

Memorandum

To: Larry S. Royster, Clerk of the Court Michigan Supreme Court

From: Hon. Jacob James Cunningham,
Oakland County Circuit Court

Hon. Lisa Gorcyca,
Oakland County Circuit Court

Hon. Lisa S. Hallmark,
Oakland County Probate Court

Hon. Dana Hathaway,
Wayne County Circuit Court

Hon. Lisa Langton,
Oakland County Circuit Court

Hon. Cheryl A. Matthews,
Oakland County Circuit Court

Hon. Julie A. McDonald,
Oakland County Circuit Court

Hon. Paul Stutesman
St. Joseph County Circuit Court

Hon. Michael Warren,
Oakland County Circuit Court

Date: August 3, 2020

Re: Professionalism Principles for Lawyers and Judges

We offer the following comments and observations regarding the draft Professionalism Principles for Lawyers and Judges. This letter only relates to the Principles as they apply to Judges. We applaud the idea behind ensuring civility in the practice and adjudication of the law. Unfortunately, as currently drafted the Principles raise some serious concerns we ask be addressed if the Supreme Court is intent on moving forward with their adoption.

What effect does it have? The Principles appear to be freestanding - unconnected to the Michigan Code of Judicial Conduct. This raises the following concerns:

- ☆ Are these suggestions or mandates?

- ☆ Can a judge be grieved for failing to adhere to them?
- ☆ Can a judge be sanctioned - i.e., censured, suspended, or removed from the bench for not following the principles?

Is this a solution searching for a problem? The ideals expressed in the Principles are noble and commendable. They are certainly aspirational, and nearly all judges do their best to fulfill them every day. Many of the concepts are addressed in some fashion in the existing canons. Questions about this concern are:

- ☆ Has there been a clamoring for additional professionalism?
- ☆ Is there is widespread problem, or are there a few outliers than can be addressed through existing mechanisms on a case-by-case basis?
- ☆ Will the approach of passing wide-ranging and generally applicable new rules to address episodic issues result in unintended consequences?

Vagueness. Again, many of the principles are aspirational and important in the abstract, but when the gavel hits the block, what seems clear becomes obfuscated.

For example, the first bullet point for Judges states: “We are patient and respectful to a party’s right to be heard and afford this opportunity.” What is “patient” and “respectful” is unclear:

- ☆ What happens when a lawyer, criminal defendant, or victim takes up valuable time in a crowded courtroom by repeating herself over and over again? This is a common occurrence. Is the judge disabled from interrupting?
- ☆ What happens when a judge listens patiently for 20 minutes to each side in a well briefed argument, announces she is ready to rule, begins to state the ruling, and she is then interrupted by the losing side because that side feels compelled to counter everything the judge is saying? Does this happen? All the time.
- ☆ What happens when a judge dispenses with oral argument - isn’t that the ultimate impatient ruling? This happens every day. In fact, sometimes judges dispense with oral argument with the aim of avoiding hostility in the courtroom and making sure that the law - and not emotion - rules the day.
- ☆ What happens when a party - believing that she is not even subject to the court’s jurisdiction because she is a sovereign nation - screams at the judge claiming that the judge is unlawfully persecuting her and is conspiring with the prosecutor? Or wants to read a 20-page essay on the tenets of the Moorish Nation? This happens more than higher courts might realize. What is the parameter of patience here?

The third bullet point states “We see as paramount our obligation to the administration of justice to facilitate the resolution of matters before us . . .”

- ☆ What does “paramount” mean? Webster’s Dictionary defines it as “Of foremost importance or concern.” On its face, legal education is not paramount - can judges attend association conferences if it means missing a few days of work? We assume the answer is “of course judges should take time for judicial education” - but could not a party complain that the judge was away from the courtroom in violation of the Principles by not attending to her urgent business?

- ☆ Are judges expected to hold court beginning at 7:00 am and ending at 7:00 pm? Again, we assume the answer is “no,” but working 12 hours a day is common for many practitioners.
- ☆ Can judges even take vacation or sick days? Obviously, the resolution of matters before judges cannot occur when vacation or sick days are taken. Again, we expect the answer is “no” because vacation and sick days are critical to a well-functioning judge - but that is a not a “paramount” consideration.

Another bullet point provides that judges are to be “respectful” to the “exigencies of litigation” in connection with scheduling.

- ☆ If the parties simply fail to comply with a scheduling order because they are busy with other matters - which is standard operating procedure for many practitioners - is that an “exigency”?
- ☆ Often a litigant’s view of an “exigency” is whatever enables the litigant to violate or avoid deadlines and to force that third adjournment of the scheduling order from the judge. Will denials of adjournments now become verboten to avoid accusations of violating these Principles?

These are just a few examples of the 17 judge specific bullets. Some of the additional vagueness is illustrated throughout the remainder of letter.

