a violation of MCL 750.448, 750.449, 750.450, or 750.462 or a local ordinance substantially corresponding to these statutes. MCL 750.451c(2).
- c. The defendant bears the burden of proving by a preponderance of evidence that the violation was a direct result of his or being a victim of human trafficking. The defendant must state under oath that he or she meets the conditions with facts supporting his or her claim that the violation was a direct result of being a victim of human trafficking. MCL 750.451c(2)(c).
- d. The defendant must be placed on probation by the judge. MCL 750.451c(2).
- e. Upon violation of a term or condition of probation, the court may enter an adjudication of guilt and proceed as otherwise provided. MCL 750.451c(3).
- f. The court must enter an adjudication of guilt and proceed as otherwise provided if the defendant commits a violation of MCL 750.448, 750.449, 750.450, or 750.462, violates an order of the court that he or she receive counseling regarding his or her violent behavior, or violates a court order that he or she have no contact with a named individual. MCL 750.451c(5).

- g. The judge may require the defendant to participate in and pay for a mandatory counseling program, and/or participate in a drug treatment court program. MCL 750.451c(4).
- h. Upon fulfillment of the terms and conditions of probation, the Michigan State Police Criminal Justice Information Center shall retain a nonpublic record of an arrest and discharge or dismissal. MCL 750.451c(8). This record shall be furnished to the courts of this state, law enforcement personnel, the department of corrections, prosecuting attorneys, or the Michigan Department of Health and Human Services for the purposes listed in MCL 750.451c(8).

## F. SCAO-Approved Forms

After determining that probation has been successfully completed, a motion for discharge from probation must be completed and submitted to the sentencing judge for approval and signature. After the sentencing judge signs the petition, the original should be placed in the court file and copies should be given to the probationer and placed in the probation file. An electronic transfer of the information contained in this order, or a photocopy of this order, must also be forwarded to the Michigan State Police Criminal Justice Information Center. This form is necessary to ensure that official records of the probationer will be classified as a **nonpublic record** by the Criminal Justice Information Center.

The following forms should be used.

- 1) [Order of Probation \(MC 243\)](#) – The appropriate box must be checked under “Judgment of guilt is deferred under.” Additionally, a photocopy of this order must be sent to the Michigan State Police Criminal Justice Information Center to create a criminal history record as required by MCL 769.16a.
- 2) [Motion and Order for Discharge from Probation \(MC 245m and MC 245o\)](#) – The appropriate box must be checked indicating that the defendant is discharged from probation supervision and that the case shall be retained as a **nonpublic record** and a copy sent to the Michigan State Police Criminal Justice Information Center.

## 6-05 Problem-Solving Courts

### A. Authority and Definition

#### 1. Drug Treatment Court

A drug treatment court is a court-supervised treatment program for individuals who abuse or are dependent upon any controlled substance or alcohol. An individual may not be admitted to a drug treatment court if he or she is a violent offender as defined in MCL 600.1060(g).

MCL 600.1070 gives the authority, upon agreement with the individual and the prosecutor, to sentence and impose probation with terms and conditions for a person who has met statutory eligibility requirements for drug court participation but who is not eligible for a deferred judgment of guilt under the drug treatment court statute. The court may also place a person in drug treatment court who is eligible for a deferred judgment of guilt under the Holmes Youthful Trainee Act (MCL 762.11), the Public Health Code (MCL 333.7411), the Spouse Abuse Act (MCL 769.4a), or the Penal Code (health-care professional). MCL 750.430.

[“6-04 Deferred Judgment of Guilt”](#) discusses drug court participation by persons eligible for a deferred judgment of guilt pursuant to the drug treatment court statute.

#### 2. Veterans’ Treatment Court

Veterans’ treatment court uses a hybrid integration of drug court and mental health court principles to serve military veterans, and sometimes active-duty personnel. They promote sobriety, recovery, and stability through a coordinated response. An individual may not be admitted to veterans’ treatment court if he or she is a violent offender as defined by MCL 600.1200(k).

To qualify the individual must be a veteran who is dependent upon or abusing drugs or alcohol, or suffers from a mental illness, and meets the other requirements of MCL 600.1203 and MCL 600.1204.

Under the agreement with the individual and the prosecutor, the court may delay or defer further proceedings as provided in MCL 771.1, or proceed to sentencing, as applicable in that case under that agreement, and place the individual on probation or other court supervision in the veterans treatment court program with terms and conditions according to the agreement and as considered necessary by the court. MCL 600.1206(1)(c). The court may also place a person in veterans’ treatment court who has been assigned the status of a youthful trainee under the Holmes Youthful Trainee Act, MCL 762.11 or where judgment was deferred under the Public Health Code (MCL 333.7411), the Spouse Abuse Act (MCL 769.4a), or the Penal Code (health-care professional).



[“6-04 Deferred Judgment of Guilt”](#) discusses veterans’ treatment court participation by persons eligible for a deferred judgment of guilt pursuant to the drug treatment court statute.

### **3. Mental Health Court**

Mental health court is modeled after drug court and was developed in response to the overrepresentation of people with mental illnesses in the criminal justice system. Mental health court diverts select defendants with mental illness into judicially-supervised, community-based treatment. Defendants are invited to participate following a specialized screening and assessment, and they may choose to decline participation. For those who agree to the terms and conditions of community-based supervision, a team of court staff and mental health professionals work together to develop treatment plans and supervise participants in the community. Participants appear at regular status hearings during which incentives are offered to encourage adherence to court conditions, sanctions for nonadherence are handed down, and treatment plans and other conditions are periodically reviewed for appropriateness.

To qualify the individual must cooperate with and complete a preadmission screening and evaluation assessment and shall submit to any future evaluation assessment as directed by the mental health court. This includes a mental health assessment. MCL 600.1093.

Pursuant to the agreement with the individual and the prosecutor, the court may either delay further proceedings as provided in MCL 771.1, or proceed to sentencing, as applicable, and place the individual on probation or other court supervision in the mental health court program with terms and conditions according to the agreement and as considered necessary by the court. MCL 600.1095(2). The court may also place a person in mental health court who has been assigned the status of a youthful trainee under the Holmes Youthful Trainee Act, MCL 762.11 or where judgment was deferred under the Public Health Code (MCL 333.7411), the Spouse Abuse Act (MCL 769.4a), or the Penal Code (health-care professional).

#### **B. Conditions**

1. The defendant must plead guilty to the offense. A judgment of guilt is entered.
2. The defendant must be placed on probation.
3. The court may require participation in treatment and prevention services, education, and mandatory periodic and random testing for the presence of any controlled substance or alcohol in blood, urine, or breath.

See MCL 600.1070 (drug treatment court); MCL 600.1095 (mental health court); MCL 600.1206 (veterans treatment court).

### C. SCAO-Approved Forms

After determining that probation has been successfully completed, a motion for discharge from probation must be completed and submitted to the sentencing judge for approval and signature. After the sentencing judge signs the order, the original should be placed in the court file and copies should be supplied to the probationer and probation file. See MCL 600.1076 (drug treatment court); MCL 600.1098 (mental health court), MCL 600.1209 (veterans' treatment court).

The following forms should be used.

- 1) [Order of Probation \(MC 243\)](#) – The appropriate box must be checked under “Judgment of guilt is deferred under.” Additionally, a photocopy of this order must be sent to the Michigan State Police Criminal Justice Information Center to create a criminal history record as required by MCL 769.16a.
- 2) [Motion and Order for Discharge from Probation \(MC 245m and MC 245o\)](#) – The appropriate box must be checked indicating that the defendant is discharged from probation supervision and that the case shall be retained as a nonpublic record and a copy sent to the Michigan State Police Criminal Justice Information Center.
- 3) [Judgment of Sentence/Commitment to Jail \(MC 219\)](#) – Upon discharge from probation, the court must send a revised judgment to the Michigan State Police Criminal Justice Information Center. In addition to the sentence, the court must indicate whether the probationer successfully or unsuccessfully completed drug treatment court, mental health court, or veterans' treatment court.

## 6-06 Conditional Sentence

### A. Authority and Definition

Conditional sentences may be imposed where a fine or imprisonment is authorized by statute. MCL 769.3 provides if punishment for an offense is either a fine or imprisonment, a judge may sentence conditionally. The judge can order a fine with or without costs within a specified period of time. The defendant may be incarcerated for failure to pay.

### B. Conditions

1. First offenders convicted of offenses carrying less than a five-year maximum may, in the alternative, be sentenced to a jail sentence not to exceed six months. MCL 750.506.
2. Persons convicted for the first time of unauthorized use of a motor vehicle may have their sentences reduced to three months in the county jail or fined not more than \$500.00. MCL 750.414.
3. The defendant is entitled to a hearing prior to incarceration for his failure to pay a fine and/or costs as part of this type of sentence. See *Bearden v Georgia*, 461 US 660, 668-669; 103 S Ct 2064; 76 L Ed 2d 221 (1983).
4. If the court imposes a conditional sentence, any restitution ordered shall be a condition of that sentence. MCL 769.1a. The conditional sentence statute further states that, “if a person is convicted of an offense punishable by a fine or imprisonment or both, the court may impose a conditional sentence and order the person to pay a fine, with or without the costs of prosecution, and restitution as provided under section 1a of this chapter or the Crime Victim’s Rights Act, 1985 PA 87, MCL 780.751 to 780.834, within a limited time stated in the sentence and, in default of payment, sentence the person as provided by law. . . . Except for a person who is convicted of criminal sexual conduct in the first or third degree, the court may also place the offender on probation with the condition that the offender pay a fine, costs, damages, restitution, or any combination in installments with any limited time and may, upon default in any of those payments, impose sentence as provided by law.” MCL 769.3.

The court may impose imprisonment under the conditional sentence if the defendant fails to pay restitution. In determining whether to impose imprisonment, the court must take into account the defendant’s employment status, earning ability and financial resources, the willfulness of the defendant’s failure to pay, and any other special circumstances that may have a bearing on the defendant’s ability to pay before incarcerating the defendant. MCL 780.826(11), MCL 769.1a, MCL 771.3(8), MCR 6.425(E)(3).

5. When a person has been convicted of domestic violence, or when a prior conviction of domestic violence is included in a criminal history record which meets the definition of domestic violence in 18 USC 922(g)(9), a condition of probation prohibiting the defendant

from possessing, carrying, or purchasing a firearm or ammunition should be included. See also [“4-03 Investigation”](#).

6. If the court orders conditions reasonably necessary for the protection of one or more named persons, the court or a law enforcement agency within the court’s jurisdiction shall enter the order or amended order of probation into the Law Enforcement Information Network (LEIN). If the order is rescinded or amended, the order in LEIN shall be amended or removed accordingly. MCL 771.3(2)(o), (4). See also [“7-05 Probation Violation”](#).

### **C. SCAO-Approved Forms**

Conditional sentences must be specified on the [Judgment of Sentence \(SCAO-approved form MC 219\)](#) and the [Order of Probation \(SCAO-approved form MC 243\)](#), if applicable.

## 6-07 Other Alternatives

### A. Community Service and Work Programs

Community service is often used as part of a sentence or probation term for various offenses. Community service may be performed in lieu of payment of discretionary assessments such as fines and costs. Community service may not be used to satisfy certain required assessments such as restitution, crime victim's rights assessment, and minimum state cost.

Work programs involve defendants who perform work in and on behalf of the community as part of a supervised crew. Many courts refer defendants to a work program administered by their funding unit or another agency. However, some courts run their own work program. Courts may order defendants into the work program as an alternative to a jail sentence, as a condition of probation, or when sentencing is delayed.

#### 1. Authority

Where probation is an authorized sentence, in most but not all felonies and misdemeanors, the court may require the probationer to engage in community service as a condition of probation. MCL 771.3(2)(e).

As part of the sentence for a violation of operating a vehicle while intoxicated (OWI), operating while visibly impaired (OWVI), operating with presence of drugs (OWPD), minor in possession of alcohol, transporting or possessing open alcohol in a motor vehicle, and minor transporting or possessing alcohol in a motor vehicle, a court may order a person to perform community service as designated by the court without compensation for a specified period: MCL 257.624a(3), MCL 257.624b(1), MCL 257.625, MCL 436.1703(1).

- a. up to 360 hours for first offenses of OWPD, OWI, and OVWI.
- b. between 30 and 90 days for persons with prior convictions of OWPD, OWI, and OVWI. A prior conviction means any conviction pursuant to MCL 257.625(1), (3), (4), (5), (6), (7), (8), and (23), and MCL 257.625m.

#### 2. Service Recipients

The best practice is to allow the defendant to choose from an inclusive list of governmental and nonprofit entities. However, it is acceptable if service recipients are limited to governmental entities. The court should never order the defendant to perform services for a specific individual or nonprofit entity. Courts should not order defendants to perform services for specific individuals or families even if the individuals are senior citizens or the families are low-income families.

### 3. Costs

A court may impose, as a cost, expenses incurred in providing oversight to the probationer. MCL 771.3(5). If the court assesses costs for participation in a community service or work program, costs must be limited to expenses the court actually incurs in administering the program. If the program is administered by the funding unit or another agency, the defendant should pay the costs directly to the community service or work program provider and the court should neither assess nor collect those costs.

If the program is administered by the court, the court must have a procedure for waiving costs for participation in cases of indigence. See [“7-01 General Procedures”](#) for information on receiving these costs.

### 4. Liability

Courts and other governmental units are generally immune from liability when engaging in discretionary activities that fall within the scope of their core functions. For instance, courts are not liable for the consequences of judicial determinations. By statute, a governmental unit is immune from suit for an activity which is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law. MCL 691.1407, *In re Bradley Estate*, 494 Mich 367, 385-386; 835 NW2d 545 (2013). See also *Hannay v Dept of Transportation*, 497 Mich 45, 60-61; 860 NW2d 67 (2014).

As the scope of a governmental unit’s activity expands beyond its core functions, its exposure to liability increases. Community service and work programs have liability concerns that are not generally present in the judiciary, including the possibility of injury to a person who is working on a job site and injuries or damages that person may cause to people or property while engaged in the community service or work program. Courts can reduce their potential exposure by:

- not determining the agencies for whom the probationer works,
- monitoring rather than overseeing the probationer’s work, and
- ensuring that fees cover the cost of the program and do not result in a surplus.

### 5. Insurance

Any community service or work program should take into consideration the safety of the participants and the public. Since governmental immunity may not provide complete coverage, the governmental agency running the program should explore the possibility of accident insurance for the participant and liability insurance for the community service or work program. Courts that run a community service or work program should consult with their insurance carriers and should include in their programs only those activities that are approved by their carriers. Insurance premiums may also be recoverable from probationers as expenses specifically incurred in providing oversight to the probationer. MCL 771.3(5).

In OWI, OWPD, and OVWI cases, the statute authorizes reimbursement for the cost of supervision for defendants sentenced to community service. Arguably, the cost of providing insurance for community service or work programs is such an expense. MCL 257.625(14).

## **B. Intensive Probation**

### **1. Authority**

Although intensive probation is not specifically mentioned, the authority for it can be found in MCL 771.3, which is the statute for probation conditions. As cited, probationers can be ordered to report “monthly, or as often as the probation officer may require.” MCL 771.3(1)(c).

