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February 26, 2019

Ms. Anne M. Boomer
Michigan Supreme Court
925 W. Ottawa
P.O. Box 30052
Lansing, MI 48909

Re: ADM File No. 2017-17 - Proposed Amendments of Rules 6.001, 6.006, 6.425, 6.427, 6.610, 7.202, and 7.208 and Proposed Addition of Rule 6.430 of the Michigan Court Rules

Dear Ms. Boomer:

On behalf of the Michigan Court of Appeals, we offer the following comments on the above-referenced rule proposal. As explained below, we support the changes to the Chapter 6 criminal procedure rules, with modification. However, we oppose the suggested revisions to MCR 7.202(6)(b) and MCR 7.208(G) because they are unnecessary and will complicate current procedure.

Requiring restitution to be set in the judgment of sentence would clarify procedure in the trial court and would benefit appellate practice by allowing a restitution issue to be raised in an appeal from the judgment. Currently, restitution is often set in a postjudgment order. Such orders are appealable by leave and, though they are exceedingly rare, they do present a second appeal on an issue that should have been resolved at the time of sentencing. Appellate practice would benefit from ensuring that the initial restitution decision is part of the judgment of sentence so that it may be considered in a plenary appeal of right.

However, the proposed revision to MCR 7.202(6)(b), allowing an appeal of right from “an order amending restitution,” is unnecessary and ill-advised. This proposal is likely intended to clarify how an appeal may be taken from such an order, but the current procedure does not need clarification. The current rules are clear that any non-final order, which includes a postjudgment order on a motion to amend restitution, is appealable by leave. MCR 7.203(B)(1). Making an order that amends restitution appealable of right complicates the current procedure by introducing an exception to the general rule. Moreover, a postjudgment restitution order presents the type of narrow issue that is conducive to an application for leave to appeal. In an application setting, the restitution issue may be reviewed with a limited record, and the Court has flexibility to grant peremptory relief under any time constraints that may be present. For these reasons, we oppose the suggested change to MCR 7.202(6)(b).

Similarly, the proposed revision to MCR 7.208(G) should not be adopted because it unnecessarily complicates rules that need no further explanation. The apparent intention of the proposal is to make clear that the trial court retains authority to decide motions to amend restitution even when an appeal is pending. This addition is unnecessary because that authority is already provided in MCR

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February 28, 2019

Page 2

7.208(A). That rule provides that the trial court “may not set aside or amend the judgment or order appealed from except . . . as otherwise provided by law.” MCL 780.766(22) and MCL 780.826(19) give the trial court authority to amend restitution without reference to whether an appeal is pending. As such, there is no need to amend MCR 7.208(G) to make this exception more explicit. As explained below, any ambiguity regarding the trial court’s authority could be better addressed as part of the proposed new rule MCR 6.430.

A primary concern with a postjudgment order amending restitution is how the new order might affect a pending appeal. If the judgment of sentence includes restitution and that is an issue on appeal, it would be best if the Court was apprised of the filing of a motion to amend restitution and the entry of an order on that motion. To that end, and to clarify that the trial court has continuing authority to hear a motion to amend restitution, we recommend that proposed MCR 6.430(B) and (E) be revised as follows:

(B) Filing. The moving party must file the motion and a copy of the motion with the clerk of the court in which the defendant was convicted and sentenced. Upon receipt of a motion, the clerk shall file it under the same case number as the original conviction. If an appeal is pending when the motion is filed, the moving party must serve a copy on the appellate court.

* * *

(E) Ruling. The court, in writing, shall enter an appropriate order disposing of the motion and, if the motion is granted, enter an order amending the restitution. If an appeal was pending when the motion was filed, the moving party must provide a copy of the order to the appellate court.

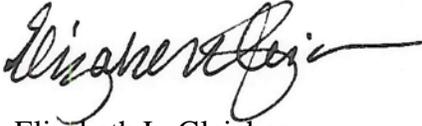
Including these provisions in MCR 6.430 accomplishes the purpose of the proposed amendment to MCR 7.208(G) by recognizing that the trial court has the authority to consider a motion to amend restitution during the pendency of an appeal. These provisions offer the additional benefit of notifying the appellate court of the potential for an order that might affect an issue on appeal.

We recommend that the proposed amendments to MCR 7.202(6)(b) and MCR 7.208(G) be rejected for the reasons stated. Altering those rules as suggested is unnecessary and would not benefit appellate practice. However, as indicated above, we believe that the new MCR 6.430 be revised to ensure that appellate courts are advised of the filing and disposition of a motion to amend restitution during the pendency of an appeal from the case.

Please let us know if we can answer any questions or provide additional information.

Very truly yours,


Christopher M. Murray
Chief Judge


Elizabeth L. Gleicher
Judge, Rules Committee Chair