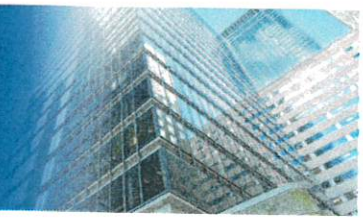

October 31, 2022

Larry S. Royster
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Via Upload to
Online Comment Portal Only

Re: Comments in Opposition to ADM File Number 2020-08 – Proposed Amendments of Administrative Order 2020-17 and Rule 4.201 of the Michigan Court Rules

Dear Clerk Royster:

Due to our Firm's extensive experience as a landlord-tenant practitioner with over a combined 150 years in practice in over 70 District/Trial Courts in the State of Michigan, this letter details our opposition to the adoption of ADM File Number 2020-08, which proposes various amendments of Administrative Order 2020-17 and Rule 4.201 of the Michigan Court Rules.

Brief Summary

Fundamental principles of separation of powers dictate that the purported amendments to Michigan Court Rules are an inappropriate forum to, in essence, make new legislation, which should be reserved to the Michigan Legislature to make changes to the Michigan Summary Proceedings Act. Accordingly, ADM File Number 2020-08 should be rejected, and Administrative Order 2020-17 should be repealed in its entirety.

Analysis and Comments

Per the Michigan Supreme Court's webpage:

> The Michigan Rules of Court are the rules adopted by the Michigan Supreme Court (MSC) to govern Michigan's legal system and the judges, lawyers, and other professionals who are charged with preserving the integrity of that system. The purpose of the court rules is to establish uniform rules and procedures for all levels of Michigan's court system so that cases are resolved without undue delay and those who appear in court receive due process and equal treatment under the law.

Yet, ADM File No. 2020-08 fails to fulfill the basic requirements of the above quoted paragraph because it:

- Fails to preserve the integrity of Michigan's legal system by the judges, lawyers, and other professionals charged to do so.
- Includes flaws, internal inconsistencies, and substantively conflicts with both existing Michigan Court Rules and Michigan's Summary Proceedings Act.
- Creates unnecessary delays and impedes the ability of Michigan District/Trial Courts to resolve cases without undue delay.
- Hinders the due process rights of real property owners that lease their property to others.
- Contains numerous requirements, which disproportionately favor tenants, and once implemented will not provide equal treatment under the law.

Now, let's address each of the proposed revisions to Rule 4.201 with recognition that MCL §600.5708, states that the procedure in summary proceedings/landlord-tenant cases "shall be regulated by rules adopted by the Supreme Court and by local court rules not inconsistent therewith." While court rules may be promulgated by the Michigan Supreme Court, no procedural rule is to be inconsistent with the express substantive statutory provisions of the Summary Proceedings to Recover Possession Act in accordance with the bedrock separation of powers doctrine of the Michigan Constitution, which expressly states "[n]o person exercising powers of one branch shall exercise powers belonging to another branch except as expressly provided in the constitution." Mich. Const. 1963, art. 3, §2.

Proposed Revision to Rule 4.201(B)(3)(c)

Proposed revision to Rule 4.201(B)(3)(c) would require a complaint involving a tenancy of residential premises to contain an allegation that the lessor or licensor is "in compliance with applicate state and local health and safety laws." At first glance, such language is overly broad as it is not specific to the municipality where the premises are located. It could impose an obligation on a property owner to make an allegation about a state or local health and safety law that does not even apply in the jurisdiction where the rental premises are located. Second, this proposed language is redundant and unnecessary based on the express statutory covenants imposed by MCL Section 554.139(b). Finally, the proposal conflicts with MCL 125.530(5), which allows a property owner to maintain a possessory action for nonpayment of rent even if there is a dispute regarding habitability. The proposed language to revise Rule 4.201(B)(3)(c) should be rejected.

Proposed Insertion of New Sub-Paragraph (f) in Rule 4.201(C)

Proposed new subparagraph (f) in Rule 4.201(C) would mandate that "[p]ursuant to SCAO guidelines, written information attached to the summons regarding the availability of rental and other housing assistance provided by legal aid or local funding agencies."

Yet, the proposed language fails to specify the party or entity required to comply with this mandate. Is it the trial court or some other entity? It is unrealistic and inappropriate to require a property owner or its attorney, especially due to the potential conflict of interest that arises for a property owner's attorney, to provide such information. In addition, due to such information being different depending on the jurisdiction the rental premises are in and the constant changes that could occur to any available rental and other housing assistance provided by legal aid or local funding agencies, this mandate would impose a time-consuming administrative burden along with additional delay for such written information to be attached to a summons. This proposed new subparagraph (f) in Rule 4.201(C) should be rejected.