### **2. Highlights**

- a. Applicants must first be screened to see if they meet the criteria for eligibility.
- b. Probationers may be subject to close supervision, which may include a variety of conditions, but is not limited to, employment checks, home visits, daily contact with the probation officer, curfews, and submitting to a preliminary breath test (PBT).
- c. Supervision is typically implemented during the first phase of a defendant’s probation status and may not necessarily continue throughout the complete term of probation.

## **C. Victim Impact Panel**

### **1. Authority and Definition**

The victim panels are not dictated by statute. Victim panels are held nationwide and are sponsored by the Mothers Against Drunk Driving (MADD) organization. They consist of a panel of victims and survivors of drunk-driving crashes, who speak briefly about their experience, which may include death of a loved one and/or injury to themselves. Drunk-driving offenders or other persons convicted of alcohol-related crimes can be required to attend as an element of their sentence. There is no interaction between victims and offenders. Any cost to the defendant for attending the program must be limited to the actual cost and cannot include any contribution used for political activity by the sponsor. A procedure must exist to waive the cost of attendance for any indigent defendant whose attendance is ordered by the court.

### **2. Forms**

Forms can be obtained through the local chapter of MADD.

## **D. Electronic Monitoring and Detention**

### **1. Authority**

A court may order a defendant to be electronically monitored as a condition of probation. MCL 771.3(2)(1).

### **2. Definition**

A variety of devices may be used as an alternative to incarceration or for an early-release program. The devices include, but are not limited to, wrist bracelet, ankle bracelet, and television monitor with or without a preliminary breath tester attached. The devices may be monitored by telephone or radio frequency. The court has the authority to specify the terms, such as hours and location, for each individual case.

### **3. Violations**

When sentencing a defendant for a probation violation, the defendant is not entitled to credit for time he or she spent on an electronic monitoring program. *People v Smith*, 195 Mich App 147, 152; 489 NW2d 135 (1992). See also *People v Pennebaker*, 298 Mich App 1, 7-8; 825 NW2d 637 (2012).

See also [“7-03 Reporting Probation”](#).



## **6-08 Under Advisement**

### **A. Definition and Authority**

To take a case under advisement is to take a plea of guilty and place the individual under the supervision of the court, without conviction or sentence, for a specified period of time.

No statutes or court rules have been identified that authorize district courts to take a plea of guilty under advisement.

## 6-09 Probationary Sentences

### A. Authority and Definition

The authority for probationary sentences is found in MCL 771.1(1). Probation may be imposed for all misdemeanors, ordinances and felonies **except** for murder, treason, armed robbery, major controlled substances offenses, and first- and third-degree criminal sexual conduct. An individual guilty of criminal contempt may also be placed on probation. MCL 600.1715.

### B. Conditions

1. The maximum term of probation is five years for felonies and two years for misdemeanors. MCL 771.2(1).
2. The maximum term of probation is five years for misdemeanor stalking, misdemeanor child abuse, and some misdemeanor registerable sex offenses. MCL 750.411h(3), MCL 750.136b, MCL 771.2a, MCL 750.448 (if the victim is a minor), MCL 750.520e (attempt, if the victim is 18 or older), MCL 750.335a(2)(b) (if the victim is a minor).
3. A probation term of five years is required for a person found guilty but mentally ill. MCL 768.36(4).
4. A term may be reduced at the discretion of the court except for lifetime probation and the five-year mandatory probationary term for guilty but mentally ill defendants. MCL 771.2(2).
5. The judge must order that the probationer:
  - a. must not leave the state without judicial consent,
  - b. report regularly to a probation officer,
  - c. refrain from violating any criminal law of Michigan, the United States, or another state or any ordinance of any municipality in Michigan or another state,
  - d. shall pay restitution to the victim of the defendant's course of conduct giving rise to the conviction or to the victim's estate,
  - e. shall pay an assessment ordered pursuant to MCL 780.905,
  - f. shall comply with the Sex Offenders Registration Act if required to be registered pursuant to the act, and

g. shall pay the minimum state cost prescribed by section 1j of chapter IX. MCL 771.3(1).

6. “An order of probation is ‘at all times alterable and amendable, both in form and in substance, in the court’s discretion.’ MCL 771.2(2).” *People v Johnson*, 210 Mich App 630, 634; 534 NW2d 255 (1995). This includes imposing new conditions, even without a violation of the original order.

7. A court may suspend probation and then reinstate it as long as it occurs within the statutory maximum period. Probation must end either by revocation or termination at the end of that maximum. *People v Sherman*, 38 Mich App 219, 220-221; 196 NW2d 15 1972). See also *People v Glass*; 288 Mich App 399, 408-409; 794 NW2d 49 (2010).

### **C. Types**

There are several types of probation: supervised, unsupervised, and nonreporting. See [“7-02 Nonreporting Probation”](#) and [“7-03 Reporting Probation”](#) for more details.

## 6-10 Financial Obligations

### A. Authority and Definition in General

Sentences in Michigan can only be imposed in accordance with specific statutory authority. A term or condition of a sentence not expressly authorized by statute or a sentence in excess of that provided by a relevant statute is unlawful and must be vacated. *People v Cunningham*, 496 Mich 145, 149-150; 852 NW2d 118 (2014).

Michigan law provides four categories of financial obligations for criminal offenses: fine, costs, assessments, and restitution. If the court requires the probationer to pay costs, the costs shall be limited to the expenses incurred in prosecuting the defendant or providing legal assistance to the defendant and supervising the probationer. Restitution and special assessments should be ordered as required by MCL 771.3(1)(e) and (f). An order of restitution entered pursuant to the Crime Victim's Rights Act remains effective until it is satisfied in full. MCL 780.826(13).

The probation statute specifically outlines how costs are to be determined and assessed. Minimum state costs shall be ordered as a condition of probation pursuant to MCL 769.1j and MCL 771.3(1)(g). Payment of restitution is regulated by MCL 780.826 and 780.827. MCL 771.3(6) and (7) provide as follows:

- (6) If the court imposes costs under subsection (2) as part of a sentence of probation, all of the following apply:
  - (a) The court shall not require a probationer to pay costs under subsection (2) unless the probationer is or will be able to pay them during the term of probation. In determining the amount and method of payment of costs under subsection (2), the court shall take into account the probationer's financial resources and the nature of the burden that payment of costs will impose, with due regard to his or her other obligations.
  - (b) A probationer who is required to pay costs under subsection (1)(g) or (2)(c) and who is not in willful default of the payment of the costs may petition the sentencing judge or his or her successor at any time for a remission of the payment of any unpaid portion of those costs. If the court determines that payment of the amount due will impose a manifest hardship on the probationer or his or her immediate family, the court may remit all or part of the amount due in costs or modify the method of payment.
- (7) If a probationer is required to pay costs as part of a sentence of probation, the court may require payment be made immediately or the court may provide for payment to be made within a specified period of time with specified installments. For more information, see also ["3-04 Recovering Expense"](#).

## **B. Fine and Costs**

### **1. Authority**

A penal fine and costs are imposed only pursuant to statutory authority. MCL 769.1k, MCL 769.3, MCL 771.3. See also *People v Cunningham*, 496 Mich 145, 149-150; 852 NW2d 118 (2014) (“[C]ourts may impose costs in criminal cases only where such costs are authorized by statute[.]”).

### **2. Credits to Fine**

Jail time must be credited against a fine if **only** a fine is imposed. The judge must credit the defendant \$5.00 for each day previously served in jail in lieu of posting bail prior to conviction. MCL 780.73.

### **3. Limitations on Costs**

Costs imposed as a condition of probation are limited to expenses specifically incurred in prosecuting the case, providing legal assistance to the defendant, and overseeing probation. MCL 771.3(5). In addition, the defendant may have been assessed those financial obligations, authorized by MCL 769.1k, in the judgment of sentence.

Costs which may not be considered in determining the amount of costs are:

- a. Juror per diem. *People v Hope*, 297 Mich 115, 118; 297 NW 206 (1941).
- b. Medical care for the defendant. *People v Kramer*, 137 Mich App 324, 326; 358 NW2d 10 (1984).
- c. Maintenance of governmental agencies. *People v Teasdale*, 335 Mich 1, 6; 55 NW2d 149 (1952).

Minimum state costs of \$50.00 for misdemeanors must be a condition of probation. MCL 769.1j. The minimum state cost is assessed when any other combination of assessments is ordered.

### **4. Finding of Ability to Pay**

The ability to pay issue, if raised, is addressed at the time of enforcement of a financial obligation, not at the time of imposing such obligation. “Once enforcement of the fee imposition has begun, and a defendant has made a timely objection based on his claimed inability to pay, the trial courts should evaluate the defendant’s ability to pay.” *People v Jackson*, 483 Mich 271, 292–93; 769 NW2d 630, 642 (2009)

While MCL 771.3(6)(a) requires that “in determining the amount and method of payment of costs under subsection (2), the court shall take into account the probationer’s financial resources and the nature of the burden that payment of costs will impose, with due regard

to his or her other obligations,” the court, in *Jackson*, indicated that an ability to pay determination is not required prior to imposing financial obligations. See also *People v Music*, 428 Mich 356, 363; 408 NW2d 795 (1987)<sup>1</sup>.

The defendant waives the right to challenge an order on appeal if he or she fails to raise the issue in a timely manner. *People v Music*, 428 Mich 356, 363; 408 NW2d 795 (1987).

## 5. Restrictions

A defendant cannot be sentenced to imprisonment and to pay court costs or face additional jail time. A sentence of this nature is outside the statutory provisions. *People v Tims*, 127 Mich App 564, 565-566; 339 NW2d 488 (1982); *People v Watts*, 133 Mich App 80, 83-84; 348 NW2d 39 (1984).

## C. Restitution

### 1. Authority

MCL 780.826(2) states, “Except as provided in [MCL 780.826(8)], when sentencing a defendant convicted of a misdemeanor, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant’s course of conduct that gives rise to the conviction or to the victim’s estate.” Similar language is included in MCL 769.1a.

Restitution shall be ordered as a condition of probation pursuant to MCL 771.3(1)(e). An order of restitution remains effective until it is satisfied in full. An order of restitution is a judgment and lien against all property of the defendant for the amount specified in the order of restitution. The lien may be recorded as provided by law. The order of restitution **must** be specified in the judgment of sentence or in a separate order of restitution. MCR 6.425, 6.427, 6.430, and 6.610. If probation is ordered, the order of restitution **must also** be specified in the order of probation.

### 2. Objections to Restitution

When restitution is imposed as a condition of probation and the defendant objects, the amount of the loss must be presented on the record. *People v Grant*, 455 Mich 221, 228-229; 565 NW2d 389 (1997); MCR 6.425, MCR 6.610. If restitution is imposed pursuant to the Crime Victim’s Rights Act, the court, in determining whether to order restitution, may order the probation officer to obtain relevant information. A dispute must be resolved on the

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<sup>1</sup> “A probationer is free to ask the sentencing judge to reduce the amount of restitution or costs, and it is clear that a probationer cannot be punished for failure to pay restitution or costs that the probationer cannot afford. Moreover, a defendant who timely asserts an inability to pay restitution or costs must be heard. In that situation, a sentencing judge shall determine whether the restitution or costs are within the defendant’s means.” *People v Music*, 428 Mich 356, 363; 408 NW2d 795 (1987).

record by a preponderance of the evidence. MCL 780.767(4). See also *People v Gubachy*, 272 Mich App 706, 708; 728 NW2d 891 (2006).

### **3. Failure to Pay**

If the court determines that a defendant has failed to pay restitution, before incarcerating the defendant for violating probation, the court must take into account: (1) the defendant's employment status, earning ability, and financial resources, (2) the willfulness of the failure to pay, and (3) any other special circumstances affecting the ability to pay. MCL 771.3(8), MCL 780.826(11), (14). See also MCL 769.1a(11).

A defendant who is required to pay restitution and who is not in willful default of the payment of the restitution may at any time petition the court to modify the method of payment. If the court determines that payment under the order will impose a manifest hardship on the defendant or his or her immediate family, and if the court also determines

that modifying the method of payment will not impose a manifest hardship on the victim, the court may modify the method of payment. MCL 780.826(12).

### **4. Other**

A judge may order that restitution be paid to an insurance company. MCL 780.826(8), *People v Bond*, 99 Mich App 86, 88; 297 NW2d 620 (1980).

### **5. Wage Assignment**

The probationer may be asked to agree to pay by wage assignment any restitution, assessment, fine, or cost imposed by the court. MCL 771.3(2)(f).

If an employed defendant misses two or more regularly-scheduled payments, the court shall order the defendant to execute a wage assignment to pay the restitution. MCL 780.826(15).

## **D. Other Assessments**

In addition to fines, costs, and restitution, conviction for some offenses may require other assessments.

### **1. Crime Victim's Rights Assessment**

The court shall order each person charged with certain offenses that are resolved by conviction, assignment to youthful trainee status, delayed sentence or deferred entry of guilt, or in another way that is not an acquittal or dismissal, to pay an assessment of \$75.00 for serious or specified misdemeanors and \$130.00 for felonies, which is transmitted to the Crime Victim's Rights Fund. See a list of the specific offenses in the Section 6 Appendix. MCL 780.905. The assessment required is in addition to any fine, costs, or other

assessments imposed by the court. The assessment shall be ordered upon the record, and shall be listed separately in the judgment of sentence or order of probation.

## **2. Reimbursement of Emergency Response Costs**

For specified crimes listed in MCL 769.1f, the court may order the defendant to reimburse the state or a local unit of government for expenses incurred in relation to the incident, including but not limited to expenses for an emergency response and expenses for prosecuting the person. If the defendant is placed on probation, any reimbursement ordered shall be a condition of that probation. The court may revoke probation if the defendant fails to comply with the order and has not made a good-faith effort to comply with the order. In determining whether to revoke probation, the court shall consider: (1) the defendant's employment status, earning ability, number of dependents, and financial resources, (2) the willfulness of the defendant's failure to pay, and (3) any other special circumstances that may have a bearing on the defendant's ability to pay. MCL 769.1f(5).

## **3. Problem-Solving Court Treatment Program Fee**

If a person is placed in drug treatment court, mental health court, or veterans' treatment court, he or she may be required to pay a reasonable fee that is reasonably related to the cost to the court for administering the treatment court program as provided in the memorandum of understanding. See MCL 600.1070(4) (drug treatment court), MCL 600.1095(3) (mental health court), MCL 600.1206(4) (veterans' treatment court). The fee is transferred monthly to the court funding unit.

This program fee is subject to the statutory allocation of payments as provided in the priority of payment statute. MCL 775.22. This statute requires that, "if a person is subject to payment of victim payments and any combination of other fines, costs, assessments, probation or parole supervision fees, or other payments, 50% of all money collected from that person shall be applied to payment of victim payments, and the balance shall be applied to payment of fines, costs, supervision fees, and other assessments or payments." This means that when a program fee is paid to a court, the money must be allocated to the priorities established in statute and cannot be directed toward the program fee only.



## 6-11 Habitual Offender

The district court can enhance sentences for the habitual or repeat offender. For the most part, enhanced sentencing occurs for felony offenses. However, the district court can enhance sentences for the following misdemeanors:

1. OWI/OVWI/OWPD upon prior conviction. MCL 257.625(15).
2. driving on a suspended license upon second offense or more. MCL 257.904.
3. checks without sufficient funds under \$50.00 upon second offense or more. MCL 750.131.
4. prostitution upon second offense or more. MCL 750.451.
5. buying, receiving, possessing, or concealing stolen property under \$100.00 upon third offense or more. MCL 750.535.
6. minor in possession of alcohol. MCL 436.1703.
7. selling or furnishing alcohol to a minor. MCL 436.1701.

