



**December 13, 2018 – January 9, 2019**

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## **Administrative Topics**

### **Chief Judge Rule – May Relieve Judge's Caseload**

Effective January 1, 2019, [ADM File No. 2015-20](#) amended MCR 8.110 to “explicitly provide[] that a chief judge, with approval of the state court administrator, may relieve a judge from presiding over some or all of the judge’s caseload”; “[t]he delegation of such authority to a chief judge does not in any way limit the Supreme Court’s authority to exercise ‘general superintending control over all courts’ under Const 1963, art 6, § 4.” Staff Comment to ADM File No. 2015-20, issued December 5, 2018. Specifically, “[a] chief judge may relieve the judge from presiding over some or all of the judge’s docket with approval of the state court administrator.” MCR 8.110(C)(5).

### **Court Form Creation – Order for Contribution**

The State Court Administrative Office (SCAO) has created MC 310, *Order for Contribution*, “to accommodate 2018 PA 214.” See the December 19, 2018 SCAO Memorandum, [Notice of Creation of MC 310](#), for a brief explanation of the form and a copy of the form. For more information on 2018 PA 214, see this edition of IMPACT’s Criminal Topics, Michigan Indigent Defense Commission Act (MIDCA) – Indigency Determination Subject to Judicial Review.

## Court of Claims – Notice of Transfer Required Before or At Time of Answer

Effective January 1, 2019, [ADM File No. 2017-12](#) added MCR 2.228 to require the transfer of a case to the Court of Claims pursuant to MCL 600.6404(3) “to be made at or before the time the defendant files an answer, which is the same period mandated for change of venue under MCR 2.221.” Staff Comment to ADM File No. 2017-12, issued September 20, 2018; MCR 2.228(A). Additionally, MCR 2.228(B) “distinguishes between courts with concurrent jurisdiction and courts without concurrent jurisdiction when an untimely notice of transfer is filed.” Staff Comment to ADM File No. 2017-12, issued September 20, 2018.

## Determination of Indigence for Purposes of Filing Fees – Clarification and Update to MCR 2.002

**Amendment of MCR 2.002.** Effective January 1, 2019, [ADM File No. 2002-37/ADM File No. 2018-20](#) amended MCR 2.002 to “clarif[y] and update[] MCR 2.002 (regarding determination of indigence for purposes of filing fees) by establishing a more streamlined procedure to be used in an e-Filing (and paper) environment, creating a threshold level of indigence (125% of the federal poverty level) and implementing a de novo review procedure.” Staff Comment to ADM File No. 2002-37/ADM File No. 2018-20, issued December 3, 2018.

**Court Form Creation.** The State Court Administrative Office (SCAO) has created MC 114, *Request for Review of Denied Fee Waiver*, “to accommodate the court rule revisions to MCR 2.002.” See the December 19, 2018 SCAO Memorandum, [Notice of Creation of MC 114](#), for a brief explanation of the form and a copy of the form.

**Court Form Revision.** SCAO has revised MC 20, *Fee Waiver Request*, “to comply with the court rule revisions to MCR 2.002”; “[t]he instructions were simplified and placed at the beginning of the form.” See the December 19, 2018 SCAO Memorandum, [Notice of Revisions to MC 20](#), for a brief explanation of the changes and a copy of the form with the changes highlighted.

## Michigan Rules of Professional Conduct (MRPC) – Communications Concerning a Lawyer’s Services

Effective January 1, 2019, [ADM File No. 2017-25](#) amended MRPC 7.1 to “restrict[] and regulate[] the use of the terms ‘retired’ or ‘former’ for a justice, judge, referee, or magistrate who returns to the practice of law”; “[i]t applies only where a lawyer is communicating information about the lawyer’s services, and thus, would not apply to a former judge who does not return to the practice of law.” Staff Comment to ADM File No. 2017-25, issued September 20, 2018.

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## Civil Topics

### *Court Activity:*

### Implied Warranty – Once Disclaimed Cannot Be Revived by Inadequacy of Express Warranty’s Remedy

“An implied warranty, once disclaimed, cannot be revived by the inadequacy of an express warranty’s remedy”; that is, “once an implied warranty is effectively disclaimed, there can be no breach of that disclaimed warranty, regardless of whether the remedy for an express or other undisclaimed implied warranty is arguably deficient.” [Vanalstine v Land O’Lakes Purina Feeds, LLC](#), \_\_\_ Mich App \_\_\_, \_\_\_ (2018). Accordingly, plaintiffs’ claims of breach of implied warranty under Michigan’s version of the uniform commercial code, MCL 440.2316, were without merit where the “defendant effectively disclaimed any implied warranty” in the parties’ agreement. *Vanalstine*, \_\_\_ Mich App at \_\_\_.

