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Corbin Davis
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

**Re: ADM File No. 2012-03 - Proposed Adoption of Rule 1.111 and Rule 8.127 of
the Michigan Court Rules**

Dear Clerk Davis:

I am a clinical faculty member of the University of Michigan Law School and director of the University of Michigan Law School Pediatric Advocacy Initiative (PAI), one of the school's clinical programs. The PAI provides civil legal services to low-income patients referred by several health clinics in Washtenaw County. Through the clinical course, law students participate in all of the services offered by the program, including direct representation of clients, advice and counsel to healthcare providers regarding patient legal issues, and formal training for healthcare providers on specific legal advocacy topics relevant to their patients. Prior to joining the Law School faculty over 14 years ago, I was a bilingual (Spanish/English) attorney for a nonprofit legal aid organization serving the immigrant and refugee community of Washington, D.C., where all of my clients were Limited English Proficient (LEP) individuals. Since joining the Law School, I have continued to serve LEP clients in my clinical work and have used my role to teach law students the skills and challenges of working with LEP clients and the interpreters that are essential to providing these individuals with access to justice. As a result, the PAI serves many LEP clients in a variety of judicial settings.

The PAI has long advocated with our local court system to recognize its obligations pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. and Michigan's Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq., to provide consistent and qualified interpreters for our clients in their civil legal matters. Unfortunately, such efforts have not been successful and the appointment of interpreters remains an arbitrary process. For example, we have been told to make our clients bring family members, friends, or to hire their own

interpreters. The need for privacy and (in many cases) personal safety make it inappropriate to require family or friends to interpret for these litigants and they have no financial means to hire their own interpreters. As a result, the clinic has had to provide interpreters for our clients, which provides no solution for the myriad other low-income, LEP litigants that appear before the courts without our representation.

For these reasons, we applaud the Court's proposal of MCR 1.111 and Rule 8.127 as possible remedies to the current situation, which denies LEP litigants true access to justice in the courts of Michigan. We submit the comments below to highlight several areas where the proposed rules do not comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. and Michigan's Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq., and suggest alternatives that would bring the proposed rule into compliance with federal and state requirements. The proposed changes are necessary to ensure that LEP persons receive the same access to justice that non-LEP persons receive.

The following comments are informed by the American Bar Association's Standards for Language Access in Courts (2012), the Model Guides for Court Interpretation developed by the National Center for State Courts, and the comparable court rules of several other states including Rhode Island, New York, Maine, Nebraska, Kansas, and Minnesota.

Rule 1.111 Foreign Language Interpreters

MCR 1.111(B): Appointment of a Foreign Language Interpreter

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance.¹ Michigan, too, prohibits discrimination based on national origin through its Elliott-Larsen Civil Rights Act.² The prohibition against discrimination on the basis of national origin has been interpreted to include the requirement to provide meaningful language access for LEP individuals.³ In order for LEP individuals to have meaningful language access to the court system in Michigan, the courts must provide interpreters free of charge to enable LEP individuals to understand and participate in the proceedings. Requiring LEP individuals to pay the costs of interpreters would have a chilling effect on their willingness to bring disputes to court, which constitutes illegal national origin discrimination.⁴

¹ 42 U.S.C. §2000d

² MCL 37.2101 et. seq.

³ See, e.g., *Lau v. Nishols*, 414 U.S. 563 (1974); 45 C.F.R. §80.1, et. seq.

⁴ Thomas Perez, Department of Justice Civil Rights Division, Letter to State Court Administrators and Chief Justices, [hereinafter "Letter to State Court Administrators"] (August 16, 2010); Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455, 41462 (2002).

Thus in order to comply with its Title VI and Elliott-Larsen requirements, the Court should adopt both “Alternative B” options in the proposed MCR 1.111. Moreover, the options should be tie-barred to avoid the unacceptable result of mandating that LEP individuals be given an interpreter and then burdening the LEP persons with fees for such services, which they often cannot afford.