**NOTE:** The defendant may only receive an enhanced sentence if he or she has been specifically charged and convicted as a repeat offender. *People v Ancksornby*, 231 Mich 271, 272; 203 NW 864 (1925).

## 6-12 Sentencing Hearing

### A. Right to Counsel

The presence of counsel at sentencing is required in district court if the defendant has counsel, unless the defendant does not have an attorney or the presence of counsel is waived.

MCR 6.610(F)(1). An indigent defendant who is without an attorney and who has not waived the right to an attorney may not be sentenced to jail. MCR 6.610(D)(2). See also [“3-01 Defendant’s Right to Court-Appointed Attorney”](#).

A sentence may not be influenced by a defendant’s past convictions obtained in violation of the right to counsel. *United States v Tucker*, 404 US 443, 447-448; 92 SCt 589; 30 LEd2d 592 (1972).

### B. Who Should be Present

1. The defendant has the right to be present at sentencing. *People v Palmerton*, 200 Mich App 302, 303; 503 NW2d 663 (1993).
2. It is not required that the defendant have the right to be present at a presentence conference between the court and defense counsel. *People v Pulley*, 411 Mich 523, 532; 309 NW2d 170 (1981).
3. The judge’s in-chambers conference with the prosecutor, in the absence of the defendant or defense counsel, entitled the defendant to resentencing. *People v VonEverett*, 110 Mich App 393, 396-397; 313 NW2d 130 (1981).
4. Where the trial judge held an ex parte conference with the victim prior to sentencing, outside the presence of the defendant and his counsel, after the defendant’s plea was accepted but before sentence was imposed, the events were analogous to a presentence investigator’s interview with the victim. Resentencing is not required. *People v Rodriquez*, 124 Mich App 773, 776-777; 335 NW2d 831 (1989).
5. The victim has the right to be present and make a statement at sentencing. MCL 780.825.
6. The prosecutor has the right to be present at the sentencing and the right to challenge the accuracy or relevancy of any information contained in the presentence report. MCL 771.14(5) and (6).

### C. Disclosure of Presentence Report

1. The court must 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. The prosecutor and the defendant’s lawyer, or the defendant if not represented

by a lawyer, may retain a copy of the report or an amended report. If the presentence report is not made available 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, are 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. MCL 771.14(5), MCL 6.610(F)(1)(b). At the time of sentencing, either party may challenge, on the record, the accuracy or relevancy of any information in the presentence investigation report.

2. Defense counsel has a right to see the presentence report before sentencing in order to make sure the defendant's sentence is based on accurate information. *See People v Harper*, 479 Mich 599, 642; 739 NW2d 523 (2007); see also *Morales v Michigan Parole Bd*, 260 Mich App 29, 46; 676 NW2d 221 (2003).
3. Any supplements to a presentence report given to the court must also be provided to the defendant or his counsel prior to sentencing the defendant. MCL 771.14(7).
4. The court may exempt from disclosure:
  - a. parts of the report which are not relevant to a proper sentence,
  - b. diagnostic opinions that might seriously disrupt a program of rehabilitation, and
  - c. sources of information that were obtained on a promise of confidentiality.
  - d. upon request, an address or telephone number that would reveal the location of a victim or witness or a family member of a victim or witness unless an address is used to identify the place of the crime or to impose conditions of release from custody that are necessary for the protection of a named individual.

See MCL 771.14, MCR 6.610(F). See also ["4-03 Investigation"](#).

#### **D. Probation Officer Responsibility**

The probation officer may be called to verify or justify the presentence investigation report at sentencing. Depending on local practice, the probation officer may be called in-chambers to respond (informal) or be challenged on the record (formal). MCL 771.14(6).

## **6-13 Crime Victim's Rights Fund**

### **A. Authority**

The Crime Victim's Rights Fund was established by the Criminal Assessment Act of 1989 to compensate victims of certain crimes. District courts are required to order each person charged with a felony, misdemeanor, or local ordinance that is resolved by conviction, assignment to youthful trainee status, delayed sentence or deferred entry of guilt, or in any other way that is not an acquittal or unconditional dismissal, to pay an assessment that is transmitted to the Crime Victim's Rights Fund. MCL 780.905(1).

### **B. Responsibilities of the Court**

The probation officer may be responsible for monitoring the payment of assessments. The crime victim assessment of \$75.00 will be ordered on misdemeanors and local ordinances (limited to one assessment per case) for:

1. convictions,
2. assignments to youthful trainee status,
3. delayed sentences,
4. deferred entries of guilt, or
5. any other resolutions that are not acquittals or unconditional dismissals.

If the court allows fines, costs, restitution, and other fees to be paid in installments, 50 percent of all money collected shall be applied to victim payments (victim restitution and crime victim's rights assessment). The balance shall be applied to all other assessments in the following priority:

1. payment of the minimum state cost,
2. payment of other costs,
3. payment of fines,
4. payment of probation supervision fees, and
5. payment of assessments and other payments.

MCL 775.22.

Payments are applied 100 percent to victim payments when:

1. the person making the payment indicates that the payment is to be applied to victim payments.
2. the payment is received as a result of a wage assignment issued pursuant to MCL 780.766 and MCL 780.826.
3. the payment is received from the Department of Corrections or sheriff under MCL 780.767a and MCL 780.830a.

If a person has more than one proceeding in a court and if the person making the payment does not indicate the proceeding for which the payment is made, the court must apply the payment to a proceeding in which there is unpaid restitution.

MCL 780.766a and MCL 780.826a.

### **C. Report of Nonpayment of Restitution**

In each case where payment of restitution is ordered as a condition of probation, the probation officer shall review the case not less than twice yearly to ensure that restitution is being paid as ordered. The final review shall be conducted not less than 60 days before the expiration of the probationary period. If it is determined that restitution is not being paid as ordered, the probation officer shall file a written report with the court and the prosecuting attorney using SCAO-approved form [MC 258, Report of Nonpayment of Restitution](#). MCL 780.826(15).

In consultation with the local prosecuting official, providing a copy of the [Request and Warrant for Probation Violation \(MC 246a\)](#), [Request and Summons for Probation Violation \(MC 246\)](#), or [Motion and Order for Discharge from Probation \(MC 245m and MC 245o\)](#) may meet the notice requirement for unpaid restitution.

Once the term of probation ends, the probation officer no longer has jurisdiction over the defendant to initiate a probation violation for nonpayment of restitution and probation may not be extended beyond the timeframes permitted by statute. See MCL 771.2, 771.2a. However, at any time the court may use its contempt power to enforce a restitution obligation.

## **6-14 Appendix**

[Comparison Between Deferred Judgments, Delayed Sentences, and Traditional Sentences](#)

[Crime Victim Assessment/Minimum State Cost Chart](#)

[Criminal Sentencing/Administrative Consequences](#)

[Minor in Possession of Alcohol and Intoxicants in a Motor Vehicle](#)

[Model Procedure for Court Ordered Counseling and Testing \(Infectious Disease\)](#)

[Revocation of Deferred Status Chart](#)

[Verification Regarding Test Results \(DCH 1252\)](#)

[Victim Authorization Regarding Notification of Test Results \(DCH 1253\)](#)

# Chapter 7: Probation

## 7-01 General Procedures

### A. Referral for Investigation, Recording, and Assignment

#### 1. Referrals

All referrals to a probation department from a court should be in writing with explicit instructions of what service the probation department is to provide according to the judge's order. General internal procedures and paper trails vary widely between the district courts, but referrals to a probation department will typically be for one of the following categories of service:

- a. bond investigations (see [“2-01 Introduction”](#)),
- b. investigation of need for court-appointed attorney (see [“3-03 Application for Indigency”](#)),
- c. full presentence investigation (see [“4-02 Types and Contents of Presentence Investigation Reports”](#)),
- d. abbreviated presentence investigation (see [“4-02 Types and Contents of Presentence Investigation Reports”](#)),
- e. alcohol screening and assessment (see [“5-03 Assessment”](#)),
- f. oral report (see [“4-02 Types and Contents of Presentence Investigation Reports”](#)), and
- g. information and referral service (see [“1-01 Introduction”](#)).

#### 2. Recording Procedures

When a written referral is received from the court, a central record (index card system) may be made within the probation department that includes the following:

- a. the date of the referral,
- b. the referring judge's name,
- c. the court making the referral, if the department serves more than one court,
- d. the defendant's name, date of birth, address, and phone number,

- e. the offense, and
- f. the type of probation service required.

Many times there will also be a service deadline date, such as the sentencing date, which should be included on the central logging device.

### **3. Assignment**

A probation officer should be assigned to complete the required service and that officer's name should also be listed on the central log. If the department is organized into units, the responsible officer may change during the life of the case. For example, there may be one probation officer assigned to bond investigations, another to screening and assessment, and another to ongoing supervision.

A probation case file or folder is generally prepared upon initial referral. This file should be placed in the filing system of the assigned probation officer. At a minimum, this file should contain the same identifying information that is on the central record or log. A copy of the [Order for Probation \(MC 243\)](#) should be included.

### **B. Fingerprinting**

MCL 769.1(2) states that the sentencing of a person convicted of a felony or a misdemeanor punishable by imprisonment for more than 92 days shall not occur until the court has examined the court file and has determined that the fingerprints of the person have been taken.

### **C. Probation Order**

#### **1. Purpose and Authority**

The probation order is a document designed to make written notice of the judge's specific directions for action to all involved in a case including the probationer and the probation officer. See [SCAO-approved form MC 243](#).

MCL 771.2(2) provides that when a person is placed on probation, the court shall fix and determine the period and conditions of probation by order. The order is to be filed or entered as part of the case record.

The probation order delineates the actions required of the probationer and provides the framework for the probation officer's rehabilitative or supervisory actions with the probationer. All items on the document must have been specifically stated on the record by the judge. Only the court may exercise discretion in setting the terms of probation. This determination may not be delegated to the probation officer. *People v Peters*, 191 Mich App 159, 164-165; 477 NW2d 479 (1991).



For the probation order to be correct and complete, the lines of communication between the judge and the person writing the document (probation order) must be open, efficient, and concise so that important details of the order are not neglected. The court reporter or recorder can be an invaluable asset in determining exactly what was ordered if the written communications are unclear.

## **2. Written Record Required**

The probation order must be in writing. MCL 771.1(2). It must be definite and certain in its provisions and must be sufficiently clear to enable the probationer to know what to do to comply with it. *People v Bruce*, 102 Mich App 573, 577-578; 302 NW2d 238 (1980).

Oral, unrecorded instructions are not valid because they cannot be filed or entered. (MCL 771.1) If a probation order is ambiguous, it cannot be construed against the probationer in violation proceedings. *People v Sutton*, 322 Mich 104, 109; 33 NW2d 681 (1948), see also *People v Bruce*, 102 Mich App 573, 578; 302 NW2d 238 (1980). For example, when payments toward fines, costs, and restitution are required, the order should specify the amount of the payments and the frequency of the payments required by the probationer. If these have not been specified, the probationer's failure to make payments in the desired manner cannot be considered a violation of probation. *People v Davenport*, 7 Mich App 613, 618; 152 NW2d 553 (1967). The statutes, laws, and cases note the importance of the probation order being written in a careful, legible and complete manner with a great deal of attention to the details of the judge's order. It is recommended that abbreviations and legal jargon be avoided, as these may be construed incorrectly by the probationer. In addition, shortcuts on the order, such as specifying self-help attendance but not clearly stating in writing how many meetings must be verified, would be determined ambiguous.

## **3. Preparation**

The writing of the probation order appears to be a clerical task, sometimes handled by court clerks and sometimes by probation officers. However, this clerical task sets forth the goals to be accomplished during the probation period and can render probation services ineffective if carelessly prepared.

## **4. Conditions**

### **a. Purpose**

Conditions of probation can vary widely based on the rehabilitative needs of the probationer. A court may impose conditions of probation not specified by the probation statute. *People v Peters*, 191 Mich App 159, 164-165; 477 NW2d 479 (1991); see also *People v Whiteside*, 437 Mich 188, 192-193; 468 NW2d 504 (1991). Conditions should be rationally tailored to the defendant's rehabilitation program. See *People v Johnson*, 210 Mich App 630, 634-635; 534 NW2d 255 (1995).

## **b. Statutorily Required Conditions**

MCL 771.3(1) provides that the conditions of probation shall include the following.

- 1) During the term of his or her probation, the probationer shall not violate any criminal law of this state, or any ordinance of any municipality in the state.
- 2) During the term of his or her probation, the probationer shall not leave the state without the consent of the court granting application for probation.
- 3) The probationer shall report to the probation officer, either in person or in writing, monthly or as often as the probation officer requires, including notifying the probation department immediately of any change of address and/or employment status.
- 4) The probationer shall pay restitution to the victim of the probationer's course of conduct giving rise to the conviction or to the victim's estate. An order for payment of restitution may be modified and shall be enforced as provided in Chapter IX.
- 5) The probationer shall pay an assessment ordered pursuant to MCL 780.905.
- 6) The probationer shall pay the minimum state cost prescribed by MCL 769.1j.
- 7) If the probationer is required to be registered under the Sex Offenders Registration Act, MCL 28.721-28.732, the probationer shall comply with that act.

These conditions are printed on the [SCAO-approved form MC 243, Order of Probation](#). The conditions should be explained to each probationer if not fully explained on the probation order being used.

## **c. Other Conditions**

Additional conditions of probation are discussed in Section 6-09. They are also addressed in MCL 771.3. Briefly, they include:

- 1) incarceration,
- 2) fine, costs, assessments, wage assignment, reimbursement of county expenses,
- 3) community service work,
- 4) urinalysis, preliminary breath test, ignition interlock device,
- 5) tether/electronic monitoring/house arrest,
- 6) notification to probation officer of any change of address or employment status, and
- 7) other lawful conditions as circumstances of the case may warrant, such as treatment, employment, education, training, restricted travel, and restricted associations.

Michigan voters approved the medical use of marihuana in November 2008.

MCL 333.26421-.26430; Mich Admin Code, R 333.101-.133. Persons using marihuana to alleviate a debilitating medical condition may obtain a physician certification and register with the Michigan Department of Licensing and Regulatory Affairs. MCL 333.26426; see also MCL 333.26423 (defining “department” as the Department of Licensing and Regulatory Affairs). The person is then issued a registry identification card. However, marihuana possession and use are still illegal under federal law. See *Ter Beek v City of Wyoming*, 495 Mich 1, 12; 846 NW2d 531 (2014). If it was determined during presentence investigation or substance abuse screening that a probationer has been issued a registry identification card for this purpose and one of the conditions of probation is to undergo monitoring for drug use, the court may make appropriate findings of this fact on the record before entering the probation order, but will not necessarily indicate anything in the order about a probationer having been issued a registry identification card to use marihuana. The probation officer should make note of the “authorized” drug use in the probationer’s file for purposes of probation supervision. See also [“4-03 Investigation”](#) and [“5-02 Referral and Screening”](#).