Proposed Revision to Jury Demand Request by a Defendant in Rule 4.201(G)(4)

The proposed revision to a defendant's ability to request a jury trial in a summary proceeding would allow a defendant to make this demand "at least two days before the adjourned trial is scheduled to begin or at the defendant's first appearance, whichever is later. If the trial is adjourned under subrule (K) and no jury demand has been made, the defendant must demand it at least two days before the rescheduled date."

This two-day time frame for a defendant to demand a jury trial is unrealistic, impracticable, and contrary to the current Michigan Court Rules requirement that a summary proceeding action must be completed within 56 days. This will result in a lengthy delay to secure the jurors to sit on the jury and an increase in delinquent rent along with the incurrence of unnecessary legal fees.

In addition, per current MCR 4.201(C)(3)(d), a summons is to include an explanation about a defendant's right to demand a jury trial and the consequences associated with not demanding a jury trial. As such, the proposed language in Rule 4.201(G)(4) seems to conflict with MCR 4.201(C)(3)(d), which is unchanged by these proposed amendments.

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Next, under the proposed amendments, a defendant could initially appear without raising a dispute or a defense, utilize all of the delay procedures set forth in the proposed amendments, only to be ultimately denied assistance or find that the approved assistance is insufficient after so many months in arrears, and then at the 11th hour demand a jury trial simply to delay proceedings further and avoid a final resolution of the case.

What kind of remedy exists for a Plaintiff under these circumstances or, when and if a defendant/tenant or its legal counsel simply demand a jury trial with knowledge that there is no triable issue, as is typical in most nonpayment of rent cases, simply to penalize a plaintiff/property owner for commencing a case against the defendant and to cause delay to force a plaintiff/property owner to make unreasonable concessions to a defendant?

Proposed Amendments to MCR 4.201(G)(5)(a)

Under the current Michigan Court Rules, MCR 4.201(D)(3) deemed service by attachment an appropriate method of service when personal service could not be obtained. Requiring personal service for a property owner to receive a default judgment at "the date and time noticed on the summons" will not only result in an increased demand for court officers to serve personally but may result in defendants evading service to intentionally elongate the process. It is not unreasonable to expect defendants to appear on "the date and time noticed in the summons", but it is unreasonable to property owners for courts to continuously excuse a defendant's failure to meaningfully participate in Summary Proceedings. Moreover, once a default judgment enters, a defendant can file a motion to set it aside if they have good cause for their failure to appear (and a meritorious defense to the underlying action). This more than adequately protects a defendant/tenant while simultaneously preserving the authority and dignity of a court.

In addition to the above-stated flaws, the proposed default protocol fails to recognize or address current circumstances where several district courts have magistrates conduct a "pre-trial hearing" or utilize the services of a third-party mediation service or resolution services to conduct a "pre-trial hearing." In such situations, the requirements to obtain entry of a default and default judgment under proposed MCR 4.201(G)(5)(a)(ii) and (iii) will be impossible to satisfy because the entity at the hearing may and will not have the authority/power to enter the default and hear the plaintiff's proofs to allow entry of a default judgment.

Finally, the language "for trial" is missing in proposed MCR 4.201(G)(5)(a) although such language appears in proposed MCR 4.201(K)(2)(a) and the hanging/penultimate paragraph of MCR 4.201(K)(2).

The proposed amendment MCR 4.201(G)(5)(a) should be rejected.

Proposed Amendment to MCR 4.201(G)(5)(d)

Per the proposed language in MCR 4.201(G)(5)(d), if a court declines to enter a default at the initial date and time set for trial noticed by the summons, the court is to adjourn the trial for at least 7 days and "the court must mail notice of the new date to the party who failed to appear." This express language fails to satisfy and provide due process to all parties involved in the case.

Besides this deficiency, the proposed language shows a misunderstanding and lack of awareness about how some district courts notify all parties to a case of an adjourned hearing date and time. Some district courts do not provide the adjourned hearing date and time on the record to an appearing party at what is now known as a pre-trial hearing or initial hearing. These courts merely adjourn the case with a date and time to be determined by the court. Some courts then mail a notice to appear with the adjourned hearing date and time to all parties. Other courts email notices to appear to all parties if they have their email addresses. If a court is not required to notify all parties of an adjourned hearing date and time by mail or email, as proposed, then how is an appearing party supposed to find out about the new date/time? Contacting a court by telephone

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to do so is disruptive and an inefficient use of all stakeholders' time as is randomly conducting an online case search because such online information is not always up to date. Finally, doesn't the proposed language reward a party for failing to appear for a court hearing they were already notified to appear at?

The proposed amendment MCR 4.201(G)(5)(d) should be rejected.

Proposed MCR 4.201(G)(5) and MCR 4.201(K)(1) & (2)

The hearing protocol proposed to be established under MCR 4.201(G)(5) and MCR 4.201(K)(1) and (2) could require a court to hold possibly three hearings, but at a minimum two hearings, in every case before a final disposition may be obtained by a plaintiff/property owner. The proposed language is unclear, which will be subject to multiple interpretations, cause delay and lead to inconsistencies and widely divergent hearing protocol in the district/trial courts.