Neither Alternative A nor Alternative C in either context of MCR 1.111 complies with Michigan’s obligations under Title VI and the Elliott Larsen Act. Alternative A for MCR 1.111(B) unacceptably limits interpreter services to court proceedings; authorities have stressed the need to also provide interpreter services in court-managed offices, operations, and programs such as information counters; intake or filing offices; cashiers; records rooms; sheriffs’ offices; probation and parole offices; alternative dispute resolution programs; *pro se* clinics; criminal diversion programs; anger management classes; detention facilities; and other similar offices, operations, and programs.⁵ Alternative C would provide interpreter services only where the party is indigent. The Department of Justice has determined such practice to be noncompliant with Title VI.⁶

Beyond adopting both “Alternative B” options, in order to ensure that the court rule has its intended effect, the rules should include provisions regarding i) notice of the right to an interpreter, ii) determination of LEP status, iii) appeals procedures, iv) notification of the interpreter’s qualifications, and v) translation of written documents. To that end, we recommend the following additions to MCR 1.111(B):

- A requirement that courts and their employees give LEP persons notice that an interpreter is available.⁷ Courts should give such notice by:
 - posting notice on the court’s website;⁸
 - posting signs in clerks’ offices, courtrooms, and all other public areas;⁹
 - training clerks and staff to identify when someone needs an interpreter, and have them inform litigants of their right to an interpreter;¹⁰ and
 - placing language on court documents and forms informing litigants of the right to an interpreter.¹¹

Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455, 41462 (2002).

⁵ Thomas Perez, Letter to State Court Administrators, *supra* note 4, at 3 (August 16, 2010). See also American Bar Association, Standing Committee on Legal Aid and Indigent Defendants, National Association of Women Judges, Report to the House of Delegates [hereinafter “ABA Report”], 37, 50 (2012).

⁶ *Id.* at 2.

⁷ ABA Report, *supra* note 5, at 22 (2012); see also R.I. S.Ct., Language Services in Courts, Executive Order No. 2012-05, (C)(2).

⁸ ABA Report, *supra* note 5, at 24 (2012).

⁹ The ABA suggests multilingual posters or language identification flashcards. ABA Report, *supra* note 5, at 23 (2012).

¹⁰ ABA Report, *supra* note 5, at 101-109 (2012).

- A protocol or guidelines for determining eligibility for an interpreter, specifically for determining whether a party is able to “understand and meaningfully participate in the case or court proceeding.”¹² It is important that the protocol/guidelines include a presumption that anyone who asks for an interpreter qualifies for an interpreter.¹³
- A requirement that courts notify parties of their right to appeal decisions involving interpreters.¹⁴ Suggested language: “If a party requests an interpreter and the court denies the request, the denial must be on the record¹⁵ and the court must inform the party, in his/her native language, of the ability to appeal the denial immediately.¹⁶ For this purpose the court shall make available information sheets in languages commonly spoken in the jurisdiction explaining the appeals process.”
- A requirement that the court inform the LEP person of an interpreter’s qualifications, or lack thereof.¹⁷ This information is important so that the LEP person can decide if he/she should object to or appeal the appointment. Suggested language: “After appointing an interpreter, the court shall inform the LEP person

¹¹ ABA Report, *supra* note 5, at 24. See also R.I. S.Ct. Language Services in Courts, Executive Order No. 2012-05 (C)(2)(a)(1), (C)(2)(a)(2); National Center for State Courts, 10 Key Components to a Successful Language Access Program in the Courts [hereinafter “NCSC’s 10 Key Components”], Definitions, Language Access Program, available at http://www.ncsconline.org/d_research/CourtInterp/10KeystoSuccessfulLangAccessProgFINAL.pdf.

¹² The National Center for State Courts provides a suggestion for such a protocol. National Center for State Courts, Court Interpretation: Model Guides for Policy and Practice in State Courts, 126 (2002). See also Cal. Std. of Jud. Admin. 2.10; S. Ct. Ga., Order: Use of Interpreters for Non-English Speaking Persons, App. A (Jan. 13, 2003), available at <http://www.georgiacourts.org/agencies/Interpreters/interpreterrule.pdf>.

¹³ The National Center for State Courts recommends such a presumption, as does the ABA. National Center for State Courts, Court Interpretation: Model Guides for Policy and Practice in State Courts, 126 (2002); ABA Report, *supra* note 5, at 32. In addition, Georgia has such a presumption. Ga. S. Ct., Use of Interpreters for Non-English Speaking Persons, App. A, §(I)(B).

¹⁴ The ABA Standing Committee on Legal Aid and Indigent Defendants recommends that notice of the right to an interpreter should be accompanied by information on how to file a complaint about an inadequate interpreter or denial of services. ABA Report, *supra* note 5, at 23 (2012). In addition, the Rhode Island Executive Order on language services in courts makes clear that aggrieved persons may seek to enforce the order in an appeal. R.I. S.Ct., Language Services in Courts, Executive Order No. 2012-05, (I)(4)(a).

¹⁵ California follows the practice of the court putting its conclusions on the record. Cal. Std. of Jud. Admin. 2.10(d). Georgia does as well. Ga. S. Ct., Use of Interpreters for Non-English Speaking Persons, App. A, §(I)(D). Putting the decision on the record would seem to suggest an ability to appeal.