The “other lawful conditions” will include both prohibitive conditions which forbid certain acts and affirmative actions that stipulate involvement in certain activities expected to assist the probationer in rehabilitative goals. “In setting additional conditions, a sentencing court must be guided by factors that are lawfully and logically related to the defendant’s rehabilitation.” *People v Johnson*, 210 Mich App 630, 634; 534 NW2d 255 (1995). However, in doing so, the “judge is accorded wide discretion” and “there is no ultimate catalog of legal or illegal terms.” *People v Miller*, 182 Mich App 711, 713; 452 NW2d 890 (1990).

If a condition of probation is for the protection of a named person(s), the court shall submit Part 2 of the Order of Probation to local law enforcement for entry into LEIN. The probation department must also submit amendments to the protective condition and notify LEIN to cancel the LEIN entry if the probationer is discharged prior to the expiration date of the order. If probation is extended beyond the original projected expiration date, and if the protective conditions will be extended, the court must also send an amended order with a new expiration date. MCL 771.3(4).

Sex offender registration is required of persons convicted of specified offenses. The probationer is responsible for completing the registration form and submitting it to the local law enforcement agency or nearest Michigan State Police post. To facilitate the process, the Michigan State Police encourage courts with on-line LEIN access to complete the registration process via terminal rather than in paper format by having the probation officer enter the information into LEIN from the completed registration form. A supply of forms can be ordered from the Michigan State Police. See also online at [http://www.michigan.gov/msp/0,4643,7-123-1645\\_3500---,00.html](http://www.michigan.gov/msp/0,4643,7-123-1645_3500---,00.html).

MCL 28.725a imposes a \$50.00 fee for each new registration. If the court registers the offender on-line in LEIN, the court must collect this fee. If the court sends the registration form to a local law enforcement agency for entry into LEIN, the court should

not collect the fee. The agency entering the registration into LEIN will be billed for \$30.00 of the fee. If the court collects the fee, the \$20.00 balance remains with the court funding unit. MCL 28.725b(1).

The court is required to revoke the probation or youthful trainee status of an individual who willfully violates the Sex Offenders Registration Act. MCL 28.729(5)-(6). Sex offender registration is not required for any person assigned youthful trainee status as of January 1, 2004. MCL 28.722(b)(ii)(B).

**NOTE:** Payment of costs as a condition of probation is seen as reimbursement to the public and not as punishment. *People v Teasdale*, 335 Mich 1, 5; 55 NW2d 149 (1952). Costs are authorized as a condition of probation pursuant to MCL 771.3, or without probation pursuant to MCL 769.1k. In addition, costs as a condition of probation may be limited by the defendant's ability to pay, when the defendant raises the issue. *People v Music*, 428 Mich 356, 363; 408 NW2d 795 (1987). See also "[3-03 Application for Indigency](#)".

## **D. Scheduling Appointments**

### **1. Responsibility**

The time frame within which an appointment is scheduled depends on the flow of cases in each court, as well as the service requested by the judge. A bond investigation or oral presentence report may require immediate service. A full presentence investigation (PSI) or partial PSI depends on the scheduled sentencing date. In some courts, the judge will stipulate the sentencing date while, in other courts, this date is set by the probation department.

### **2. Procedure**

Appointments scheduled with a probationer should be noted in the probation case file. If the appointment is scheduled by a phone call, the arrangement should be noted in the file, dated, and signed or initialed by the probation officer. Some courts place on the probation order a condition that the probationer schedule an appointment within a certain number of days.

Written correspondence can be sent to the probationer's address designating an appointment time, location, and purpose. A copy should be kept in the probation case file to document the contact. Officers should also record the appointment in their own daily appointment calendar, as well as on an office-wide calendar, if such a tool exists. This office-wide calendar can be very helpful to clerical staff in answering questions about appointments scheduled within the department.

The use of a pen in marking appointments in a daily appointment book assures a permanent record. If appointments are cancelled or postponed, it should be recorded in the

probationer's case file, along with a notation whether the probationer or the probation officer required the action.

## **E. Maintaining Files - Documentation**

### **1. Importance**

The probation case file created at the time of referral serves to document that services are being provided as ordered in a responsible and timely fashion. It also verifies whether the probationer complied with the judge's order. With the increasing caseloads in most courts, actions of the probation officer or the probationer should not be left to human memory, but must be documented in the probationer's record, whether in a manual or an automated case management system. The file provides for continuity of service if cases are transferred to a different probation officer due to divisions of labor within the department or the original officer's retirement, resignation, or promotion to different duties.

### **2. Producing a Suitable Record**

In order to produce a suitable record, the following conventions should be observed:

- a. document actions in the probationer's record, whether in a manual or an automated case management system,
- b. place the probationer's name in each entry (e.g., in a manual system, the probationer's name should be placed on each page of a document; in an automated system, the probationer's name should be entered in each field where prompted to do so),
- c. date and initial each entry,
- d. sign worker's full name at the bottom of a completed page of notes,
- e. document contacts chronologically,
- f. write legibly and spell correctly,
- g. use only established and recognizable abbreviations,
- h. record all phone conversations, in-person contacts and e-mails, and
- i. record cancelled or postponed appointments.

### **3. Record Retention**

Complete probation files must be kept for three years after closure or discharge before

being destroyed by approved methods. See [“Chapter 9: References and Resources”](#) for further details. See also the [Michigan Court Administration Reference Guide](#).

#### **4. Active and Inactive Files**

There are both active and inactive files in most probation departments. An example of an inactive file is when a probationer fails to comply with a judge’s order to appear in court and a bench warrant is issued. The case is not discharged from probation but becomes inactive while waiting for the probationer to be returned to the court on the bench warrant. If the defendant is not returned to the court on a warrant after a period deemed suitable by the court (e.g., seven years), the judge may review the warrant for recall and discharge the probationer at that time.

#### **F. Sending Notice**

A notice to appear ([SCAO-approved form MC 06](#)) before the court should be prepared designating the sentencing date, time, and location. It is important to be sure that the defendant and the defendant’s attorney are advised of the sentencing date in writing. In some courts this may be the court clerk’s function and in others it may be a function of the probation officer. A copy of notices must be kept in the probation file and another copy placed in the court record.

#### **G. Conducting Appointment with Probationer**

##### **1. Time**

The manner of conducting an appointment with a probationer should reflect the gravity of the business to be conducted. The appointment should begin at a specified time, adhered to by both the probationer and the probation officer if possible. It will demonstrate a lack of respect for your clients if you keep them waiting in the same way their failure to appear on time displays a lack of respect for your time and the court’s orders. A reasonable time frame for the interview should be designated, with the appointment terminating at a specified time.

##### **2. Setting**

The interview should be held in a quiet and confidential setting so the probation officer can attend to the interview process and the probationer can feel free to disclose information without being overheard. All interviews should be conducted in a nonjudgmental and respectful manner.

##### **3. Stating Purpose of Interview**

The purpose of the interview should be clearly stated with an opportunity for the

probationer's questions to be answered. Stating the purpose limits the topics of conversation, while stating how much time is available encourages the effective use of interview time.

#### **4. Ethical Considerations**

In providing services to clients, the probation officer's goal is to accomplish the tasks at hand while maintaining absolute respect for the client, as well as for the position of the probation officer. To do this, it is very important for probation officers to abide by the following recommended rules of conduct.

- a. Never accept gifts of any size from a client. Any gift may be construed as a bribe.
- b. Never accept gifts from service providers. Protect yourself from charges of graft.
- c. Never fraternize with a client.
- d. Never conduct any type of business transaction with a client.
- e. Maintain a respectful attitude with clients at all times, use language that is professional and in no way demeaning to the client or your role as probation officer.
- f. Never discuss a client's case outside the confines of your office and be careful even in the office that you cannot be overheard by other probationers being seen by another probation officer in the office.
- g. Lock all your files in a secure cabinet at night, or at other times when your office is unattended, in an effort to ensure the confidentiality of the files is not compromised.
- h. Never give a client money no matter how sad the story.
- i. Never give your home phone number or e-mail address to a client. It sends a message of familiarity and can create dependency.

#### **H. Collecting Money**

The Supreme Court Finance Department, through the State Court Administrative Office, recommends that all money assessed be collected in one place in the court, including fees, fines, costs and other assessments for civil, criminal, traffic, and probation. It is further recommended that probation officers not handle any money because probation officers are not authorized by statute to collect fines.

#### **I. Warrantless Arrest**

A peace officer, without a warrant, may arrest a person if the peace officer has reasonable

cause to believe the person has violated a condition of probation imposed by a court. MCL 764.15(g). See also [“6-06 Conditional Sentence”](#).

## **J. Issuing a Bench Warrant or Summons**

A warrant ([SCAO-approved form MC 246a](#)) is an order issued by a court for the arrest of a person who violates a court order. If a warrant is issued, the warrant tolls the term of probation until the defendant is arraigned on the warrant. *People v Ritter*, 186 Mich App 701, 711; 464 NW2d 919 (1991). A summons ([SCAO-approved form MC 246](#)) is an order to appear as directed and present to the court reasons and considerations as to why certain circumstances should be continued, permitted, or prohibited. Both actions can be initiated from the probation department. The probation file should document the dates initiated or issued.

## **K. Probation Violation**

Additional information on probation violations are in the [Criminal Proceedings Benchbook, Volume 2](#), Chapter 4.

When a probationer fails to comply with any of the terms of the probation order, the probation officer should inform the court of this noncompliance. This can be done in one of the two following ways.

### **1. Diversion Processing of Alleged Probation Violations**

A diversion process for alleged probation violations may be used in lieu of traditional probation violation procedures. Courts seeking to implement a diversion program rather than immediately violating probationers should work closely with their probation agents to establish guidelines. See [SCAO Communication, dated February 2, 2006](#).

If a probation officer chooses to follow the diversion process rather than pursuing formal violation proceedings, the diversion process must occur before any formal violation proceedings are commenced. The diversion process must also strictly adhere to the Michigan Court Rules.

If there is reasonable cause to believe a probationer has violated a condition of probation and the probationer and probation officer stipulate to additional conditions of probation in lieu of formal proceedings, a proposed amended order of probation must be submitted to the court for final determination.

If a probationer agrees to diversion in lieu of instituting formal proceedings, he or she must not be required to provide an admission of guilt or waiver of arraignment. Moreover, the court should not issue an Advice of Rights.



## **2. Request for Probation Violation Hearing**

If a probation officer chooses to follow the formal violation proceedings rather than the diversion process, the probation officer must initiate the probation violation process by Request and Warrant for Probation Violation ([SCAO-approved form MC 246a](#)) or Request and Summons for Probation Violation ([SCAO-approved form MC 246](#)). Both forms should allege each specific term of the probation order with which the probationer is failing to comply.

The probationer must receive a written copy of the acts or omissions charged against him or her that constitute a violation of probation. The probationer must receive this motion in sufficient time to obtain counsel and present witnesses. The motion should be specific as to the alleged violations and complete in the list of all terms violated. If the violation involves nonpayment of an outstanding amount owed to the court, the application of the 20 percent late penalty provided by MCL 600.4803 should be included in the motion. Any term not addressed as part of the motion may not be addressed at the probation violation hearing.

If noncompliance pertains to nonpayment of restitution, the probation officer must complete a Report of Nonpayment of Restitution ([SCAO-approved form MC 258](#)). See [“6-13 Crime Victim’s Rights Fund”](#).

## **3. Preparing for the Hearing**

Documentation must be gathered to support the allegations during the violation hearing. This type of documentation would include court records of new convictions, police records of new arrests, and in-house files which document the probationer’s failure to report to the probation officer or failure to fulfill monetary obligations where indigence has not been established. See also [“7-05 Probation Violation”](#).

## **4. Probation Violation Hearing**

If the probationer is found guilty or pleads guilty to the probation violation, the court may continue probation, modify the conditions of the existing probation, extend the probation period, or revoke the probation and impose a jail sentence. See MCL 771.4. The court may require a presentence report. See [“7-05 Probation Violation”](#) for more details.

## **5. Order Regarding Probation Violation**

After the judge has sentenced the probationer on the violation, the judge’s order must be documented in writing and placed in the court file. If probation is revoked, a discharge ([SCAO-approved form MC 245o](#)) must be completed. If probation is not revoked, an amended order of probation must be written and filed. In both cases, the probationer should receive a copy of the written document. A copy of these documents should also be placed in the probation case file. If a condition of probation was imposed for the protection of a victim, and if the victim requests, the court is required to notify the victim by mail if the

probation order is terminated early. MCL 780.768b, MCL 780.827b.

**NOTE:** Probation may not be revoked for failure to pay costs if the reason for nonpayment is the defendant's indigence and defendant has made a good faith effort to comply with the order. MCL 771.3(8)-(10). See also ["3-03 Application for Indigency"](#).

#### **L. Discharging a Probationer**

MCL 771.5(1) provides for the discharge of probationers. When the probation period terminates, the probation officer shall report that fact and the probationer's conduct during the probation period to the court. Upon receiving the report, the court may discharge the probationer from further supervision and enter a judgment of suspended sentence or extend the probation period as the circumstances require, so long as the maximum probation period (two years for a misdemeanor) is not exceeded. [SCAO-approved form MC 245](#) can be used for this purpose.

MCL 771.6 states that when a probationer is discharged, an entry of the discharge shall be made in the records (case file and probation file) and the probationer is entitled to a certified copy.

Payment toward restitution shall continue after discharge from probation in accordance with MCL 780.826(13). The court may continue collection for fines, costs, and assessments after revocation and discharge. MCL 769.1k(3). See ["7-08 Discharge"](#).

The provision that unpaid supervision fees may not be suspended upon discharge from probation applies only to probation under the supervision of the Department of Corrections. MCL 791.225a(6).

## **7-02 Nonreporting Probation**

### **A. Authority**

MCL 771.3(1)(c) states that a probationer shall make a report to the probation officer on a monthly basis or as often as the probation officer may require. The report may be either in person or in writing. Nonreporting probation is most effectively conducted through written documents.

### **B. Responsibility of the Probation Officer**

#### **1. Monitoring the Probationer**

The probation officer is responsible for informing the client of all terms of probation as written on the order, facilitating the probationer's compliance with these terms, monitoring the probationer's progress, and informing the court of the probationer's conduct during the period of probation when the probation is terminated. Similarly, if the probation officer believes the probationer has violated the terms of probation during the term of nonreporting probation, the officer should bring probation violation or revocation procedures (SCAO-approved form MC 246 or MC 246a).

#### **2. Administrative Duties**

The probation officer is responsible for documenting the probationer's compliance with the order. Requiring a monthly written report with attachments such as verifications for treatment, meeting attendance, payments to the court, pay stubs to prove employment, and hours logged in community service will assist the probation officer in this documentation. The probation case file should note when these written reports and other documents are received. A date stamp may also be affixed to the reports as they are received.

### **C. Responsibility of the Probationer**

In all cases, the probationer is required to follow the conditions of probation mandated in MCL 771.3. See [“7-01 General Procedures”](#). There will probably be other terms on the probation order which may include assessment of fines and costs, community service work to be performed, or a specified treatment program to complete. The probationer is responsible for complying with any other conditions the order mandates in writing.

### **D. Referral Agencies**

It is necessary for probation officers to know the referral agencies within their geographic area so treatment programs, educational or training programs, and community service opportunities can be found. See [“7-01 General Procedures”](#) for more on this case management function.