Undermining Truth and Justice and Inviting Self-Censorship. By imposing a framework of courtesy and civility on judges, the unintended consequence could be the neutering of truth - just when it is needed most.

- ☆ Judges are to be “courteous, respectful, and civil in opinions” If a judge finds a lawyer, witness, or party incredible, lying, and vexatious, and she sanctions them for such conduct - the sanctioned person will find that to be discourteous, disrespectful and uncivil. Will judges undermine truth and justice by refusing to make “disrespectful” findings?
- ☆ Judges are to conduct proceedings “with dignity, decorum, and courtesy.” When a child rapist appears before a judge for sentencing and the conduct is rightfully condemned by the judge as outside of the bounds of civilized society - an observer could easily say that the judge did not use decorum and certainly discourteous to the rapist. Is the judge supposed to censor herself for the sake of avoiding violating the Principles - even when the community rightfully expects condemnation under such circumstances? (This also plays out in the Opposing Goals section below.)
- ☆ However, one characterizes a judge holding a person in summary contempt, the words “courtesy” and “dignity” do not leap to mind. This is usually because the offending party is so disruptive when a judge holds someone summarily in contempt. A judge should not need to second-guess or hold back on summary contempt when the rule of law and justice are at stake. (This also plays out in the Opposing Goals section below.)
- ☆ One might question whether a judge would really self-censor in light of the Principles. Quite frankly, self-censorship is happening today in connection with these draft Principles. The primary author of this letter has circulated this document to several learned and experienced judges who have expressed strong agreement with its contents but have declined to sign the letter.

These are just a few examples of the 17 judge specific bullets potentially undermining truth, justice, and inviting self-censorship.

Internally Contradictory Goals. A careful examination reveals that many of the bullets contradict each other - and some of them are internally contradictory - or, at the very least, create a very cautious if not untenable balancing act. Examples include:

- ☆ Patience and respect for the right to be heard (bullet #1) versus calling out uncivil conduct on a judge's own initiative (bullet #2). Judges are mandated to allow the parties to be heard patiently and respectfully, but when a party is "uncivil" (however that is defined) to the opposing party, the court is required to "call such conduct to the attention of the offending lawyer on [the judge's] own initiative." The key here is that the judge must be able to precisely determine when a lawyer is no longer "civil" and then the judge literally, on the spot, polices the conduct. But if she acts a second too soon, she violates bullet #1 (and others); if she acts a few seconds too late, she violates bullet #2. Trial judges, of course, do not have the benefit of a cold transcript and months of briefing to make such decisions.
- ☆ Bullet #5 requires judges to be "courteous, respectful, and civil in opinions, ever mindful that that we are the ultimate measure of the public's faith and confidence in our system of justice." As noted above, sometimes opinions and actions that are essential to ensure the public's faith and confidence in our system of justice (holding people in contempt, sanctioning parties, denying countless motions to adjourn, calling out egregious violations of probation, condemning horrific criminal behavior) are often not considered to be "courteous, respectful and civil." The subjectivity of what is courteous, respectful, and civil is obvious, and sometimes to affirm confidence by the public requires something that could be considered by some otherwise.
- ☆ Bullet #6 requires a judge to be punctual in convening the court; bullet #7 requires consideration of time schedules of lawyers, parties, and witnesses; bullet #8 requires the court to be respectful of personal emergencies and exigencies in litigation; and bullet #11 demands that a judge not engage "in practices and procedures that needlessly . . . contribute to unnecessary delay." The conflicts here are clear. Lawyers and parties are very creative in distilling emergencies; conflicts; scheduling disputes; need for additional time for depositions, discovery, and untimely motions; and other exigencies - which undermines the ability to be punctual and to maintain docket control. Yet, when a party opposes a granted adjournment, the judge can be accused of "needlessly . . . contribut[ing] to unnecessary delay." If the judge denies an adjournment, she can be accused of failing to consider the schedules of the lawyers, parties, and witnesses. And then there are case disposition guidelines which cut against the grain of several of these Principles. The practical reality is that a motion to adjourn runs into a buzzsaw of several of the Principles. If what this is attempting to address are judges who fail to put in a full day of work, start court late, and fail to make timely rulings, we would be better served with something more direct.
- ☆ Bullet #10 requires that judges "maintain control of the proceedings, recognizing that we have both the obligation and authority to ensure that all proceedings are conducted in a civil manner." Similar to prior concerns, maintaining control of the proceedings and civility may be at odds; also concern for exigencies and personal time of parties clearly undermines maintaining control of the proceedings.

These are just a few examples of the 17 judge specific bullets with internally contradictory goals.

We respectfully ask that the judiciary rely on the current Canons and that you not adopt the Professionalism Principles for Judges, or at least substantially revise the Professional Principles to create greater clarity and consistency for the judiciary.

We thank you in advance for your thoughtful consideration of our concerns.