¹⁶ Laura Abel, Brennan Center for Justice, *Language Access in State Courts*, 13 (2009). Abel explains that interlocutory appeals are necessary because the denial of an interpreter may cause a litigant irreparable harm, much as the denial of counsel might. *Id.* at 13, FN 61.

¹⁷ Iowa and Minnesota post warnings on their court websites and interpreter rosters explaining the meaning of the term “non-certified.” However, the usefulness of these explanations is limited since they are in English only.

of the interpreter’s qualifications or lack thereof, and other pertinent information such as the interpreter’s relevant experience or background.”

- A procedure for appealing a) the decision to deny an interpreter or b) the appointment of a particular interpreter on competence or ethics grounds.¹⁸
- A requirement that the court must provide translation for vital written materials in a timely manner upon request.¹⁹

MCR 1.111 (D) Recordings

We find the phrase “during those portions of the proceedings” to be ambiguous and unnecessary, and therefore recommend striking those words.

MCR 1.111 (E) Avoidance of Potential Conflicts of Interest

Conflicts of interest are as serious for interpreters as they are for judges and attorneys, and perhaps even more so since interpreters can skew the information that all other parties receive. As such, courts should have as strong a duty to avoid conflicts of interest with interpreters as they do with judges and attorneys; courts should not merely have a duty to “use reasonable efforts” in this area. Therefore we recommend rephrasing MCR 1.111(E) as follows: “The court shall avoid potential conflicts of interest when appointing a person as a foreign language interpreter. Situations where there is a potential conflict of interest include, but are not limited to, the following:”

MCR 1.111(F)(3)

Authorities agree that telephonic interpretation services carry additional risks and difficulties above those inherent in the translation process. The Department of Justice explains that nuances and non-verbal communication often assist interpreters but cannot be recognized over the phone.²⁰ Thus, this issue should receive more attention than the few words towards the

¹⁸ Kentucky allows for removal of an interpreter upon request. KRS § 30A.410(2) (2012). Oregon has a similar rule and also allows a judge to remove and replace an interpreter for any reason. ORS § 45.275(5) (2011). See also ABA Report, supra note 5, at 23 (2012).

¹⁹ Assistant U.S. Attorney General Thomas Perez found North Carolina in violation of federal law in part because of its failure to do this. Thomas Perez, Letter to North Carolina Administrative Office of the Courts, Report of Findings, 2 (March 8, 2012). See also NCSC's 10 Key Components, supra note 11, at Definitions, Language Access Program; ABA Report, supra note 5, at 67 (2012).

²⁰ 67 FR 41455, 41462.

end of MCR 1.111(F)(3).²¹ We recommend striking the mention of remote technology from that section and adding a separate section that reads as follows:

- (4) The court shall use telephonic interpretation or other remote technology only:
- (a) for short proceedings or meetings, or instances in which a local interpreter is unavailable;
 - (b) with proper equipment; and
 - (c) after interpreter and court personnel are trained on telephonic interpretation protocols.²²

MCR 1.111(F)(4)

As explained above, the Department of Justice has made it clear that charging litigants for interpreter services is inappropriate and that, in order to comply with Title VI, the Court must pay for interpreters.²³ Requiring LEP individuals to pay the costly fees of interpreters would have a chilling effect on their willingness to bring disputes to court, which constitutes illegal national origin discrimination.²⁴ Therefore, Alternative B is the only Title VI-compliant option for MCR 1.111(F)(4).

MCR 1.111(G)

We agree with the Michigan Coalition for Immigrant and Refugee Rights as well as the Board of Commissioners of the State Bar of Michigan that the words “so help you God” should be stricken from MCR 1.111(G). We agree that this phrase could create cultural conflicts and would not significantly increase the likelihood that interpreters will carry out their duties ethically.

²¹ Rhode Island’s executive order on language services in courts has a section with six subsections elaborating on the situations in which remote technology may be used. R.I. S. Ct. Language Services in Courts, Executive Order No. 2012-05(C)(6).

²² Laura Abel, Brennan Center for Justice, *Language Access in State Courts*, App. C, 58 (2009).

²³ Thomas Perez, Letter to State Court Administrators, *supra* note 4, at 2 (Aug. 16, 2010); Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455, 41462 (2002). See also Merrily A. Friedlander, Chief, Dep’t of Justice Civil Rights Div’n Coordination & Review Section, Letter to Lilia G. Judson, Executive Director, Ind. Sup. Ct. Div’n of State Ct. Admin., 2 (Feb. 4, 2009), available at http://www.lep.gov/whats_new/IndianaCourtsLetterfromMAF2009.pdf.