## **1. List of Community Resources and Referral Agencies**

The probation department should maintain a list of community resources and referral agencies. Some examples are:

- a. substance abuse treatment programs, such as
  - 1) residential/inpatient,
  - 2) intensive outpatient,
  - 3) outpatient counseling, especially those that provide services to low-income or indigent clients, and
  - 4) didactic/educational programs.
- b. support group meetings, such as
  - 1) Alcoholics Anonymous (AA), Narcotics Anonymous (NA), Gambler's Anonymous (GA), Cocaine Anonymous (CA), LifeRing, SMART Recovery, etc.
  - 2) Adult Children of Alcoholics (ACOA), and
  - 3) support groups for situational traumas such as loss of job, divorce, or death of a loved one.
- c. mental health agencies for evaluation and treatment.
- d. employment and training programs.
- e. adult education/high school completion program.
- f. treatment facilities for batterers and abused spouses.
- g. shelters for the homeless and for abused women and children.
- h. community organizations willing to provide community service work opportunities for probationers.

## **2. Other Resources**

### **a. Substance Abuse Service Delivery Network Directory of Programs**

One resource for the probation officer is the Michigan Department of Health and Human Services website at <http://www.michigan.gov/mdhhs>. This site provides information on

the Office of Drug Control Policy, which oversees the treatment, prevention, education, and law enforcement efforts related to substance abuse in Michigan. Substance abuse services are provided through regional coordinating agencies. See the website for details.

**b. United Way and Alliance of Information Referral Systems “2-1-1”**

Another resource is “2-1-1,” the Health and Human Resources equivalent of “9-1-1,” sponsored by United Way and the Alliance of Information Referral Systems. “2-1-1” calls are free and are answered by professional information and referral specialists. Translation is available for non-English speaking callers. The database contains over 5,000 agencies with more than 20,000 public, nonprofit and faith-based health and human services programs. It is currently active in almost every county in Michigan. For more information see <http://www.mi211.org/>.

**c. Nonprofit Organizations**

1) Community Service Sites

The probation department should develop local listings of nonprofit organizations that will provide community service work opportunities for probationers. It is helpful to establish a specific contact person at the community service site so communications between the probation officer and the site can be consistent. An organization may be more willing to accept probationers for community service work if the contact person knows they will have the support of the probation department if the probationer causes any problems.

2) Other Support Services

Many of the same organizations that provide community service placements may also provide services that will assist the probationer, such as transportation, shelter, food, and financial assistance. The probation officer needs to know what services these organizations provide and how to help probationers access them.

**E. Forms**

There are no SCAO-approved forms for nonreporting probation. The probation department may want to develop forms for its own needs. A few examples include:

- 1) Self-help Verification.
- 2) Monthly Written Report.
- 3) Community Service Verification.

## **7-03 Reporting Probation**

### **A. Authority**

MCL 771.3(1)(c) states that a probationer shall make a report to the probation officer on a monthly basis or as often as the probation officer may require. The report may be either in person or in writing. Reporting probation is conducted through face-to-face contacts and interviews.

### **B. Responsibility of the Probation Officer**

#### **1. Monitoring the Probationer**

The probation officer is responsible for informing the client of all terms of probation as written on the order, facilitating the probationer's compliance with these terms, monitoring the probationer's progress, and informing the court of the probationer's conduct during the period of probation when the probation is terminated. Similarly, if the probation officer believes the probationer has violated the terms of probation during the term of reporting probation, the officer should bring probation violation or revocation procedures (SCAO-approved form MC 246 or MC 246a). All monitoring is done through face-to-face contacts and interviews.

#### **2. Appointments**

Scheduled appointments should be documented in the probation case file, noting whether the appointment was arranged by phone or correspondence. Any cancelled appointments should be noted as well, identifying who cancelled the appointment, why the appointment was cancelled, and the date and time of cancellation. The probation officer should note in the probation case file when a probationer fails to appear for an appointment. During the appointments, the probation officer is responsible for inquiring about the probationer's compliance with all conditions specified in writing on the probation order.

#### **3. Administrative Duties**

The probation officer is responsible for documenting the probationer's compliance with the order. Although the probationer is not required to prepare a monthly written report, written verifications for treatment, meeting attendance, payments to the court, pay stubs to prove employment, and hours logged in community service should be placed in the file to support the written case record prepared by the probation officer.

If a probationer misses two or more regularly-scheduled restitution payments, the court must order the probationer to execute a wage assignment (if employed). MCL 780.826(15). The probation officer and chief judge should establish a procedure for this to occur.

## **C. Responsibility of the Probationer**

In all cases, the probationer is required to follow the conditions of probation mandated in MCL 771.3. See [“7-01 General Procedures”](#). There will probably be other terms on the probation order which may include assessment of fines and costs, community service work to be performed, or a specified treatment program to complete. The probationer is responsible for complying with any other conditions as the order mandates in writing, including taking part in scheduling appointments and making himself or herself available to meet with the probation officer at the scheduled time.

## **D. Supervised Probation**

### **1. Regular Supervision**

Regular supervision of a reporting probation client generally involves face-to-face contact between the probationer and an assigned probation officer once a month. At this meeting, problems and progress regarding the terms of probation are discussed. Verifications of other court-ordered activities should be presented by the probationer, and copies should be placed in the case record.

### **2. Intermediate Supervision**

In some situations, a probationer will be subject to a slightly-increased level of supervision and/or drug/alcohol testing that does not rise to the level of intensive supervision. This is sometimes referred to as “intermediate supervision” and is almost always the result of amended probation conditions after a probation violation. One such situation where intermediate supervision occurs is the diversion process referred to in [“7-01 General Procedures”](#).

A probationer who meets the conditions for intermediate supervision may be placed on increased supervision and/or drug/alcohol testing for a short period of time (e.g., 30, 60 or 90 days). This increased supervision can be handled by either the assigned probation officer or one of the probation officers who handles intensive supervision for the time specified in the probation violation diversion agreement and the amended court order.

### **3. Intensive Supervision**

In some courts, certain probationers who are at high risk of repeat offenses may be placed on intensive supervision by an assigned probation officer. This type of supervision requires multiple weekly contacts with the probationer to closely monitor compliance and to provide support for the probationer’s attempts to abide by the conditions of probation. Regular contacts may also be made with the probationer’s employer, educational facility, community service site, and family members.

#### 4. Electronic Monitoring/Tether

Electronic monitoring and tethering are also commonly known as “house arrest.” This method of supervising a probationer vastly restricts the client’s freedom of movement during certain hours of the day but allows the probationer to continue to live in the community, work or attend school, support themselves or their families, and have access to community treatment or training resources. The probationer is restricted to the home except for certain prescribed activities during specified time periods. The house arrest and tethering programs should be specifically ordered by the judge, stipulating that the probationer be placed on house arrest, the hours of unrestricted movement to be allowed and the duration of the term of house arrest. See also [“6-07 Other Alternatives”](#).

There are various types of electronic monitoring systems. Local service providers can be contacted for the specifics of their programs, including fees the probationer is responsible for paying. A description of four systems follows.

##### a. Transmitter

This system requires the probationer to wear a “transmitter” on a legband that verifies the probationer’s location through radio frequency signals to a “receiver” within that person’s home. This receiver searches for the transmitter at regular intervals and, if it is unable to find the transmitter within its range, the receiver communicates this to the system’s monitoring computer. This system has been used without phone lines in the home, but it is not as effective this way because information about the probationer’s absence from the receiver’s range cannot be immediately logged with the monitoring computer without use of a phone line. The receiver’s range can vary but most typically is a maximum of a 150-foot radius.

##### b. GPS

The GPS system uses the U.S. Department of Defense’s Global Positioning Satellites, the same network that oversees our nation’s safety day and night. A real-time monitoring system to ensure continuous operation supports this system.

*Active Tracking GPS.* This system offers a real-time map that reports the offender’s every movement. For increased security, it also allows for the ability to establish “hot zones,” which are areas the offender is not allowed to enter. Victims can participate, via pagers, by being notified of offender “hot zone” violations. This is an excellent system for domestic violence, stalking, and drug cases.

*Passive Tracking GPS.* This system offers conventional house arrest plus historical tracking of the offender’s movements 24 hours a day. Once the portable tracking device is placed in the charging stand that is located in the home, the system provides a map of the offender’s past movements. “Hot zones” can also be implemented into this system.



### **c. Visual Telephone**

This system makes use of a visual telephone which is placed in the probationer's home and connected to the telephone. Again, random phone calls are made to the probationer's home and, when the individual receives the call, he or she must "send" an image (a still picture) of themselves to the base station computer to verify their presence in the home. This system can also be set up to have a breathalyzer attached. The visual telephone will show an image of the probationer blowing into the breathalyzer and provide the blood alcohol level at the time of the random phone call.

### **d. SCRAM**

SCRAM utilizes the science of transdermal alcohol testing to measure the amount of alcohol that migrates through the skin in order to determine a person's blood alcohol content. Offenders have no ability to ignore a request for testing or miss a scheduled test. SCRAM's transdermal testing eliminates both the need for supervision at the time of testing and offenders traveling to a testing center. Offenders are able to maintain a normal daily routine and are tested regularly. The ankle bracelet is both tamper proof and water resistant. Offenders have the ability to travel and still be monitored 24 hours a day.

## **E. Unsupervised Probation**

Some courts may place probationers on a totally unsupervised probation term with no personal or written contacts required, except a final review which verifies the probationer has completed or refrained from certain activities as ordered by the judge.

## **F. Forms**

There are no SCAO-approved forms for probation reporting. The probation department may want to develop forms for its own needs. A few examples include:

- 1) Self-help Verification.
- 2) Monthly Written Report.
- 3) Case Notes Log.
- 4) Order for Electronic Monitoring.

## 7-04 Appeals from Sentence

### A. Authority

A defendant who violates probation and whose underlying conviction was based on a guilty plea does not have an appeal of right after probation is revoked and instead must seek leave to appeal. Const 1963 Art 1, § 20; see also *People v Perks (On Remand)*, 259 Mich App 100, 108-109; 672 NW2d 902 (2003).

MCR 6.445(H) states that a probationer has a right to appeal from a sentence of incarceration imposed pursuant to MCR 6.445(G) if the underlying conviction occurred as a result of a trial or the right to file an application for leave to appeal if the underlying conviction was the result of a plea of guilty or nolo contendere. These are specifically for offenses punishable by incarceration of six months or more. MCR 6.445(H) is inapplicable to district court misdemeanors. See MCR 6.001(B).

The order or judgment of a district court may be reviewed only by an appeal to circuit court. (MCR 7.103) An appeal to circuit court may be taken within 21 days from the date of sentence, as noted on the Advice of Rights and Plea Information form ([SCAO-approved form DC 213](#)).

### B. Procedure

MCR 6.425(A)-(G) is applicable to district courts and lays out procedures for probation revocation. See MCR 6.001. The evidence against the probationer must be disclosed to the probationer. The probationer has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses. The court may consider only evidence that is relevant to the violation alleged, but it need not apply the rules of evidence except those pertaining to privileges. The state has the burden of proving a violation by a preponderance of the evidence. MCR 6.445(E). If the court finds that the probationer has violated a condition of probation, or if the probationer pleads guilty to a violation, the court may continue probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration. The court may not sentence the probationer to prison without having considered a current presentence report and may not sentence the probationer to prison or jail (including for failing to pay fines, costs, restitution, and other financial obligations imposed by the court) without having complied with the provisions set forth in MCR 6.425(B) and (E). MCR 6.445(G). Appointment of appellate counsel for district court cases is governed by MCR 6.625.

### C. Probation Officer's Responsibility

A probation officer **has no responsibility** regarding a probationer's desire to appeal a sentence. However, a probation officer will probably hear the probationer's dissatisfaction with a sentence. Probation officers should advise probationers who have a complaint to seek legal counsel or refer them to a low-cost legal aid service for advice. The Advice of Rights

and Plea Information form ([SCAO-approved form DC 213](#)) can be given to a probationer if the original has been lost or misplaced.

If an appeal is filed and is pending, the probationer remains under the jurisdiction of the court and its probation order unless the court orders otherwise. MCR 7.108(C). Note: The case is not stayed unless bond is filed.

## 7-05 Probation Violation

### A. Authority for Revocation

Probation is a form of leniency. It is not an automatic right, and it can be revoked. MCL 771.4. If it appears to the sentencing court that a probationer is likely to again engage in an offensive or criminal course of conduct during the period of probation, the court may revoke probation. The court may also revoke probation if it determines the public good requires it. All probation orders can be revoked in any manner the court considers appropriate, whether for a violation or attempted violation of a condition of probation or for any other type of antisocial conduct or action. While probation can be revoked without a violation, this section discusses only those revocations resulting from violations or attempted violations of probation.

When probation is granted, a probationer agrees to the terms and understands that, for certain acts of misconduct, his or her probation may be terminated. When brought before the court charged with a violation of probation, a probationer is not charged with a new crime, but with a violation of the agreement with the court. See *People v Perks (On Remand)*, 259 Mich App 100, 108; 672 NW2d 902 (2003). A new count for violation of probation may not be added to the underlying criminal case.

Probation revocation proceedings cannot be commenced after the maximum period of probation permitted by law. *People v Wakefield*, 46 Mich App 97; 207 NW2d 461 (1973).

The sentencing court does not lose the power to revoke probation due to the fact that the probationer violated the terms of his or her probation and managed to evade apprehension until after expiration of the maximum period of probation. *People v Ritter*, 186 Mich App 701; 464 NW2d 919 (1991).

The maximum period of probation in misdemeanor cases in district court probation offices is two years, except with stalking and child abuse, which is five years. See also [“6-09 Probationary Sentences”](#) and [“7-05 Probation Violation”](#) for more information. MCL 771.2a.

Additional information on probation violations is in the [Criminal Proceedings Benchbook, Volume 2](#), Chapter 4.

### B. Determining Nature of Violation

#### 1. Definition of Violation

A violation of the terms of probation is either an act or the omission of an action by a probationer, where he or she fails to abide by all terms specifically set forth in the probation order. A revocation cannot be based on conditions which are not prescribed by statute or which have not been included in the order of probation as entered and filed. *People v McNeil*, 104 Mich App 24, 27; 303 NW2d 920 (1981). *McNeil* reinforces the importance of

carefully and specifically prescribing all the judge's orders on the order of probation when it is written. Failing to do so can weaken the probation officer's position later.

A revocation cannot be based on an indigent probationer's inability to make payments as ordered as a condition of probation. The court may, however, require a probationer to make a good-faith effort to find a job to make ordered payments. MCL 771.3(8)-(10).

## **2. Evidence**

The acts or omissions of the probationer must be established by evidence collected by the probation officer and presented to the court. The evidence may include:

- a. court records of new convictions,
- b. police reports or a police officer's testimony,
- c. case records reflecting the probationer's failure to report to probation,
- d. court records indicating the probationer failed to pay fines, costs, or restitution as assessed (if not indigent), or
- e. lab reports indicating the probationer has used drugs or alcohol.

A careful review of the probationer's order and file will help the probation officer decide what evidence must be collected to substantiate the allegation of a violation in the court. The state has the burden of proving the violation by a preponderance of the evidence. MCR 6.445(E). This preponderance of evidence rule is less stringent than establishing guilt beyond a reasonable doubt and can mistakenly lead to basing violation charges on an arrest for which the probationer has not yet been convicted. A probationer's term of probation may be revoked solely on the basis that the probationer has been arrested if there are verified facts in the record by which the court can find a violation of probation by a preponderance of evidence.

