

**MICHIGAN DOMESTIC AND SEXUAL VIOLENCE
PREVENTION AND TREATMENT BOARD
MEETING MINUTES
October 1, 2021**

***** Approved *****

Members Present:

F/Lt. Yvonne Brantley
Hon. Thomas Cameron, acting Chair
Hon. (retired) Elizabeth Pollard Hines - conference line (per MCL 15.263 and 15.263a)
Hon. Melissa Lopez Pope - conference line (per MCL 15.263 and 15.263a)
Matt Wiese - conference line (per MCL 15.263 and 15.263a)

Members Absent with Notice:

Dr. NiCole Buchanan
Hon. Amy Ronayne Krause, Chair

Staff Present:

Jess Averill
Michael Bobbitt, Board Secretary
Debi Cain, Executive Director
Gail Krieger
Angela Povilaitis
Lore Rogers

WELCOME AND INTRODUCTIONS

T. Cameron convened the October 1, 2021 Michigan Domestic and Sexual Violence Prevention and Treatment Board meeting at the DHHS Grand Tower Building, Dempsey Room, First Floor in Lansing, Michigan at 1:42 p.m.

BOARD CONSENT

Review of October 1, 2021 agenda and approval of September 2010, 2021 meeting minutes.

MOTION: Moved by Y. Brantley to approve the October 1, 2021 agenda. Motion seconded by L. Hines. Motion carried.

MOTION: Moved by Y. Brantley to approve the September 10, 2021 meeting minutes. Motion seconded by L. Hines. Motion carried.

CHAIR'S REPORT

No Chair's report.

EXECUTIVE DIRECTOR'S REPORT – GENERAL OVERVIEW OF WORK TO DATE

D. Cain asked Board members to review and let staff know if there are any conflicts with the proposed 2022

Board meeting dates.

D. Cain said a portion of funding for such programs as child advocacy centers and sexual assault nurse examiners depends on offenders' fines and fees, which have recently been declining. The fees were so low last year the Division of Victim Services was unable to fund the child advocacy centers. Fortunately, enough money was available from other funding sources to help supplement the child advocacy centers.

D. Cain provided an overview of four boards and commissions housed within the Division of Victim Services (DVS); the Michigan Domestic and Sexual Violence Prevention and Treatment Board, the Crime Victim Services Commission, the Human Trafficking Health Advisory Board, and the Sexual Assault Evidence Kit Tracking and Reporting Commission. Cain explained that DVS administers funding from over 20 sources, the majority of which are federal funding. There are also over 400 interagency contracts funding over 200 organizations, the majority of which are private nonprofits.

LEGISLATIVE REVIEW

A. Povilaitis discussed draft bail reform bills 1 through 8. Different versions of these bills were introduced in past sessions (as HB 4351-4360 in 2019 and as HB 6455-6463 in 2018), and those versions have been discussed in previous Board memos. This package of bills substantially alters the bail/bond system in Michigan and would change the process by which judges are bound to set bail and bond. When reviewing the draft bills, staff have focused on the impact these changes would have on crimes involving domestic violence, sexual assault, other assaultive crimes, and serious misdemeanors. A few bills are tie barred meaning the bills they are tie-barred to would also have to pass for the laws to be enacted.

Draft 1 alters two chapters of the Code of Criminal Procedure, Chapters 1 and 8. Chapter 1 provides new definitions for "abscond", "nonappearance", and "without unnecessary delay". Chapter 8 amends the speedy trial section, requiring that a defendant be tried not more than 18 months after arrest or issuance of a ticket, but allows for tolling of the 18-month requirement under certain circumstances. Expanding the current tolling process to include a delay to accommodate a request for a victim could provide protection for victims. Staff anticipates limited impact on victims of sexual assault, domestic violence or stalking from this bill.

MOTION: Moved by Y. Brantley to be neutral on draft 1 of the bail reform bill package. Motion seconded by T. Cameron. Motion carried.

Povilaitis shared information about Draft 2 of the bail reform bill package, which amends Chapter 5, Section 6b & 6f of the Code of Criminal Procedure (MCL 760.1 to 777.69). Section 6b amends the process by which a judge may impose additional conditions beyond the standard conditions listed in section 6, including conditions reasonably necessary for the protection of one or more persons. Often these conditions can include electronic monitoring or GPS tether and/or non-contact provisions. In this draft, before a judge can impose a special condition, they must hold a hearing into whether a defendant can pay for those special conditions. Draft 2 limits the issuance of electronic monitoring devices to only those defendants charged with domestic violence, an assaultive crime, a listed SORA offense, or if a defendant who poses an articulable risk of personal harm to another person or poses a significant identifiable flight risk. The bill limits which court orders would go into LEIN. This draft also amends the procedure in which a defendant would be entitled to have a review hearing of their bond and states that a defendant's statements made at this hearing can only be used for impeachment purposes. Section 6f outlines a new procedure in which a review hearing of a prior pretrial release decision can be reviewed after 48 hours.