## Michigan Regulation of Collection Practices Act (MRCPA) – Entitlement to Damages and Attorney’s Fees and Costs

Where only the insured plaintiff—and not the plaintiff no-fault insurance companies—sought relief under the MRCPA for the defendant medical provider’s aggressive pursuit of payment of a balance bill, “only [the insured] is entitled to damages and reasonable attorney’s costs and fees under MCL 445.257(2),” and “the trial court erred by awarding fees to [the insurance companies] on that basis.” [\*Auto-Owners Ins Co v Compass Healthcare PLC\*](#), \_\_\_ Mich App \_\_\_, \_\_\_ (2018).

## No-Fault Act – Medical Provider’s Right to Seek Payment of Balance Bill

Medical providers challenging the failure to fully reimburse medical bills as a violation of the No-Fault Act “must do so in the trial court, and have the burden of establishing by a preponderance of the evidence that their charges were reasonable.” [\*Auto-Owners Ins Co v Compass Healthcare PLC\*](#), \_\_\_ Mich App \_\_\_, \_\_\_ (2018). Accordingly, where the defendant medical providers failed to challenge the insurance companies’ determination of reasonableness in any action or pleading, and “never presented any evidence from which the trial court could have concluded by a preponderance of the evidence that the [medical charge] incurred by [the insured] was reasonable and necessary,” but rather “chose[] to harass [the insured] over [the balance bill] outside of the courts,” the trial court did not abuse its discretion when it refused to reverse its grant of summary disposition in favor of the insurance companies and the insured. *Id.* at \_\_\_\_\_. A medical provider cannot “seek payment of balance bills from a patient-insured on a *contractual* liability theory, rather than under the No-Fault Act, after a provider’s charges were audited for reasonableness and the provider was paid a partial payment based on the findings of those audits.” *Id.* at \_\_\_\_\_. Specifically, “[t]o conclude that defendants could prevail on the theory of an implied contract is contrary to the purpose of the No-Fault Act, and its implications would allow medical providers to circumvent the protective nature of the No-Fault Act”; accordingly, “any claim defendants may have against [the insured] would be for payment of services rendered to an injured person ‘covered by personal protection insurance’ under the No-Fault Act.” *Id.* at \_\_\_\_\_.

## No-Fault Act – One-Year-Back Rule

Where the plaintiff insurance companies “made a reasonable payment to [the defendant medical providers] on behalf of [the insured],” “in order to contest the reasonableness of the amount paid, or pursue the remaining [balance bill amount], defendants would have had to file suit against [the insured] on or before [one year had elapsed from the payment date].” [\*Auto-Owners Ins Co v Compass Healthcare PLC\*](#), \_\_\_ Mich App \_\_\_, \_\_\_ (2018). Further, where “[d]efendants concede they did not file any action in the trial court,” “any claim defendants may have had against [the insured] is now barred by the one-year-back rule.” *Id.* at \_\_\_\_\_.

## Superintending Control – MCL 600.2963(8) Cannot Bar Complaint Based on Outstanding Fees Owed by Indigent Prisoner

MCL 600.2963(8), which provides that “[a] prisoner who has failed to pay outstanding fees and costs as required under [MCL 600.2963] shall not commence a new civil action or appeal until the outstanding fees and costs have been paid,” is “unconstitutional as applied to bar a complaint for superintending control seeking relief in an underlying criminal case where the indigent plaintiff is unable to pay the outstanding fees owed to [the Court of Appeals] for a prior case subject to MCL 600.2963.” [\*In re Jackson \(On Remand\)\*](#), \_\_\_ Mich App \_\_\_, \_\_\_ (2018). Additionally, the “conclusion that this case must be recognized as criminal in nature for purposes of the federal constitutional right of access to the courts in such cases does not change its classification as an original civil action subject to the fee-related requirements of MCL 600.2963 (apart from an unconstitutional application of MCL 600.2963(8)) by Michigan procedural and statutory law.” *In re Jackson*, \_\_\_ Mich App at \_\_\_\_\_.

## Taxable Costs – Depositions and Mileage

**Depositions.** Under MCL 600.2549, “[t]o tax costs for the taking of a deposition, the deposition must be (1) filed with any clerk’s office, and (2) read into evidence at trial or when damages were assessed”; accordingly, where “a review of the register of actions does not support” the defendant’s “assert[ion] that the deposition transcripts were filed in the clerk’s office,” and “the record does not indicate that the depositions were read into evidence in the trial court,” “defendant was not entitled to any taxable costs for the taking of depositions.” [Vanalstine v Land O’Lakes Purina Feeds, LLC](#), \_\_\_ Mich App \_\_\_, \_\_\_ (2018).