## **3. Preparing and Serving the Motion**

The probation officer should prepare a Request and Summons for Probation Violation ([SCAO-approved form MC 246](#)) or a Request and Warrant for Probation Violation ([SCAO-approved form MC 246a](#)), depending on the court's preference. The request must state the specific violations which the probation officer believes have occurred. Each condition of probation alleged to be violated should be listed in separate statements. The completed request should be presented to the judge for approval and signature. Because the judge can only consider the violations included in the request, it is imperative the probation officer include all violations in the motion.

A violation of conditions reasonably necessary for the protection of one or more named

persons which has been entered on LEIN in accordance with MCL 771.3 must be brought to the court by motion. Law enforcement has the authority to arrest a probationer without warrant for violating this condition pursuant to MCL 764.15(1)(g). Law enforcement must then follow the procedure in MCL 764.15e.

For all other conditions of probation, the entry on LEIN merely provides a mechanism for law enforcement to notify the probation officer or court that a probationer has violated the condition. The probation officer must then prepare a request and summons for probation violation or a request and warrant for probation violation. There is no statutory authority for a district court probation officer to request law enforcement to hold a probationer for an alleged violation without a warrant. See also [“6-06 Conditional Sentence”](#).

MCR 6.445 requires that the probationer receive written notice of any alleged violation. A court’s decision to revoke probation cannot be based on uncharged conduct. Therefore, a careful review of the probationer’s compliance with all terms of probation should be made before preparing the motion. For instance, it may be obvious to the probation officer that treatment has not been verified; however, if current criminal history and driver history records are not obtained, the officer may omit an important fact, such as a new offense by the probationer during the probation term. If this new offense is not included in the motion as presented to the probationer, it cannot be considered at the violation hearing.

## **C. Procedure for Arraignment**

### **1. Issuing Summons or Warrant**

On finding probable cause to believe that a probationer has violated a condition of probation, the court may: MCR 6.445(A).

- a. issue a summons ([SCAO-approved form MC 246](#)) in accordance with MCR 6.103(B) and (C) for the probationer to appear for arraignment, or
- b. issue a warrant ([SCAO-approved form MC 246a](#)) for the arrest of the probationer. An arrested probationer must be brought immediately before the court for arraignment.

### **2. Arraignment on the Charge**

#### **a. Advice of Rights**

At the arraignment on the violation, the court must give the probationer written notice of the alleged violation and must advise the probationer of the right to contest the charge at a hearing and of the right to an attorney. If the probationer cannot afford an attorney, the court must advise the probationer that the court will appoint one at public expense. MCR 6.445(B).

Even though a probationer charged with a probation violation has waived the assistance

of a lawyer, the court must advise the probationer of the right to an attorney at each subsequent proceeding. MCR 6.005(E), MCR 6.445(D).

Before proceeding on the charge, the probationer must be informed of the right to contest the charge at a hearing. MCR 6.445(B)(2).

MCR 6.445(B) requires the court to advise the probationer of certain rights on the record. [SCAO-approved form MC 446, Probation Violation Arraignment Advice of Rights](#) may be used to aid the probationer.

#### **b. Release from Custody**

The court must determine what form of release, if any, is appropriate. If the probationer is held in custody, the hearing must be held within 14 days after arraignment or the court must order the probationer released from custody pending the violation hearing. MCR 6.445(B)(4), MCR 6.445(C).

#### **c. Scheduling the Hearing**

The court must set a reasonably prompt hearing date or postpone the hearing at arraignment. Postponement of the hearing may be necessary when the alleged violation is based on a criminal offense that is a basis for a separate criminal prosecution and the court is awaiting the outcome of that prosecution. MCR 6.445(B)(5) and (C).

### **3. Pleading Guilty at Arraignment**

Pursuant to MCR 6.445(F), before accepting a guilty plea at the arraignment, the court must speak directly to the probationer and advise the probationer of several provisions:

- a. that, by pleading guilty, he or she is giving up the right to a contested hearing,
- b. if the probationer decides not to retain an attorney, the probationer must be informed that he or she is giving up the right to legal assistance at the arraignment, and
- c. the maximum possible jail sentence for the offense.

The court must also ascertain that the probationer's plea is understandingly, voluntarily, and accurately made and must establish factual support for a finding the probationer is guilty.

## **D. Presentence Report and Recommendation on Violation**

### **1. Requirement for Presentence Report**

The district court is not required to consider an updated presentence report before sentencing a probationer who has violated probation. The portion of MCR 6.445(G)

requiring a presentence report pertains to felony cases only where the probationer can be sent to prison. The judge, however, may request that an updated presentence report be completed, and the rule for content should be followed as in the original presentence report. MCR 6.425, MCL 771.14. See [“4-04 Presentence Report”](#) for more details.

## **2. Recommendation**

In considering recommendations as part of an updated presentence report, the maximum sentence which may be imposed for a probation violation is the same as the maximum sentence for the underlying offense for which probation was originally imposed. (MCL 771.4) Probation is not a “sentence” which can be imposed again after revocation. *People v Alvarado*, 192 Mich App 718, 723; 481 NW2d 822 (1992).

The maximum term of probation for an offense that is not a felony is two years, with some exceptions. MCL 771.2(1); MCL 771.2a. A brief probation term may be extended to the maximum at any time as the result of a violation. However, if a probationer violates probation toward the end of a two-year probation term, probation cannot be extended because the two-year maximum has already been imposed.

## **E. Hearing**

### **1. Presiding Judge**

Probation violation hearings should be held before the original judge, if possible. If the probationer does not motion the court for disqualification of a new judge in a timely manner, it is not considered prejudice against the probationer if the original judge does not conduct the probation violation hearing. *People v McIntosh*, 124 Mich App 705; 335 NW2d 129 (1983). In *People v Manser*, 172 Mich App 485, 487; 432 NW2d 348 (1988), it was determined that a probationer’s conviction for a probation violation should be reversed where a probationer objected to proceeding before a different judge than the one who had imposed sentence and there was no showing that the previous judge was unavailable or unable to act.

### **2. Conduct of Hearing**

There are minimum due process requirements the court should observe at the hearing.

- a. A written notice of the specific violations must be provided to the probationer.
- b. Evidence against the probationer must be disclosed to the probationer.
- c. The probationer must be given an opportunity to be heard in person, to present evidence, and to examine and cross-examine witnesses.
- d. The probationer must be advised of the right to an attorney and, if unable to afford one,



that the court will appoint one at public expense.

MCR 6.445(D) and (E).

### **3. Findings of the Court**

At the conclusion of the hearing, the court must find the facts specially, state its conclusions of law separately, and direct entry of the appropriate judgment. The court must state its findings and conclusions on the record or in a written opinion made a part of the record. MCR 6.403, MCR 6.445(E). The court may use SCAO-approved form [MC 433, Order Following Probation Violation Hearing](#), to record its findings.

## **F. Sentencing/Revocation**

### **1. Basis**

- a. A proceeding for probation revocation has two steps:
  - 1) a factual determination that the violations charged in the petition of probation violation have occurred, and
  - 2) a discretionary determination that proven charges warrant revoking probation.
- b. If the court finds that the probationer has violated a condition of probation or if the probationer pleads guilty to a violation, the court may:
  - 1) continue probation,
  - 2) modify the conditions of probation, including a term of incarceration,
  - 3) extend the probation period, or
  - 4) revoke probation and impose a sentence of incarceration.

Probation officers should consider each of these options when making their recommendations. MCR 6.445(G).

### **2. Right to Counsel**

The probationer must be advised of the right to an attorney and, if unable to afford one, that the court will appoint one at public expense. MCR 6.445(D).

The probationer should have a reasonable opportunity to obtain counsel of his or her own choosing. If indigent, the court is responsible for appointing counsel.

The sentencing court may order the probationer to pay the costs of an appointed attorney as a condition of probation. MCL 771.3.

## **G. Forms**

- 1) [Notice to Appear \(SCAO-approved form MC 06\).](#)
- 2) [Request and Summons for Probation Violation \(SCAO-approved form MC 246\).](#)
- 3) [Request and Warrant for Probation Violation \(SCAO-approved form MC 246a\).](#)
- 4) [Probation Violation Arraignment Advice of Rights \(SCAO-approved form MC 446\).](#)
- 5) [Request for Court-Appointed Attorney and Order \(SCAO-approved form MC 222\).](#)
- 6) [Order Following Probation Violation Hearing \(SCAO-approved form MC 433\).](#)
- 7) Advice of Rights, Revocation of Probation (sample).
- 8) Probation Violation Hearing Waiver (sample).
- 9) Consent to Administrative Sanction for Probation Violation (sample).
- 10) Waiver of Rights and Guilty Plea (sample).
- 11) Acceptance of Admission of Guilt to Probation Violation Charges (sample).

## 7-06 Transfer

### A. Request for Transfer

The vast majority of cases requiring transfer at the district court level will be within Michigan only. To transfer a probationer, the sentencing court must send a letter requesting supervision by the court where the probationer is residing. A copy of the probation order and the presentence report may accompany the request letter. There is no authority that requires a court to accept a transfer for probation supervision.

### B. Response to Transfer

Upon receiving an affirmative response accepting the transfer, the sentencing court notifies the probationer of the transfer, the location and phone number of the new probation department, and the name of the person to contact at the supervising office. The notice should make clear it is the probationer's responsibility to contact the supervising office immediately.

### C. Responsibilities

#### 1. In-State

##### a. Fines, Costs, Restitution, and Supervision Fees

###### 1) Sentencing Court

All payments for fines, costs, restitution, and probation oversight assessed as part of the probation order shall be made to the sentencing court. The sentencing court may need to create a cash code for probation oversight fees on transfer cases.

###### 2) Supervising Court

The supervising court does not collect any oversight fees assessed as part of the probation order. The sentencing court will remit the probation oversight fees to the supervising court when that line item is paid in the order of priority pursuant to MCL 775.22.

##### b. Violations, Amendments, Bench Warrants, and Discharges

###### 1) Sentencing Court

###### a) Amendments

It is the responsibility of the sentencing court to proceed on making needed amendments to the probation order when notified of this need by the supervising court. An amended order ([SCAO-approved form MC 244](#)) should be forwarded to the supervising court.

### **b) Violations**

If the supervising court notifies the sentencing court that a probation violation may have occurred, the sentencing court is responsible for starting the probation violation hearing procedure. If needed, the sentencing court is responsible for issuing any bench warrant.

### **c) Discharges**

If the sentencing court receives a final report from the supervising court indicating that all conditions of probation have been satisfactorily met, the sentencing court must process the probationer's termination from supervised probation. A copy of the Motion and Order for Discharge ([SCAO-approved form MC 245](#)) should be sent to the supervising court to close its file.

## **2) Supervising Court**

The supervising court is responsible for:

- a) notifying the sentencing court of needed amendments to the probation order.
- b) notifying the sentencing court of allegations that a probation violation may have occurred.
- c) preparing and submitting to the sentencing court a final report of the probationer's conduct while on probation. The final report should be submitted at least 30 days before the ordered termination date so the sentencing court has time to determine the appropriate course of action. The case may be closed in the supervising court after receiving a copy of the petition and order for discharge from the sentencing court.

## **2. Transfers to Another State**

### **a. Authority**

Out-of-state transfers are handled by way of the Interstate Compact, which is an agreement between states for cooperative effort and mutual assistance in preventing crime. It describes the responsibilities of the sending state and the receiving state. MCL 3.1012. The revised rules regulating transfer of probation are available on the Interstate Commission for Adult Offender Supervision website at <http://www.interstatecompact.org/>

Michigan's Interstate Compact office is located at Interstate Compact, Department of Corrections, PO Box 30003, Lansing, MI 48909, (517) 335-1370.

## **b. Eligibility**

The Interstate Compact prohibits a misdemeanor offender under supervision in Michigan to relocate to another state without the other state's acceptance of the transfer of supervision. Effective January 1, 2005, in order to transfer under the compact, the offender must have at least one year of supervision and the offense must include one or more of the following:

- an offense in which a victim has incurred direct or threatened physical or psychological harm,
- an offense that involves the use or possession of a firearm,
- a second or subsequent misdemeanor offense of driving while (intoxicated or) impaired by drugs or alcohol, and/or
- an offense which requires sex offender registration in Michigan. Interstate Compact R 2.105.

If an offender does not meet the above criteria and is allowed to go to another state without transfer through the compact, the sending state would be held responsible for supervision and the offender's actions while in the other state.

1) Other eligibility requirements, all of which must be met are:

- a) at least 90 days left of supervision, AND
- b) valid supervision plan in the other state, AND
- c) substantial compliance with the terms of supervision, AND
- d) resident of the other state, OR has resident family in the receiving state who have indicated a willingness and ability to assist as specified in the plan of supervision and is an individual who can obtain employment in the receiving state or has means of support. Interstate Compact R 3.101.

2) Transfer of Military Members

An offender who is a member of the military and has been deployed by the military to another state, shall be eligible for reporting instructions and transfer of supervision. Interstate Compact R 3.101-1(a)(1).

Transfer of offenders who live with family who are members of the military—An offender who meets the criteria specified in Rules 3.101 (a), (b), & (c) and (e)(2) and who lives with a family member who has been deployed to another state, shall be eligible for reporting instructions and transfer of supervision, provided that the offender will live with the military member in the receiving state. Interstate Compact R 3.101-1(a)(2).

### 3) Transfer Due to Relocation for Employment

An offender who meets the criteria specified in Rules 3.101 (a), (b), & (c) and (e) (2) and whose family member, with whom he or she resides, is transferred to another state by their full-time employer, at the direction of the employer and as a condition of maintaining employment, shall be eligible for reporting instructions and transfer of supervision, provided that the offender will live with the family member in the receiving state. Interstate Compact R 3.101-1(a)(3).

### 4) Employment Transfer to Another State

An offender who meets the criteria specified in Rules 3.101 (a), (b), & (c) and is transferred to another state by their full-time employer, at the direction of the employer and as a condition of maintaining employment shall be eligible for reporting instructions and transfer of supervision. Interstate Compact R 3.101(a)(4).

### 5) Transfers of Veterans for Medical or Mental Health Services

An offender who meets the criteria specified in Rules 3.101 (a), (b), & (c) and who is a veteran of the United States military services who is eligible to receive health care through the United States Department of Veterans Affairs, Veterans Health Administration and is referred for medical and/or mental health services by the Veterans Health Administration to a regional Veterans Health Administration facility in the receiving state shall be eligible for reporting instructions and transfer of supervision provided: a) the sending state provides documentation to the receiving state of the medical and/or mental health referral; and b) the transfer of supervision will be accepted if the offender is approved for care at the receiving state Veterans Health Administration facility. Interstate Compact R 3.101(a)(5).

## **c. Procedure**

Specific forms must be completed and sent to the Interstate Compact Office in Lansing to initiate the transfer. Probation officers wanting further information should call the Interstate Compact Office in Lansing. The office will provide a local contact in your county where the request for transfer forms may be obtained. Forms may also be obtained on-line at <http://www.interstatecompact.org/>. For information on transfer fees, see <http://www.interstatecompact.org/fees>.