Staff expressed the following concerns with Draft 2:

- Domestic violence, stalking, and sexual assault crimes are included in the crimes where a GPS monitoring device may be ordered, and those crimes are exempt from the 60-day review requirement and presumption.
- Requires the court in all cases to conduct an inquiry into the defendant's ability to pay for a special condition, including a GPS tether, but does not address what courts must do when a defendant cannot pay but a monitoring device might be warranted to provide a victim with peace of mind or protection.
- Establishes a new bond review hearing process with shorter timelines that could result in victim uncertainty about their offender's incarceration.

Board members recommended that statements made by an offender at the bond review hearing that did not pertain to their financial ability to pay should be admissible at later hearings or trial for any proper evidentiary purpose, not just for impeachment. Board suggested that the language could be changed to "only statements made pertaining to or about financial ability or ability to pay are inadmissible or only used for impeachment purposes."

Board members noted that GPS monitoring devices are a less restrictive tool but can provide a false sense of security because they do not prohibit unwanted contact or actions or keep victims safe and in no way provide the same sense of security to a victim as when an offender is incarcerated. An intimate partner offender who presents significant lethality risk likely will not be deterred by wearing a tether and a tether in that case would not protect an individual or the public. Board also has concerns around effective monitoring and notification of GPS tether violations (both to issuing court and victims), as people routinely cut them off/violate them.

Board expressed concern related to the requirement that courts conduct an inquiry into a defendant's financial ability to pay prior to issuance of GPS tether and noted that the bill does not address what a court may do where a defendant cannot pay and yet a monitoring device is warranted to protect a victim and provide a victim with peace of mind.

The Board expressed concern with the new bond review hearing process where a hearing is held within 48 hours of the initial bail decision. This could result in uncertainty for victims if an offender is initially ordered held on bond but within 48 hours could have that bond decision overturned or reduced, especially for those who are making decisions to enhance their safety during the window of opportunity presented while their offender is incarcerated. The Board also raised concerns as to whether prosecutors could adequately staff this additional hearing, especially since currently most prosecutors do not appear at the initial arraignment. A new and shortened bond review hearing within 48 hours of the initial bail decision presents uncertainty for victims.

Board members also suggested replacing "*and* 750.411h" with "*or* 750.411i" so that section (11)(iii) reads:

(iii) A violation of section 110a, 136b, 234a, 234b, 234c, 349b, or 411h of the Michigan penal code, 1931 PA 328, MCL 750.110a, 750.136b, 750.234a, 750.234b, 750.234c, 750.349b, or 750.411i, or any other felony which involves a violent act or threat of a violent act against any other person.

MOTION: Moved by M. Wiese to oppose draft 2 of the jail reform bill package, and that board concerns and suggestions regarding draft 2 be expressed to the bill's sponsor by staff. Motion seconded by T. Cameron. Motion carried.

Povilaitis summarized Draft 3, which amends Ch. 5, Section 6, 6a and 6g of the Code of Criminal Procedure. This bill creates a major change to how bond is set. It creates a presumption that a personal recognizance bond be set unless the court finds two factors exist: (1) that the defendant poses an articulable and substantiated risk of nonappearance or absconding or that there is an "articulable" risk that the defendant will cause personal harm to another reasonably identifiable person, the community at large, or themselves; and (2) that there is no combination of non-monetary conditions for release that would address that risk. In addition to finding these two factors, the defendant must also be charged with one of these crimes: assaultive crimes, SORA listed offense, serious misdemeanors, OUIL offenses or a felony punishable by imprisonment for 5 or more years. Povilaitis explained that a personal recognizance bond is a bond where no cash is required to be posted in order for a defendant to be released from custody.

This bill discusses standard conditions ordered when releasing an offender on bond in every case. Staff wondered why a no contact provision is identified as a special condition and not as a standard condition in this draft. This draft also discusses the financial disclosure form that each offender would have to submit.

Currently judges and magistrates have broad discretion when setting bond. Guided by existing court rules and statutes, judges and magistrate may consider the unique facts of each case when determining an appropriate type of bond or amount. The new procedure outlined in Draft 3 could negatively impact victims of sexual assault, domestic violence, and stalking or other crimes as there could still be a situation where their offender is released on the presumptive personal recognizance bond should the court determine that it is unable to find the first two factors required and discussed above, including that it may be difficult to prove an articulable risk.