A fundamental flaw, however, with these proposed court rules and the multiple hearing protocol is that both are contrary to express substantive law. Specifically, MCL §600.5735 states that a court "shall issue a summons" and "shall command the defendant to appear for trial":

- "[w]ithin 10 days of the issuance date of the summons" [in nonpayment of rent cases]; and
- "a summary proceeding shall be heard within 7 days after the defendant's appearance or trial date and shall not be adjourned beyond that time other than by stipulation of the parties either in writing or on the record."

MCL §600.5735(2)(b) and (6).

Again, while the Michigan Supreme Court may establish court rules for the procedure of summary proceedings, it still must do so with deference to statutory substantive language. The current proposed rules lack such deference. Also, based on MCL §600.5732 the powers of a court with jurisdiction over summary proceedings are only permitted with the authority to engage in certain express actions as well as a catch all provision of to "do all other things necessary to hear and determine summary proceedings." A multiple hearing protocol is contrary to doing what is necessary "to hear and determine" a case.

In addition, the proposed multiple hearing protocol is counter to the policy purpose, spirit, and express language of the statutes within the chapter of the Summary Proceedings to Recover Possession of Premises. The Michigan Legislature made a policy decision for prompt determination in Summary Proceedings to allow a property owner to be restored to possession of its property and to minimize any sums or financial harm to a defendant/tenant.

Proposed New Sub-Paragraph (K)(2)(c)(iv) – Entry of Consent Judgment or Conditional Dismissal

The proposed amendments state that a consent judgment or conditional dismissal can enter only upon judicial review and after "an adequate inquiry determines the terms fair". Neither the phrase "adequate inquiry" nor the word "fair" are defined terms. Lack of definition or factors to be determined by the court will lead to arbitrary rulings. This "adequate inquiry" into "fairness" is wholly unnecessary because MCL §600.5744(5) already dictates the timeframe determined to be fair by the legislature for redemption/surrender of possession (i.e., ten days). Anything agreed to between the parties elongating that timeframe is therefore inherently fair.

Proposed New Sub-Paragraph (3) in Rule 4.201(I) – Stay of Proceedings for up to 30 days

A new sub-paragraph (3) to the Interim Orders protocol under Rule 4.201(I) contains numerous flaws including:

- Invades the authority of the Michigan Legislature by its attempt to modify Michigan's Summary Proceedings Act, which is devoid of any express terms to authorize the issuance of a stay.

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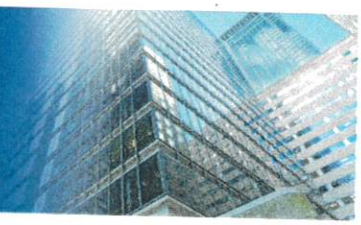

- Substantively conflicts with MCL 600.5732 by purporting to allow a court to exercise power it does not possess.
- Internally inconsistent with the opening paragraph of Rule 4.201(I), which establishes the procedure for interim orders to be requested by motion of a plaintiff or defendant, or by agreement of the parties based on good cause and then gives a court the power to issue an interim order. Rule 4.201 does not give a court authority to *sua sponte* enter its own interim order to stay further proceedings in a case.
- Impermissibly allows a defendant to engage in *ex parte* communication with the Court about their application to receive rental assistance from a designated funding source or rental assistance agency.
- Fails to require the defendant to notify or serve the Plaintiff about a pending rental application.
- Violates a plaintiff/property owner's due process rights by failing to hold a hearing prior to imposition of a stay. Such a hearing would allow a plaintiff to seek more information about the validity of a tenant's rental application.
- Unnecessarily provides five additional days for a defendant to act to apply to receive rental assistance after having already been informed of the availability of rental assistance agencies through receipt of the summons.
- Creates an unrealistic and unmanageable administrative burden on the courts as well as plaintiffs to be informed less than 48 hours prior to a rescheduled hearing date about the stay. There is nothing in the proposed language to explain how notice of the stay is to be provided by the courts to a plaintiff.

This proposed new subparagraph (3) in Rule 4.201(I) should be rejected.

Conclusion

Adoption of these proposed amendments would constitute an abrogation of private property rights and an unacceptable infringement on parties right to contract. Further, they would be an undue burden on the district/trial courts and should therefore be vehemently opposed.

We would hope that the enormous volume of commentary in opposition is a loud beacon that should be heard and not ignored. These amendments are replete with inconsistencies and raise constitutional concerns that should and could be avoided. Separation of powers needs to be recognized and it should be known that the making and changing of laws is within the exclusive purview of the legislative branch.

Respectfully submitted,

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