## **d. Limitations**

The Interstate Compact Office works with district court probation cases on a somewhat limited basis because of the relatively short time period a district court probationer is on probation. Except for stalking and child abuse convictions, the maximum time period of probation for offenders in the district court is two years, with many probationers receiving terms of six months or one year. It is not recommended that a transfer

application be initiated unless the probationer has at least six months remaining on the probation term.

## 7-07 Extension

### A. Authority

At the end of the probation period, the probation officer must report the fact to the court and report the conduct of the probationer during the term of probation. The court may extend the probation period as circumstances may require, as long as the maximum period of probation is not exceeded. MCL 771.5. Except for stalking and child abuse convictions, the maximum period for a term of probation for misdemeanor offenses is two years. MCL 771.2(1). Extensions are one option available to the court as the result of a probation violation. MCR 6.445(G).

### B. Responsibility

The probation order may be extended only by the court. This authority cannot be delegated to others. *People v Peters*, 191 Mich App 159, 164-165; 477 NW2d 479 (1991). Therefore, probation officers do not have the authority to extend probation.

### C. Circumstances

1. A sentencing court may extend the period of probation even if there has been no probation violation, as long as the statutory maximum is not exceeded. *People v Marks*, 340 Mich 495, 501; 65 NW2d 698 (1954).
2. A probation order may be amended by the court to extend probation on an ex parte basis without giving the probationer notice and an opportunity to be heard. *People v Kendall*, 142 Mich App 576, 579; 370 NW2d 631 (1985).
3. The court may extend probation up to the statutory maximum upon finding a probationer has violated probation or upon receiving a plea of guilty regarding the charge of a probation violation. MCR 6.445(G).

### D. SCAO-Approved Forms

[Petition/Order for Amendment of Order of Probation \(MC 244\)](#).



## 7-08 Discharge

### A. Authority

Upon termination of the probation period, the probation officer must report the fact to the court, including the conduct of the probationer during the period of probation. The court may discharge the probationer from further supervision and enter a judgment of suspended sentence. MCL 771.5(1).

### B. Reviewing the File

The probation officer should review the probationer's file in a timely fashion to determine the probationer's compliance with the conditions of probation as of the last-ordered day of probation.

The probation officer should:

1. carefully review the order for a listing of the conditions of probation and then compare case notes and documents, verifying such activities as treatment, AA attendance, and community service work hours to verify each condition was successfully completed by the probationer.
2. verify that all fines, costs, restitution, and supervision fees have been paid in full. If restitution has not been paid, a Report of Nonpayment of Restitution must be prepared ([SCAO-approved form MC 258](#)). See also ["6-13 Crime Victim's Rights Fund"](#).
3. obtain a current criminal history from LEIN and a current driving record from the Secretary of State to ensure that the probationer has not incurred any new arrests or convictions during the term of probation. (Nonpublic record, see ["8-02 Right to Access Records"](#).)

### C. Conditions Not Met

#### 1. Time Available for Extension

If the probation officer is not satisfied that all conditions have been met, this information must be provided to the judge. The judge may extend the probation period for additional supervision, granting time for the probationer to complete the ordered conditions. A formal written extension order should be prepared, clearly stating the provisions so the probationer knows what he or she must do to comply. Oral, unrecorded instructions are not valid since they cannot be filed or entered on the court record. MCL 771.2(2).

#### 2. Time Unavailable for Extension

If the probation period cannot be extended because the maximum period has already been met, the probationer must be discharged or the probation order must be revoked, depending on the circumstances.

### **3. Recovering Fines, Costs, and Other Fees**

The court may collect unpaid fines, costs, and other fees once the probationer is discharged or the probation is revoked. MCL 769.1(k). See [“3-04 Recovering Expense”](#) for more details.

Pursuant to MCL 780.826(11) and (13), if the defendant is placed on probation, any restitution order pursuant to the Crime Victim’s Rights Act shall be a condition of that probation. In addition, an order of restitution entered pursuant to the Crime Victim’s Rights Act remains effective until it is satisfied in full. See [“6-10 Financial Obligations”](#) for further information.

### **D. Conditions Met**

If the probation officer is satisfied the conditions of probation have been met, the probation officer should prepare a Motion and Order for Discharge from Probation ([SCAO-approved form MC 245m and MC 245o](#)) and present it to the judge.

### **E. Early Discharge**

There are occasions when a probationer may receive an early discharge from probation. The petition and order for discharge should clearly state the reasons for an early discharge. If a condition of probation was imposed for the protection of a victim and, if the victim requests, the court is required to notify the victim by mail if the probation order is terminated early. MCL 780.768b, MCL 780.827b. The probation officer must notify the law enforcement agency to cancel the protective probation order from LEIN ([SCAO-approved form MC 239](#)).

### **F. Other Reasons for Discharge**

Probation discharges may be issued for reasons other than satisfactory completion of probation. The following are some examples:

1. The probationer has died. The petition and order for discharge must be (1) accompanied by a death certificate, which can be obtained from a family member of the probationer, the Bureau of Vital Statistics, or the office of the city or county clerk, or (2) validated by a reliable source, such as the Social Security Death Index.
2. The probationer disappeared for a lengthy period of time and is later found. If deemed appropriate, the court may discharge him or her without punitive action.
3. The probationer has disappeared for a lengthy period of time and the likelihood of the probationer being located is remote.
4. The probationer appears to be incapable of improving his or her life circumstances but is not considered at risk for committing serious crimes.

5. The probationer is unable to meet the full obligations of the order but has made a good-faith effort to meet those terms which were possible, or made reasonable approximations of the specific terms.

### **G. Record of Discharge**

When a probationer is discharged, the discharge order must be filed with the court. A copy of the discharge order should be placed in the probation file and a copy should be given to the probationer. All warrants for arrest must be recalled ([SCAO-approved form MC 220](#)).  
MCL 771.6.

### **H. SCAO-Approved Forms**

- 1) [Motion and Order for Discharge from Probation \(MC 245m and MC 245o\)](#).
- 2) [Warrant Recall \(MC 220\)](#).
- 3) [Removal of Entry from LEIN \(MC 239\)](#).

## **7-09 Protection Against Possible Exposure to HIV, HBV, HCV**

### **A. Authority**

If a county employee or court employee who, while performing his or her official duties or otherwise performing the duties of his or her employment, determines that he or she has sustained a percutaneous, mucous membrane, or open wound exposure to the blood or body fluids of an arrestee or probationer, he or she may request that the arrestee or probationer be tested for HIV infection, HBV infection, or HCV infection pursuant to MCL 333.5204 only if he or she has received training in the transmission of bloodborne diseases under the rules governing exposure to bloodborne diseases in the workplace promulgated by the occupational health standards commission or incorporated by reference under the Michigan Occupational Safety and Health Act, MCL 408.1001 to 408.1094.

### **B. Request for Testing**

#### **1. Request Form**

A probation officer who desires to make a request as described above shall make the request to his or her employer in writing on a form provided by the Department of Community Health as soon as possible, but not later than 72 hours after the exposure occurs. The request form shall be dated and shall contain, at a minimum, the name and address of the officer and a description of his or her exposure to the blood or other body fluids of the probationer. The request form shall also contain a statement that the probation officer is subject to the confidentiality requirements of MCL 333.5131 and MCL 333.5204(7). The request form shall not contain information that would identify the probationer by name except if necessary to identify the individual for purposes of testing. MCL 333.5204(3).

See the Michigan Department of Health and Human Services form, [DCH-1169\(E\), \(Officer/Employee Request for HIV, Hepatitis B and/or Hepatitis C Testing of Arrestee, Correctional Facility Inmate, Parolee, or Probationer\)](#).

#### **2. Employer Responsibility**

The probation officer's employer shall accept as fact the probation officer's description of his or her exposure to blood or other body fluids and shall have the test(s) performed by the local health department or by a health-care provider designated by the local health department. If the probationer consents to the performance of the test(s) named in the request, the probation officer's employer shall have the probationer transported to the place of testing. MCL 333.5204(4). If the probationer refuses to undergo testing, the probation officer's employer may proceed with a petition to the family division of the circuit court or to the appropriate district court. See page 7-09-02.

### **3. Probation Officer Responsibility**

In addition to preparing the request for testing, the probation officer is responsible for the reasonable and customary charges of each test, if those charges are not payable by the employer. MCL 333.5204(5).

#### **C. Petition for Testing**

If the probationer refuses to undergo testing requested by the probation officer, his or her employer may petition the circuit or local district court for the county in which the employer is located for an order requiring the probationer to undergo testing. MCL 333.5205(3), (7). See [SCAO-approved form MC 72](#). A hearing before a judge is required within 24 hours of the date and time the petition is filed.

For more details, see MCL 333.5204 and 333.5205.

# Chapter 8: Records Management

## 8-01 Maintaining Records

Every probation department should have a program for managing the creation, maintenance, and disposition of all relevant court records. Any records management program instituted should consider the handling of a case file from initiation to eventual destruction.

For details on records management, see [Section 4, Michigan Trial Court Administration Reference Guide](#) and [Michigan Trial Court Records Management Standards](#).

### A. Authority

MCR 8.119 governs records and entries kept by the district court clerk, as well as by a district court probation department.

### B. Responsibility

The district court probation department shall keep in a probation case file, in such a form as may be prescribed by the district court, a copy of a probation order, as well as any other necessary forms or documents that may be relevant to the probation order.

### C. Types of Records and Contents of Files

Probation case files may include the following items: probation order, community service referral forms, monthly report forms, relevant reports from substance abuse agencies, psychological or psychiatric reports, sex offender registration forms, and notes relevant to the probationer's standing and progress, among others.

## 8-02 Right to Access Records

### A. Authority and Procedure for Accessing Information

Generally, unless access to a file is restricted by statute, court rule, or an order sealing records under MCR 8.119(I), any person may inspect pleadings and other papers in the clerk's office and may obtain copies as provided in MCR 8.119(H) and (J). Every court shall adopt an administrative order to make reasonable regulations necessary to protect its public records and prevent excessive and unreasonable interference with the discharge of its functions. MCR 8.119(H)(2).

Access to a file may be restricted by court rule, statute, or a judicial order under certain circumstances. Case folders and related records (register of actions, indexes, court reporter notes, audio/video recordings, calendars, etc.) of certain types should be clearly marked as confidential. For information on confidential records, see [the Michigan Access Security Matrix](#).

The area containing restricted-access files that are frequently accessed should be away from the area accessible to the general public and unauthorized personnel and should be supervised. Each folder should be clearly identified to warn court personnel that access to the folder is restricted. The procedures and policies for restricted-access files should be explicitly stated in the court rules or clerk of the court's manual and periodically reviewed with all staff who come into contact with such files. The clerk of the court must also take precautions to maintain the confidentiality of pieces of information in restricted-access case files and other court records. This information includes confidential information regulated by Michigan or federal statute, federal regulation, or Michigan court rule.

When access to any court record or probation case file is restricted by statute, court rule, or order, the trial court should clearly mark the record "NONPUBLIC RECORD."

For more information, see ["1-03 Rules of Confidentiality"](#). See also [Section 4, Michigan Trial Court Administration Reference Guide](#) and the [Michigan Trial Court Records Management Standards](#).

### B. Access to Nonpublic Records and Privileged Information

When a court has ordered, or has pending before it a request to order, a limitation on public access to court proceedings or records of those proceedings that are otherwise public, any person may file a motion to set aside the order or an objection to entry of the proposed order. If the court denies the motion or enters the order after objection is filed, the moving/objecting party may file an application for leave to appeal in the same manner as a party to the action. MCR 8.116(D).

When public inquiry is made about a record the access to which is restricted by court rule or court order, court personnel should respond that "no public record exists."

### **C. Disclosure of Probation Records, Reports, and Case Histories**

MCL 791.229 clearly makes all circuit court probation records and reports privileged and confidential. The records are not open to public inspection. Access is authorized only for judges, probation officers, the attorney general, auditor general, and law enforcement agencies. The overriding purpose is to protect the confidential relationship between the probation officer and the defendant. There is no similar protection or requirement for district court probation in statute.

In *Howe v Detroit Free Press*, 440 Mich 203, 212; 487 NW2d 374 (1992), the Michigan Supreme Court considered whether a district court probation record was privileged. The court found that MCL 791.229 applied, and held that the record was privileged (although the privilege was waived in the case before the court).

The privilege protects the probationer, to the exclusion of others. A waiver signed by the defendant would allow a probation record to be released. Prior to releasing a probation record, the probation officer should receive a copy of the signed waiver.

A waiver of privilege by a probationer applies only to information or documents directly relating to the probationer. The probation officer must review the waiver in light of the request and provide only what is requested. Information within the probation file to which the probationer would not have a right to access, such as victim address and phone number, should not be released, even if the request and the waiver cover the entire probation file. If there is any question as to the appropriateness of release, the probation officer should seek guidance from the chief judge.

The privileged status of probation records may be compromised if such records are contained within the case file under the custody of the clerk of the court. It is recommended that with the exception of the probation order, any amended order, and the order of discharge, all probation records be kept separately from the case file maintained by the clerk. Requests other than a subpoena for access to probation records that may be in the custody of the court clerk must follow the procedures outlined in MCR 8.119(H).

MCL 28.214 creates misdemeanor and felony penalties for misuse of LEIN by way of improper access, use, or disclosure of nonpublic information. A person who intentionally discloses information governed by the Criminal Justice Information Systems (CJIS) Act may be charged criminally. MCL 28.214.

### **D. Freedom of Information Act**

Probation records or court records are often requested by an individual citing the Freedom of Information Act. MCL 15.231 *et seq.* The judiciary is specifically excluded from the definition of public bodies subject to the act. MCL 15.232(d)(v).



## **E. Probation Officer Testifying in Court**

If a probation officer receives a subpoena for a probation record, it is appropriate for the officer to attend the court hearing with the record requested and to advise the presiding official that the record is protected pursuant to MCL 791.229 and *Howe*. A waiver signed by the probationer would allow a probation record to be released, but only as to documents directly relating to the probationer. An order of the court would allow those parts of the probation record to be released that are included in the court's order. For further information, see ["1-03 Rules of Confidentiality"](#).

## 8-03 Retaining and Destroying Records

### A. Maintenance Standards and Regulations

Records may not be disposed of, mutilated, or destroyed, except as allowed by statute or court rule. Minimum record retention schedules for use by the trial courts have been approved by the State Administrative Board. MCL 399.5, MCL 600.1428, MCL 750.491, and MCR 8.119(K).

### B. Records Retention and Destruction Schedule

<u>Records Title</u>	<u>Description</u>	<u>Retention Period</u>
13.101	Screening and Assessment Evaluations, Pre-sentence Reports, Pretrial Risk Assessments, Probation Files*, and Problem Solving Court Treatment Files	RETAIN UNTIL: Discharge from probation or until date of sentencing if not placed on probation PLUS: 3 years THEN: Destroy
13.301	Accounting records for district courts, such as receipts (including summary receipt reports, individual receipts, and transmittal/deposit advices); disbursement records (including check registers, bank records, bank statements, bank reconciliations, and deposit slips); bond and trust records (including open bond and trust reports and bond and trust check registers); vouchers and payments (including attorney fee payments, time book of jurors/juror payments, and witness payments); requisitions.	RETAIN UNTIL: End of the fiscal year PLUS: 6 years THEN: Destroy
13.302	Used checkbooks and canceled checks	RETAIN UNTIL: End of the fiscal year PLUS: 6 years THEN: Destroy
13.304	Personnel files	RETAIN UNTIL: Employment ends PLUS: 6 years THEN: Destroy
13.305	Job Applications (hired and not hired)	RETAIN UNTIL: Position is filled PLUS: 3 years THEN: Destroy

13.311	Statistical reports and general correspondence	RETAIN UNTIL: Records are of no further value, but not less than 1 year THEN: Destroy
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The approved disposal methods of records are transfer, shredding, and burning.