**Mileage.** “[D]efense counsel’s travel to certain depositions, hearings, and court proceedings . . . is not covered by MCL 600.2559”; “[t]o the extent that mileage is authorized in some of the subsections of MCL 600.2559, Subsection 1 makes clear that any mileage taxed under MCL 600.2559 must be related to out-of-court service of process or papers[.]” [Vanalstine](#), \_\_\_ Mich App at \_\_\_. Accordingly, “because defendant has not shown that the mileage and travel fees were authorized by statute, defendant has not shown that the taxation of [costs] was authorized by statute.” *Id.* at \_\_\_.

## Witness Immunity – Not a Defense to Professional Malpractice Action

“Where a duty of professional care exists such that a malpractice action may be maintained, witness immunity is not a defense to a malpractice action except . . . insofar as the action is premised on the substance of the professional’s evidence or testimony intended to be provided to the court”; stated another way, “[a] professional’s client is not precluded from maintaining a professional malpractice action by witness immunity, except to the extent the action is premised on the substance of evidence or testimony prepared for the benefit of the court.” [Voutsaras Estate v Bender](#), \_\_\_ Mich App \_\_\_, \_\_\_ (2018) (holding that “the trial court erred by construing the doctrine of witness immunity too broadly”—“[t]o the extent plaintiff’s claims rest on the . . . defendants having provided damaging testimony or evidence intended for consideration by the trial court, the . . . defendants are clearly protected by the doctrine of witness immunity”; however, “the . . . defendants are not absolutely immunized from professional malpractice claims where they already owed a duty of professional care, merely because part of their retention included the provision of expert testimony”).

### Legislative Activity:

## Revised Judicature Act (RJA) – Amendments to Reflect Changes to Michigan Election Law

Effective December 31, 2018, [2018 PA 121](#) amended the RJA, MCL 600.101 *et seq.*, to account for sections that were repealed by 2018 PA 120 in the Michigan Election Law. MCL 600.9940. Specifically, MCL 600.9940—which addresses the election of a district court judge for the thirty-second-b district—now refers to “MCL 168.467 to [MCL] 168.467m” instead of “MCL 168.467 to [MCL] 168.467n.” MCL 600.9940(2), (6).

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## Criminal Topics

### Court Activity:

## Motion for Relief from Judgment – Successive Motion and Actual Innocence

Effective January 1, 2019, [ADM File No. 2013-05/ADM File No. 2014-46](#) amended MCR 6.502 to “make several substantive changes . . . regarding postjudgment relief from judgment motions”—“[f]irst, the new language in MCR 6.502(G)(2) inserts a discretionary ‘actual innocence’ waiver provision similar to that in MCR 6.508(D)(3)”; “[f]urther, MCR 6.502(G)(3) is added to clarify that shifts in science are included in the definition of ‘new evidence’ for purposes of the exemption from the successive motion limitation.” Staff Comment to ADM File No. 2013-05/ADM File No. 2014-46, issued September 24, 2018. Additionally, Michigan Rule of Professional Conduct (MRPC) 3.8, concerning special responsibilities of a prosecutor,

was amended “to require certain actions by a prosecutor who knows of new, credible, and material evidence creating a reasonable likelihood that defendant is innocent of the crime for which defendant was convicted, or who knows of clear and convincing evidence that shows defendant is innocent of the crime.” Staff Comment to ADM File No. 2013-05/ADM File No. 2014-46, issued September 24, 2018. See also MRPC 3.8(f), (g), and (h).

### **Sentencing – Findings of Fact Required to Support Amount of Attorney Fees**

“[A] sentencing court may [not] impose attorney fees upon a defendant under MCL 769.1k(1)(b)(iv) of the Code of Criminal Procedure, MCL 760.1 *et seq.*, without first making findings of fact in support of that amount,” because “the language of MCL 769.1k(1)(b)(iii), which gives trial courts the authority to assess costs without ‘separately calculating those costs involved in the particular case,’ [does not apply] to the attorney-fee provision in [MCL 769.1k(1)(b)(iv)], which authorizes the imposition of expenses for legal assistance to a defendant.” *People v Lewis*, \_\_\_ Mich \_\_\_, \_\_\_ (2018) (holding that “the trial court was required to determine the cost of providing legal assistance to defendant pursuant to MCL 769.1k(1)(b)(iv),” and “remand[ing] to the trial court for that court to support its findings regarding the cost of legal assistance provided to defendant”).

### **Understanding Plea – Advise Defendant That a Plea Precludes Right to Appeal Certain Issues**

Effective January 1, 2019, [ADM File No. 2017-16](#) amended MCR 6.302 to “require[] a trial court judge to advise a defendant that if a plea is accepted, the defendant will give up the right to appeal issues that might have been available after the conclusion of a trial”; “[s]uch an advisement would prompt further discussions between counsel and defendant, if necessary.” Staff Comment to ADM File No. 2017-16, issued September 20, 2018. Specifically, “the court must advise the defendant” that “if the plea is accepted, the defendant may be giving up the right to appeal issues that would otherwise be appealable if she or he were convicted at a trial.” MCR 6.302(B)(5).

