



STATE OF MICHIGAN
MICHIGAN CIVIL RIGHTS COMMISSION
LANSING

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GOVERNOR

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April 27, 2009

Court Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

**RE: ADM File No. 2007-13
Proposed Amendment to MRE 611**

The Michigan Civil Rights Commission (Commission) opposes adoption of the currently proposed amendments to Michigan Rule of Evidence 611. The proposed rule appears to deny the free exercise of religion guaranteed by both the Michigan and U.S. Constitutions. Even if given its most benign interpretation, the proposal is an unnecessary restatement of existing court authority that has the effect of further muddying, rather than clarifying, the status quo.

The Commission is greatly concerned that the proposed rule treats two entirely separate judicial interests, credibility and identity, as though they were one in the same. While observing a witness's face may be necessary for identification purposes, observing his or her facial expressions is at best an unnecessary and inaccurate (it may often be a counterproductive), method of assessing the witness's credibility. This is especially true when the witness is certain to be embarrassed and avoid eye contact because she believes she is being forced to improperly expose herself in an open courtroom.

The staff comment accompanying the proposed amendment indicates that "(t)he proposal was suggested in response to a case in which a district judge was sued for dismissing a plaintiff's case following the plaintiff's refusal to remove her niqab during testimony." The Commission believes that ordering the plaintiff to either remove her hijab or face dismissal of her civil suit was an unreasonable exercise of the judge's existing authority to regulate his courtroom.

The proposal purports to give courts only the "reasonable control over the appearance of parties and witnesses" it already has. However, because the proposal is specifically drafted in response to the niqab incident it has the effect of determining the district court's order to remove the niqab was "reasonable." If the intent of the proposal is to create a presumption of reasonableness in an order to remove a niqab, the change from existing discretion must be rejected.

If the proposal is not intended to signal any change to the level of discretion presently given to a trial court, the Commission urges that no change to the court rule should be made. It is not disputed that judges currently possess reasonable control over the attire of all persons in their courtrooms. Changing this court rule, in this context, suggests a change of law. Change should therefore be avoided if changing the status quo is not intended.

If it is determined that Rule 611 must be amended in order to clarify the standard of review to be applied to judicial decisions made pursuant thereto, the Commission urges that the current proposal be amended to include specific language indicating that it is never reasonable to order the removal of a religious face covering (or indeed any clothing required by a sincerely held religious belief), when the only purpose is to allow the trier of fact to assess the person's demeanor. The rule should also specifically state that if it is necessary to order the removal of a religious face covering in order to permit necessary identification, that it be done in the least intrusive way possible.

The Commission does not disagree with the premise that a judge should have "reasonable" control over his or her courtroom. However, a finding that it is reasonable to order the removal of the niqab, effectively denies all access to our justice system to any woman who believes it is required by her religious beliefs. This plainly contravenes the Michigan Constitution which states; "The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his [or her] religious belief."¹ It would also have the effect of deterring persons from admitting to being witnesses or otherwise participating in any part of the judicial process.

Finally, the Commission notes that the belief that observing a witnesses facial expression and demeanor will provide a fact finder with the ability to "read" the witness is based upon the faulty assumption that all persons react to similar situations in similar ways. Like spoken language, our body language is a function of the culture we are exposed to and the ability to read in one language does not automatically create the ability to read others. The Commission encourages the court to recognize the enormous cultural diversity present in the State of Michigan and thus appearing in our judicial system. We hope Michigan courts will seize this opportunity and pursue further training for judicial fact finders and staff in the areas of religious accommodation, disability and particularly cultural competency. It is through recognizing and respecting our differences that all in Michigan can build upon our common goals, in this instance no less a goal than that of justice for all.

The proposed amendment to MRE 611 has the potential to result in harm which will work to alienate individuals not only on the basis of religion, as in the case that prompted the proposed amendment, but also on the basis of disability, cultural norms, and/or the visual impairment of the fact finder. The Michigan Civil Rights Commission urges that the proposed amendment of MRE 611 in its current form be rejected. It further urges that should there be any amendment to MRE 611, it specifically include a finding that it is never reasonable to order removal of a niqab, burqa or other religious face covering for the sole purpose of assessing a witnesses credibility -- and where removal is necessary for identification purposes it be done in the least intrusive way possible.

Respectfully submitted,

Michigan Civil Rights Commission
Matthew Wesaw, Chair

¹ Mich. Const. Art. 1, Sec. 4.