

CRIMINAL ISSUES INITIATIVE

Respectfully submits the following position on:

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ADM File No. 2014-15

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The Criminal Issues Initiative is comprised of members appointed by the President of the State Bar of Michigan.

The position expressed is that of the Criminal Issues Initiative only and is not an official position of the State Bar of Michigan, nor does it necessarily reflect the views of all members of the State Bar of Michigan.

The State Bar position on this matter is to take no position but authorize the Criminal Jurisprudence & Practice Committee and Criminal Issues Initiative to submit their comments to the Court.

The total membership of the Criminal Issues Initiative is 8.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 8. The number who voted in favor to this position was 5. The number who voted opposed to this position was 0.

CRIMINAL ISSUES INITIATIVE

CHAIR

Valerie R. Newman
State Appellate Defender Office
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MEMBERS

Erika R. Breitfeld, Auburn Hills
Heather J. Garretson, Grand Rapids
Hon. Katherine L. Hansen, Detroit
Hon. Mabel Johnson Mayfield, St.
Joseph
Janet A. Napp, Royal Oak
Hon. Angela Kay Sherigan, Shelby
Township

August 10, 2015

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

RE: ADM File No. 2014-15 – Proposed Amendment of Rule 6.106 of the Michigan Court Rules

Dear Clerk Royster:

The Criminal Issues Initiative is comprised of members appointed by the President of the State Bar of Michigan.

The position expressed is that of the Criminal Issues Initiatives only and is not an official position of the State Bar of Michigan, nor does it necessarily reflect the views of all members of the State Bar of Michigan. The State Bar has authorized the Initiative to submit its position on ADM File No. 2014-15 to the Court.

The Criminal Issues Initiative offers the below comments in reply to Justice McCormack's questions:

- Is this amendment necessary?
This amendment is only necessary if the court wants a separate section that limits contact under the pretrial release section. In the same rule, but in a different section called conditional release--section D (2) (m), similar language appears that already addresses this issue. Perhaps what is needed is not new language, but repositioning the language of section D(2)(m) earlier in the rule so that it applies to all pre-trial custody orders.
- Does a court now have to specifically authorize other conditions that are commonly imposed on pretrial detainees?
Adding this language could potentially strengthen the argument that Courts may only order within the restraints of the plain text. This is problematic because the Court should have the discretion to tailor its conditions on a case-by-case basis. That type of discretion requires not an express rule, but rather a flexible and vague rule providing adaptability.

A better solution would be to insert the language “including but not limited to” before a list of conditions, and moving those conditions to a part of the rule that would apply to any type of custody order.

Further, the court has a catchall phrase under pretrial release—conditional release D(2)(o), which states “comply with any other condition...reasonably necessary to ensure the defendant’s appearance as required and the safety of the public.” This condition appears to allow the court to use its inherent authority to protect the integrity of the proceedings as well as the public. This catchall should apply to all custody orders, not just matters under the conditional release section.

- Will this rule dissuade judicial officers from ordering conditions that are not identified in the rule but might be merited?

This proposed amendment will create more questions than it will solve. It could have a chilling effect in that Judges may try to fit a condition into one of the express rules, rather than using their inherent power and discretion to create conditions that would protect the integrity of the process as well as the public’s safety. Again, while a catchall provision appears in D 2 (o), this provision only applies to conditional release. It does not apply to the general custody order rule or release on personal recognizance. It should apply to any custody situation.

- Will a judge know at the time of arraignment if the defendant will remain in custody during the duration of the trial process? If not, does this practical hurdle matter?

No, a judge will not always know if a defendant will remain in custody. A defendant could post bond at any time, even after days or weeks in custody. As such, the judge should give all conditions at the time of the arraignment in preparation for the possibility of release. This would not be the case, however, when the court denies pre-trial release, as provided under section (B)(1).

We thank the Court for the opportunity to comment on the proposed amendment.

Sincerely,



Valerie R. Newman
Co-Chair, Criminal Issues Initiative