²⁴ Thomas Perez, Letter to State Court Administrators, *supra* note 4, at 2 (Aug. 16, 2010); 67 Fed. Reg. 41455, 41462 (2002).

Additional Section

We recommend the addition of a final section for MCR 1.111 that reads as follows: “Nothing herein shall be construed to prevent a party from procuring the assistance of an interpreter in addition to one appointed by the judicial officer to assist that party or to monitor the performance of the appointed interpreter.”²⁵

Rule 8.127 Foreign Language Board of Review and Regulation of Foreign Language Interpreters

Rule 8.127(B)

In order to strengthen the Board and ensure that its expert members have a real role in shaping Michigan’s court interpreter policy, we recommend *requiring*, rather than permitting, the state court administrator to adopt some version of the Board’s proposed Code of Professional Responsibility for Court Interpreters and Interpreter Certification Requirements. For this reason we urge changing the word “may” in Rule 8.127(B)(1) and 8.127(B)(3) to “shall.”

Furthermore, we agree with the Michigan Coalition for Immigrant and Refugee Rights and the Board of Commissioners of the State Bar of Michigan that the Foreign Language Board of Review should have a larger role than the one contemplated by the proposed rules. Accordingly, we recommend the following additions:

- A duty to coordinate communications.²⁶ Suggested language: “The board shall have the responsibility to communicate on an ongoing basis with the state court administrator, the Court, and the profession on language access issues, including but not limited to making recommendations regarding best practices and making recommendations regarding the coordination of services.”
- A duty to help maintain an adequate pool of competent interpreters. Suggested language: “The board shall have the responsibility to assist the state court administrator and the courts in maintaining records on the need and demand for interpreters,²⁷ in using census data to estimate the need for interpreter services, and in attracting and retaining the necessary number of competent interpreters.”²⁸
- A duty to assist with the training of relevant parties.²⁹ Suggested language: “The board shall have the responsibility to assist the state court administrator and the Court

²⁵ R.I. S. Ct., Language Services in the Courts, Executive Order No. 2012-05(C)(9).

²⁶ NCSC’s 10 Key Components, *supra* note 11, at component 8; ABA Report, *supra* note 5, at 112 (2012).

²⁷ ABA Report, *supra* note 5, at 28 (2012).

²⁸ The National Center for State Courts suggests encouraging the development and maintenance of formal programs at institutions of higher education and collaboration with professional associations. *Id.* at component 10, 7.

²⁹ See, e.g., NCSC’s 10 Key Components, *supra* note 11, at component 9; R.I. S.Ct., Language Services in the Courts, Executive Order No. 2012-05(G)(2). See also ABA Report, *supra* note 5, at 101, 121 (2012).

with the training and continuing education of interpreters and court personnel, as well as other resource development issues. The board shall also propose a plan and a mechanism for training judges on issues related to the court interpreter system,³⁰ i.e., how to effectively handle interpreters in the courtroom and how to determine whether a party is an LEP.”

- A duty to monitor courts’ efforts to properly implement this plan and to provide interpreter services quickly³¹ and efficiently, coupled with a duty to report any noncompliance to the state court administrator for appropriate action.³²
- Appropriate deadlines for establishing the board, recommending a professional code of responsibility, and setting certification requirements.³³

Rule 8.127(D)(9)

The integrity of this system is crucial to ensure equal access to justice among LEP individuals. Therefore, the system for handling complaints must be easy to navigate and individuals must be aware that they will face no retaliatory action for making a complaint. We therefore recommend elaborating on 8.127(D)(9) as follows: “The State Court Administrative Office shall make complaint forms readily available in court houses, court offices, and on the website and shall also provide complaint forms translated into Spanish and such other languages for which a significant demand exists. Complaint forms shall include a notice that no court personnel may retaliate against any person filing a complaint or assisting in the investigation or resolution of a complaint.”³⁴

Thank you for your attention to this important issue regarding access to justice for all members of our community.

Sincerely,



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³⁰ NCSC's 10 Key Components, supra note 11, at component 9.

³¹ ABA Report, supra note 5, at 27 (2012).

³² See, e.g., NCSC's 10 Key Components, supra note 11, at component 7; R.I. S.Ct. Language Services in the Court, Executive Order No. 2012-05 (H); ABA Report, supra note 5 at 115 (2012)..

³³ See, e.g., NCSC's 10 Key Components, supra note 11, at (G)-(H).

³⁴ See, e.g., id. at (I).