



State of Michigan
36th District Court
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March 9, 2016

Via e-mail only to ADMcomment@courts.mi.gov

Michigan Supreme Court
Office of the Administrative Counsel
P.O. Box 30052
Lansing, MI 48909

RE: Comments on ADM File No. 2015-12

To whom it may concern:

As an initial matter, thank you for accepting these comments regarding the proposed changes to the Michigan Court Rules, commonly known as the “Ability to Pay” rules (“Proposed Rules”). While the 36th District Court (“Court”) recognizes that the Proposed Rules essentially represent a codification of the applicable case law and seek to address a real concern, the Court nonetheless believes that the Proposed Rules as currently written lack some very important elements, as detailed in this comment.

First, the Proposed Rules do not clarify upon whom the burden rests to prove a defendant’s ability or inability to pay. The Court believes that establishing the burden of proof within the court rule will provide clarity for all parties. Since ability to pay must be assessed at the time of enforcement, a defendant has already been adjudicated guilty or responsible for the underlying offense and the State has met its initial burden. Therefore, the Court believes it is proper for the defendant to bear the burden of proving an inability to pay. Stating this fact in the rule will put all sides on notice as to who bears the burden of proof.

Second, in conjunction with stating that the burden of proof rests with the defendant, the level of “clear and convincing” should be used and stated in any Final Rule. The State has an interest in its laws being followed and that the proscribed penalties be enforced. Not paying a fine, or serving a different sentence in lieu of the fine, are alternatives to the normal requirements of the statutes setting forth those penalties. As such, the Court believes that a party asserting an inability to pay should be required to prove the inability to pay by “clear and convincing” evidence. Given that the defendant has already been adjudicated guilty and a sentence was

imposed, the Court believes that setting the burden of proof at a “preponderance of the evidence” would be too low.

Third, the Proposed Rules do not clearly state whether a finding of fact must be made on each of the enumerated factors. Clarifying this issue would be helpful to all courts and litigants. For large high volume courts, such as the 36th District Court, imposing a requirement that a finding of fact be required as to each factor would create significant burdens on judges addressing the issue, particularly any judge presiding over a specialized collections docket. In that vein, the Court suggests that any Final Rule state that while the enumerated factors must be considered, there is no requirement to make a finding of fact on each factor. Rather, only a finding of fact as to the ultimate issue, utilizing the enumerated factors, should be required to adequately support a judge’s ruling. Such a procedure is consistent with the pattern of MCR 6.106(F)(2), which governs pre-trial release of an unadjudicated defendant.

Fourth, the Court sees the possibility that many defendants will seek adjournments as a way to delay the process, rather than as a way to assert a bona fide defense. Adjournments would slow down the processing of cases and unnecessarily delay recovery of collections or completion of sentencing. The Court believes that any Final Rule should include language clarifying that a defendant is required to meet his burden of proof at the time he asserts an inability to pay. Such a requirement would act as a deterrent to those individuals who do have the ability to pay, but are merely trying to game the system.

Finally, and even by including the above changes, the requirements set forth in the proposed rules are unlikely to be easily implemented in a high volume court for several reasons. For example, given the demographics of the City of Detroit with 40% of the residents below the poverty level, a disproportionate number of 36th District Court cases would likely be affected by implementing the Proposed Rules.¹ While the Proposed Rules may be fairly easy for other district and circuit courts with a lower case volume to implement, implementing this rule while continuing to improve the efficiency of case processing and increase collections rates will be extremely challenging for the 36th District Court. In order to provide some flexibility for the busier courts throughout the State, the Court suggests adding specific language that would enable courts to submit proposed local court rules to SCAO. Allowing the creation of local court rules, which of course requires approval by the Supreme Court, would allow individual courts to create standards and programs that best address their individual circumstances while ensuring that defendants’ rights are protected.

The above referenced concerns can be addressed by making the following language changes to the Proposed Rules:

- Modify proposed MCR 6.425(E)(3)(c)(ii) to read as follows: Defendant’s employability and earning ability *from all sources*.

¹ United States Census Bureau website, Quick Facts page located at <http://www.census.gov/quickfacts/table/IPE120214/2622000> and viewed on March 1, 2016.

- Add a new MCR 6.425(E)(3)(c)(vi) to read as follows: Defendant's previous criminal record and personal familiarity with the criminal justice system.
- Renumber the previously proposed MCR 6.425(E)(3)(c)(vi) to MCR 6.425(E)(3)(c)(vii).
- Add a new MCR 6.425(E)(3)(d)(i) to read as follows: The burden shall be on the defendant asserting an inability to pay to prove by clear and convincing evidence that the defendant is not able to pay without manifest hardship. The defendant shall be required to meet this burden at the time the defendant asserts an inability to pay.
- Add a new MCR 6.425(E)(3)(d)(ii) to read as follows: A defendant's failure to provide evidence necessary to allow the court to consider any of the factors contained in subsection (c) supports a finding that the defendant has failed to establish an inability to pay.
- Add a new MCR 6.425(E)(3)(d)(iii) to read as follows: When making its ultimate determination on the ability to pay, the court need not make a specific finding of fact as to each element contained in subsection (c). However, the court must establish a record that shows it considered the required factors when making its ultimate determination.
- Add a new MCR 6.425(E)(3)(e) to read as follows: Courts may submit an alternate or supplemental rule to SCAO for review and possible approval in order to address issues or needs specific to that court, provided that any alternate rule meets the Constitutional safeguards as set forth in the applicable case law.

Thank you for your time in reviewing these comments. If you have any questions or if I can be of any assistance, please feel free to contact me.

Very truly yours,



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MAC/lrb

cc: Nancy M. Blount, Chief Judge
Kelli Moore Owen, Court Administrator