\* A probation file may include a copy of the probation order, an alcohol assessment, a report of substance abuse assessment, monthly report forms, relevant reports from substance abuse agencies, psychological or psychiatric reports, and notes relevant to the probationer’s standing and progress.

(Excerpt from [Records Retention and Disposal Schedule, General Schedule #13 – District Courts](#))

Where applicable, computer records are the work products of any district court probation department and are to be treated in the same manner as other applicable items or records on the retention schedule.

**C. SCAO-Approved Forms**

The state court administrator, under the Supreme Court’s supervision and direction, shall approve and publish forms as required by the Michigan Court Rules, and such other recommended forms as the administrator deems advisable. MCR 8.103(9).

## **8-04 Management Reports**

### **A. Authority and Responsibility**

While there is no specific authority that requires a probation department to collect, maintain, and analyze statistical data regarding the preparation of management reports, there is, at least, an implied responsibility for this function under duties and responsibilities of district court probation departments.

## 8-05 Criminal Records Reporting

### A. Authority

The Criminal Justice Information Center of the Michigan State Police is the state central repository for collecting and filing criminal history records. Local law enforcement agencies are required to take the fingerprints of any individual arrested for a felony or for a misdemeanor with a maximum penalty exceeding 92 days imprisonment or a fine of \$1,000.00 or more. MCL 28.243(1). Courts have an obligation to review these criminal filings at arraignment and before sentencing to ensure that the individual's fingerprints have been taken and to report the criminal disposition to the Criminal Justice Information Center. MCL 28.241-28.247, MCL 764.29, MCL 769.16a.

### B. SCAO-Approved Forms

The district court probation department will be involved in the criminal records reporting process to varying degrees as prescribed by the district court. Forms that a probation department will most likely complete are:

- 1) [Order of Probation \(MC 243\)](#).
- 2) [Motion and Order for Discharge from Probation \(MC 245m and MC 245o\)](#).

## **Chapter 9: References and Resources**

### **9-01 General**

The most important resource available to the probation officer is the ability to network or communicate with others who work in the criminal justice system or a related field. Networking is a vital part of any agency or organization; it is a tool for obtaining information outside of the more formal means of communication.

There are several ways to network effectively. The most common is through daily contacts with local agencies and other probation officers. These contacts can be expanded by attending various agency, association, or organization meetings and conferences. Although the probation officer is often too busy to become involved in many external functions, efforts should be made to contact one another as a resource. Collectively, probation officers possess a wealth of information that covers the range of this manual and beyond.

## 9-02 Legal References

### A. Michigan Court Rules

The Michigan Court Rules govern practice and procedure in all courts established by the constitution and laws of the State of Michigan. These rules are the “Michigan Rules of Court - State.” An individual rule may be referred to as Michigan Court Rule \_\_\_\_ (number), and cited by the acronym “MCR.” The rules are to be construed to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties.

The Michigan Court Rules are published by West Publishing Company, Darby, and the Institute of Continuing Legal Education. Annotated Court Rules, which analyze and apply the court rules to specific cases, are also published by West Publishing Company and are entitled “Michigan Court Rules Practice.”

The Michigan Court Rules are also available on the [One Court of Justice website](#).

### B. Michigan Statutes

#### 1. Michigan Compiled Laws and Michigan Compiled Laws Annotated

The Michigan Legislative Council, composed of Michigan legislators, as directed by the Michigan Constitution, caused to be compiled, without alteration, all laws of a general and permanent nature in force in Michigan and enacted through regular sessions of the Michigan Legislature.

The official Michigan Compiled Laws is published by the Legislative Service Bureau in Lansing, Michigan in the form of Public Acts and can be accessed on-line at <http://www.legislature.mi.gov/>.

The Michigan Compiled Laws Annotated is published by West Publishing Company. Publications are supplemented yearly and advance sheets are published throughout the year as laws are passed. Editorial features and research aids incorporated into Michigan Compiled Laws Annotated (MCL) include the following:

- a. Analysis of each chapter.
- b. History notes to each section of the MCL, reflecting all amendments to that section since its enactment and the effective dates of those amendments.
- c. Notes containing opinions of the Michigan Supreme Court and the United States Supreme Court regarding the constitutionality of acts or parts of acts.

- d. Notes designating those statutes which transfer powers and duties from one state agency to another.
- e. Notes indicating the origin and disposition of prior statutory provisions which carried the same compilation numbers, and accounting for similar provisions which being obsolete, superseded, or repealed by implication, no longer appear in the MCL.

## **C. Case Law**

The following references can be used to research case law.

### **1. Michigan Appeals Court Reports**

This report, published by Lawyers Cooperative Publishing, includes Michigan Court of Appeals cases and an alphabetical table of cases. Advance sheets are published periodically. Cases can be searched at the [One Court of Justice website](#).

### **2. Michigan Reports**

This report includes the cases heard by the Michigan Supreme Court. It is published by Lawyers Cooperative Publishing. Advance sheets are published periodically throughout the year. Cases are also searchable on the [One Court of Justice website](#).

### **3. Michigan Digest**

Available from Lawyers Cooperative Publishing as “Callaghan’s Michigan Digest” and West Publishing Company as “West’s Michigan Digest,” this compilation is supplemented annually and advance sheets are published periodically throughout the year.

### **4. Reports of Supreme Court Decisions**

This report includes cases heard by the United States Supreme Court and is published by West Publishing Company as the “Supreme Court Reporter” and Lawyers Cooperative Publishing as the “United States Supreme Court Reports, Lawyers Edition.” Advance sheets are published periodically throughout the year.

See also [Section 7-01, Michigan Court Administration Reference Guide](#).



## 9-03 State Agencies

### A. Department of Corrections, Policy Directives and Procedures

While the Policy Directives and Procedures of the Department of Corrections are aimed at parole officers, circuit court probation officers, and community residential programs, the district court probation department may find the information helpful in developing internal policies and procedures. On an individual level, the procedures themselves may provide direction or explanation to the probation officer in a variety of related areas. Copies of the policies and procedures can be requested from:

Department of Corrections  
Office of Policy and Hearings  
Policy and Rule Unit - Development Unit  
Grandview Plaza Building - Fourth Floor  
PO Box 30003  
Lansing, MI 48909  
(517) 373-3366  
<http://www.michigan.gov/corrections>

### B. Michigan Department of Health and Human Services, Crime Victims Services Commission

The Michigan Department of Health and Human Services, Crime Victims Services Commission maintains and awards funds as directed by the Crime Victim's Rights Act (formerly managed by the Office of Criminal Justice and the Office of Contract Management, Grants Management Division). This office is also involved in issuing restitution and coordinating compensation awards. The department can be contacted at:  
Michigan Department of Health and Human services

Crime Victim Services Commission  
Crime Victim Rights Assessments  
1033 South Washington  
Lansing, MI 48910  
(517) 334-9185  
<http://www.michigan.gov/mdch>

### C. Office of Highway Safety Planning (OHSP)

The National Highway Safety Act of 1966 charges each state with establishing a highway safety program. State programs are designed to reduce death, injury, and property damage caused by traffic crashes. In Michigan, the Office of Highway Safety Planning (OHSP) is responsible for these programs. The funding for the programs comes from the United States Department of Transportation through the National Highway Traffic Safety Administration, as well as the Federal Highway Administration. The funding to OHSP is distributed at the state

level in the form of grants for programs and activities that ensure the safe use of Michigan roads.

OHSP has provided grants for projects in alcohol counter measures (stopping drunk driving) and enhancing the enforcement of traffic safety laws statewide. Some of the programs provided by the Michigan Judicial Institute have been funded by the grants available through OHSP if they address issues relating to highway safety. OHSP has funded an intensive probation project in Michigan as an alcohol counter measure. Special projects have been funded to enhance the efficiency and effectiveness of the district court personnel in dealing with traffic cases. The office also produces public information materials to increase awareness of safety issues on Michigan roads. Another project area that benefits the district court and local law enforcement efforts is the testing of new technology and funding the installation of that technology in sites around the state.

A brochure detailing the services provided by OHSP is available by contacting:

Office of Highway Safety Planning

333 South Grand Avenue

PO Box 30634

Lansing, MI 48909

(517) 241-2500

[https://www.michigan.gov/msp/0,4643,7-123-72297\\_64773---,00.html](https://www.michigan.gov/msp/0,4643,7-123-72297_64773---,00.html)

#### **D. Michigan Department of Health and Human Services – Office of Recovery Oriented Systems of Care**

The Michigan Department of Health and Human Services – Office of Recovery Oriented Systems of Care is the state level substance abuse authority. This agency is responsible for administering state and federal funds allocated to it for substance abuse prevention and treatment. It employs a sub-state structure to accomplish this task, contracting with 16 local coordinating agencies for the delivery of services in their respective areas.

Michigan Department of Health and Human Services

Office of Recovery Oriented Systems of Care

320 S. Walnut

Lansing, MI 4891

(517) 335-0129

[https://www.michigan.gov/mdhhs/0,5885,7-339-71550\\_2941\\_4871---,00.html](https://www.michigan.gov/mdhhs/0,5885,7-339-71550_2941_4871---,00.html)

## **E. Michigan State Police - CJIS Field Services**

For information pertaining to background screening of probation officers using fingerprint identification for authorization to use LEIN or for information about sex offender registration, the probation officer may contact CJIS Field Services at:

Michigan State Police  
CJIS Field Services  
(517) 241-0667  
<http://www.michigan.gov/msp>

## 9-04 Supreme Court Assistance, Training, and Education

### A. State Court Administrative Office

The State Court Administrative Office (SCAO) is responsible for assisting in the administration of the Michigan trial courts under the general direction of the Supreme Court. The functions of the SCAO are outlined in Michigan Court Rule 8.103. Those functions directly related to assistance, training, and education for trial courts are:

1. Providing management assistance and direction to the courts on the administration of the court through distribution of relevant information, advice and direction on specific issues, and on-site management reviews.
2. Developing and analyzing statewide information regarding the work of the courts.
3. Conducting research on court management issues.
4. Acting as liaison between courts, media, the executive and legislative branches of government, and state agencies.
5. Developing guidelines for operations and certain decision-making functions, such as child-support guidelines and sentencing guidelines.
6. Developing and maintaining automated trial court information systems.
7. Operating court improvement programs and other special state level court-related programs.
8. Analyzing administrative impact of court rules, legislation, and other administrative policy on court operations.
9. In conjunction with the Michigan Judicial Institute, providing training on court administration to judges and court support staff.
10. Developing forms and operations/reference manuals for court use.
11. Administering the certification of court reporters and recorders.
12. Managing the Foster Care Review Boards.
13. Managing the Friend of the Court Bureau.

For details, see [Section 2, Michigan Court Administration Reference Guide](#).

The SCAO has a central office and six regional offices located throughout Michigan. The regional offices work directly with the courts in their region on a variety of local issues.

SCAO offices are located at:

Region 1  
PO Box 02984  
Detroit, MI 48202  
(313) 972-3300

Region 2  
PO Box 30048  
Lansing, MI 48909  
(517) 373-9353

Region 3  
PO Box 750  
Mt. Pleasant, MI 48804  
(989) 772-5934

Region 4  
PO Box 100  
Gaylord, MI 49734  
(989) 732-3311

Region 5  
PO Box 30048  
Lansing, MI 48909  
(517) 373-8679

Region 6  
PO Box 02984  
Detroit, MI 48202  
(313) 972-3300

State Court Administrative Office  
Hall of Justice  
PO Box 30048  
Lansing, MI 48909  
(517) 373-4835  
[CourtServices@courts.mi.gov](mailto:CourtServices@courts.mi.gov)

## **B. Michigan Judicial Institute**

The Michigan Judicial Institute (MJJI) was created by the Michigan Supreme Court in 1977 to provide judges and court personnel with an opportunity to develop and enhance their professional skills. MJJI develops and conducts a wide range of continuing education and training programs in the following areas: judicial education, court administrative personnel development, court professional personnel development, and Michigan court support staff training. MJJI produces various publications to keep judges informed of the latest developments in Michigan law and procedure. MJJI also maintains an audio visual lending library which supplements its seminars. For further information contact:

Michigan Judicial Institute  
Hall of Justice  
PO Box 30205  
Lansing, MI 48909  
(517) 373-7171  
[mjieducation.mi.gov](http://mjieducation.mi.gov)

## 9-05 Associations

### A. State Bar of Michigan

The State Bar of Michigan publishes an annual *Michigan Bar Journal*, which is a directory of State Bar functions, Michigan courts, federal courts and agencies, Michigan government, and members of the State Bar (including attorney addresses). Subscriptions to the monthly *Bar Journal* are also available. This monthly publication features: (1) analyses of legal issues, statutes, and court rules, (2) federal and Michigan case opinions, and (3) notices and articles on a variety of topics. Requests for information can be made to:

State Bar of Michigan  
306 Townsend Street  
Lansing, MI 48933-2012  
(517) 346-6300 FAX (517) 482-6248  
<http://www.michbar.org/>

### B. American Bar Association

The American Bar Association (ABA) produces publications similar to those of the State Bar of Michigan. An *ABA Directory of Publications* is available at a minimal cost by contacting:

American Bar Association  
321 North Clark Street  
Chicago, IL 60610  
(312) 988-5000 FAX (312) 988-6281, -6282, or -6283  
<http://www.americanbar.org>

### C. Michigan Association of District Court Probation Officers

The Michigan Association of District Court Probation Officers (MADCPO) is an organization founded in 1970 which provides its membership a directory of Michigan district court probation departments, quarterly newsletters, and an annual conference. For more details, see [“1-05 Michigan Association of District Court Probation Officers”](#).

### D. Michigan Corrections Association

The Michigan Corrections Association (MCA) is an organization aimed at promoting professionalism in the field of corrections. The primary purposes of the association are:

1. promoting interchange of ideas and experience at all levels concerning functions and methods in the field of probation, parole, and correctional institutions,

2. preventing and correcting delinquency and crime throughout Michigan,
3. providing adequate information to the public,
4. fostering sound legislation, and
5. promoting adequate services and facilities in the correctional field.

The MCA holds one to three mini-conferences each year and one annual conference in October of each year. The MCA is a dual-membership with the American Correctional Association.

Further membership information may be obtained from an MCA member or other professionals in the corrections field. Requests for information should be made to the American Correctional Association (see below).

The association's website is at <http://micorrections.org/>.

#### **E. American Correctional Association**

The American Correctional Association (ACA) is a national, multidisciplinary organization consisting of correctional professionals and individuals, agencies, and organizations involved in the entire spectrum of correctional activities. ACA offers a variety of services for correction professionals such as standards and accreditation, technical assistance, publications, and training. Further information is available at:

American Correctional Association  
206 N. Washington Street  
Alexandria, VA 22314  
(703) 224-0000  
<http://www.aca.org>

For membership information, address your request to the attention of "Membership." Calls can be made to (800) ACA-JOIN.