### **Legislative Activity:**

#### **Medical Marijuana Facilities Licensing Act (MMFLA) – Unlicensed Operator of Marijuana Facility**

Effective January 1, 2019, [2018 PA 582](#) added a provision to the MMFLA, MCL 333.27101 *et seq.*, to provide that beginning June 1, 2019, a person shall not hold itself out as operating a marijuana facility if the person does not hold a license to operate that marijuana facility or if the person’s license is suspended, revoked, lapsed, or void, or was fraudulently obtained or transferred to the person other than pursuant to MCL 333.27406. MCL 333.27407a. A person who violates MCL 333.27407a is guilty as follows:

- First violation—misdemeanor punishable by a fine of not less than \$10,000 or more than \$25,000, or imprisonment of not more than 93 days, or both, MCL 333.27407a(a);
- Second or subsequent violation—misdemeanor punishable by a fine of not less than \$10,000 or more than \$25,000, or imprisonment of not more than one year, or both, MCL 333.27407a(b);
- If the violation causes death or serious injury, a felony punishable by a fine of not less than \$10,000 or more than \$25,000, or imprisonment for not more than four years, or both, MCL 333.27407a(c).

#### **Michigan Indigent Defense Commission Act (MIDCA) – Indigency Determination Subject to Judicial Review**

Effective December 23, 2018, [2018 PA 214](#) amended the MIDCA, MCL 780.981 *et seq.*, to, among other things, require that “[a] preliminary inquiry regarding, and the determination of, the indigency of any defendant, including a determination regarding whether a defendant is partially indigent . . . must be made as determined by the indigent criminal defense system not later than at the defendant’s first appearance in court”; “[i]f an indigent criminal defense system determines that a defendant is partially indigent, the indigent criminal defense system shall determine the amount of money the defendant must contribute to his or her

defense,” and “[a]n indigent criminal defense system’s determination regarding the amount of money a partially indigent defendant must contribute to his or her defense is subject to judicial review.” MCL 780.991(3)(a). Additionally, the Michigan Indigent Defense Commission must “promulgate objective standards for indigent criminal defense systems to determine whether a defendant is indigent or partially indigent” and “the amount a partially indigent defendant must contribute to his or her defense”—the “standards must include availability of prompt judicial review, under the direction and supervision of the Supreme Court, if the indigent criminal defense system is making the determination regarding a defendant’s indigency or partial indigency” or “how much a partially indigent defendant must contribute to his or her defense.” MCL 780.991(3)(e)-(f). See also [Michigan Supreme Court Memorandum Re: Michigan Indigent Defense Commission Act Amendments](#), issued October 31, 2018. Additionally, the State Court Administrative Office (SCAO) has created MC 310, *Order for Contribution*, “to accommodate 2018 PA 214.” See the December 19, 2018 SCAO Memorandum, [Notice of Creation of MC 310](#), for a brief explanation of the form and a copy of the form.

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## Family Topics

### *Court Activity:*

#### Domestic Relations – Final Postjudgment Order

Effective January 1, 2019, [ADM File No. 2017-20](#) amended MCR 7.202 to “clarif[y] what constitutes a final postjudgment order in a domestic relations case for purposes of appeal by right.” Staff Comment to ADM File No. 2017-20, issued September 20, 2018. Specifically, “final judgment” or “final order” “in a domestic relations action[ means] a postjudgment order that, as to a minor, grants or denies a motion to change legal custody, physical custody, or domicile[.]” MCR 7.202(6)(a)(iii).

### *Legislative Activity:*

No activity.

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## Probate Topics

### *Court Activity:*

No activity.

### *Legislative Activity:*

#### Michigan Trust Code (MTC) – Certificate of Trust

Effective December 27, 2018, [2018 PA 491](#) amended the MTC, MCL 700.7101 *et seq.*, to modify the information that must be included in a certificate of trust. MCL 700.7913.



## Recording Trust Agreement – Trust Instrument and Certificate of Trust

Effective December 27, 2018, [2018 PA 492](#) amended the Recording Trust Agreement or Certificate of Trust Existence and Authority Act, MCL 565.431 *et seq.*, to:

- Refer to a *trust instrument* instead of a *trust agreement*, MCL 565.431(1)(a), MCL 565.435;
  - Refer to a *certificate of trust* instead of a *certificate of trust existence and authority*, MCL 565.431(1)(b), MCL 565.435;
  - Require a certificate of trust to be recorded as a separate document if it accompanies an instrument that conveys, encumbers, or otherwise affects real property, MCL 565.434; and
  - Repeal MCL 565.432, MCL 565.433, and MCL 565.436, which pertained to certificates of trust existence and authority, the execution of a certificate of trust existence and authority, and indexing a certificate of trust existence and authority, respectively.
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