

Order

Michigan Supreme Court
Lansing, Michigan

February 16, 2010

Marilyn Kelly,
Chief Justice

ADM File No. 2009-25

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

Proposed Amendment of
Rule 8.120 of the Michigan
Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 8.120 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

Rule 8.120. Law Students and Recent Graduates; Participation in Legal Aid Clinics, Defender Offices, and Legal Training Programs.

(A)-(C)[Unchanged.]

(D) Scope; Procedure.

- (1) A member of the legal aid clinic, in representing an indigent person, is authorized to advise the person and to negotiate and appear on the person's behalf in all Michigan courts except the ~~Court of Appeals and the Supreme Court~~.
- (2) Representation must be conducted under the supervision of a state bar member. Supervision by a state bar member includes the duty to examine and sign all pleadings filed. It does not require the state bar member to be present

- (a) while a law student or graduate is advising an indigent person or negotiating on the person's behalf, or
 - (b) during a courtroom appearance of a law student or graduate, except in a criminal or juvenile case exposing the client to a penalty of more than 6 months.
- (3) A law student or graduate may not appear in a case in a Michigan court without the approval of the judge of that court or a majority of the panel of judges to which the case is assigned. If the judge or a majority of the panel grants approval, the judge or a majority of the panel may suspend the proceedings at any stage if the judge or a majority of the panel ~~he or she~~ determines that the representation by the law student or graduate
- (a) is professionally inadequate, and
 - (b) substantial justice requires suspension.

In the Court of Appeals, a request for a law student or graduate to appear at oral argument must be submitted by motion to the panel that will hear the case. The panel may deny the request or establish restrictions or other parameters for the representation on a case-by-case basis.

- (4) A law student or graduate serving in a prosecutor's, county corporation counsel's, city attorney's, or Attorney General's program may be authorized to perform comparable functions and duties assigned by the prosecuting attorney, county attorney, city attorney, or Attorney General, except that
- (a) the law student or graduate is subject to the conditions and restrictions of this rule; and
 - (b) the law student or graduate may not be appointed as an assistant prosecutor, assistant corporation counsel, assistant city attorney, or assistant Attorney General.

Staff Comment: Under this proposal, a law student or recent law graduate who is a member of a legal aid clinic would be eligible to appear on behalf of a client in the Court of Appeals. The appearance would require the same protections that now exist, i.e., supervision by a licensed attorney who signs all pleadings, and approval by a majority of the judges of the assigned panel.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by June 1, 2010, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2009-25. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

YOUNG, J. (*concurring*). I share the concerns Justice MARKMAN raises about the extension of the “student advocate” program to the Court of Appeals. Were it not for the fact that the judges of the Court of Appeals expressed an interest in having this proposal published for comment, I would have opposed it. The quality of advocacy by *licensed* attorneys at both the Court of Appeals and the Supreme Court remains a concern even without extending the ability to appear before an appellate court to unlicensed persons. (I note that some jurisdictions require special qualification for licensed attorneys to appear in appellate courts.) My agreement to publish this proposal in no way ensures that I will ultimately support its enactment. However, I am interested in seeing the responses to the issues Justice MARKMAN raises from those who support the student advocate program.

MARKMAN, J. (*dissenting*). I would not publish the proposed amendments to MCR 8.120, allowing law students to argue before the Michigan Court of Appeals. An ongoing responsibility of this Court by its supervision of the Michigan State Bar, the Attorney Grievance Commission, and the Attorney Discipline Board, as well as by its final appellate review of the decisions of all other courts in this state, is to enhance the quality of legal representation. I do not believe that extending authority to law students to argue before our second-highest court carries out this responsibility. Rather, I believe this achieves the opposite result. It is not to disparage the outstanding law schools of Michigan, or the caliber of their students, to observe that law students have not yet completed their education or learned their profession, they have not yet been judged competent to practice law through the examination process of our state, they have not yet undertaken an oath promising to comply with standards of conduct of the legal profession, and they have garnered none of the experience and perspective that, with very few exceptions, characterizes lawyers who are participants in our appellate process.

In addition to this overriding concern, I have the following specific difficulties with the proposed amendments:

(1) These amendments delegate Michigan’s standards of professional competency and character for lawyers from the people of this state acting through the elected Justices of this Court, to public and private law schools.

(2) I view as meaningless the requirement that “a majority of the panel of judges to which the case is assigned” must first approve the student’s representation. Given that

the proposed amendments are premised upon the proposition that students are eligible to participate in appellate argument, what conceivable basis would a judge have for determining that second-year student John or Mary Doe could not participate in an appeal? Would such judge be expected to review the student's grades, or consult with his or her professors, or scrutinize the student's LSAT scores? Unlike in the case of a member of the Bar, there would be no background investigations available, no character assessments, no disciplinary histories, no previous court appearances, and no private sources of evaluation, such as Martindale-Hubbell ratings.

(3) Disproportionately, the clients of these law students would be indigent persons who would effectively become 'guinea pigs' in an experiment allowing non-lawyers to participate in a process in which, in my judgment, there is the greatest need for trained and experienced lawyers.

(4) Law student representation may well afford additional grounds for unsuccessful criminal appellants to raise claims of constitutionally ineffective assistance of counsel, regardless of the validity of such arguments.

(5) Standards for law student participation in the appellate process that rely upon student grades, as do the proposed amendments: (a) fail to distinguish between the disparate grading policies of different law schools; (b) risk intruding the Justices of this Court in scrutinizing this grading process; and (c) threaten the integrity of the grading process by incentivizing more lenient grading standards in order not to deprive students of their eligibility to participate in appellate arguments.

(6) The premise of current rules pertaining to law student participation in "legal aid clinics, defender offices, and legal training programs" is that as potential penalties increase, the amount of supervision should increase, see e.g., MCR 8.120(D)(2)(b), and that in the most serious cases an actual lawyer should be present. It seems anomalous then, under the proposed amendments, that law students should now be allowed to participate in the most serious cases in the Court of Appeals with a diminished opportunity for further appeal, under circumstances in which even the presence of a member of the bar would have the least possible effect in rectifying a serious error made during oral argument by the student.

(7) However much assistance and supervision law students receive from professors, or members of the bar, in preparing for appellate argument, in the end what they say in court, and what they say in response to questioning from judges, carries enormous and often irreparable consequences for their 'clients.' Given the relatively small number of Court of Appeals decisions that are eventually heard on appeal by the

Michigan Supreme Court, I believe the stakes are too great to allow parties in the Court of Appeals to be represented by law students.

(8) Finally, I am concerned about the blurred sense of professional, ethical, and disciplinary accountability between law students and supervising lawyers as to appeals pursued under the amended rule. I am concerned that the law student is not subject to standards otherwise applicable to all lawyers, and I would be equally concerned that, if the student *is* deemed to be subject to these standards, the impact upon the student of being found to be in violation would be damaging on a long-term basis.



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 16, 2010

Corbin R. Davis

Clerk