Board expressed concerns that this change could negatively impact victims of sexual assault, domestic violence, and stalking. The current court rule provides a framework that allows for both judicial discretion and guidance in setting a case appropriate bond.

Board members suggested adding back to the standard conditions of release that a defendant is prohibited from leaving the state without the express permission of the court. This is a current standard condition of release and the Board saw no reason to delete it as it is an important condition, especially in stalking cases where a court (and victim) want to know where a defendant is.

Board members expressed concern that judges and magistrates could only consider community ties, employment history and residence history in order to support an offender's release and mitigate other risk factors. The Board recommends that a lack of these factors should be considered when deciding an appropriate bond, especially when a defendant lacks a permanent, stable residence or lacks employment, both of which can be lethality factors in domestic violence cases.

Board members recommended adding language under (3)(f) that would include "law enforcement" and "including but not limited to" the list of persons a court can receive any other relevant information provided by when making a bond decision. Police are more likely to be at an arraignment than a prosecutor. Judges can only make informed decisions when they have all the relevant information and others, including law enforcement, may have relevant, helpful information.

Board members again recommended that statements made by an offender at the bond review hearing that did not pertain to their financial ability to pay should be admissible at later hearings or trial for any proper evidentiary purpose, not just for impeachment. Board suggested that the language could be changed to “only statements made pertaining to or about financial ability or ability to pay are inadmissible or only used for impeachment purposes.”

Board members noted a problem with the definition of “substantiated”. The bill would require judges to hold a hearing with hearsay testimony as long as the witness/testimony is reliable. The Board questioned how a court will determine reliability: if testimony comes from a complete stranger, how could they ever be reliable? The Board noted that courts currently may revoke an offender’s probation or parole on hearsay testimony but under this bill, a court could not set a bond using the same testimony, unless it’s found to be reliable. The Board suggested possible language: “hearsay testimony that the defendant has a willful intent to abscond”.

MOTION: Moved by M. Pope to oppose draft 3 of the bail reform bill package and that board concerns and suggestions regarding draft 3 be expressed to the bill’s sponsor by staff. Motion seconded by L. Hines. Motion carried.

Draft 4 addresses the release of misdemeanor offenders, by requiring that when a magistrate is unavailable to arraign a misdemeanor offender, an arrestee must be released on his or her own recognizance or on an unsecured appearance bond. Draft 4 changes the amount that an individual might be able to post in order to be released without seeing a magistrate. The bill continues to exempt individuals arrested for misdemeanor and aggravated domestic violence from release on interim bond or personal recognizance citing to Section 2a (MCL 780.582a). Domestic violence offenders must appear before a judge or a magistrate and cannot be released quickly on an interim bond.

Other domestic related misdemeanor offenses, such as malicious destruction of property or interfering with a crime report, would not be exempt from the interim bond statute. While these offenses are currently eligible for an interim bond under the current statute, the amount an arrestee would be required to post as an interim bond is currently more and would be substantially reduced under the changes outlined in Draft 4.

Board members recommended including the domestic violence related misdemeanor offenses of stalking, malicious destruction of property, malicious use of writing and interfering with a crime report in draft 4.

MOTION: Moved by L. Hines to oppose draft 4 of the bail reform bill package but move to a neutral position if the sponsors of the bill will exempt out other domestic violence related offense and that board concerns and suggestions regarding draft 4 be expressed to the bill’s sponsor by staff. Motion seconded by Y. Brantley. Motion carried.

Draft 5 repeals MCL 780.61 through 780.734, which outline the current procedures for bail for traffic offenses or misdemeanors. The sponsor indicates this section is no longer needed as the earlier drafts, specifically Drafts 3 and Draft 6, outline the new misdemeanor bail procedure. This bill is tie-barred to Drafts 3 and Draft 6 and would only become law if Drafts 3 and 6 also passed and were signed into law.

MOTION: Moved by Y. Brantley to take no position on draft 5 of the bail reform bill package. Motion seconded by T. Cameron. Motion carried.

Draft 6 repeals MCL 257.311a and eliminates the driver's license surrender requirement for misdemeanor and ordinance violations. This bill is tie-barred to Drafts 3 and Draft 5. This bill may assist survivors who would have their driver's license surrendered for misdemeanor or ordinance violations.

MOTION: Moved by Y. Brantley to support draft 6 of the bail reform bill package. Motion seconded by T. Cameron. Motion carried.

Draft 7 amends the Michigan Penal Code, MCL 750.165, by requiring that defendants arrested for friend of the court felony non-support crimes have a bond set after arrest in the same manner outlined in the earlier draft bills in Section 6. This would create the presumption of a personal recognizance bond in almost all these types of cases. Currently FOC defendants, whose charges stem from a failure to pay child support and often have significant arrears, are currently required to post a cash bond, either \$500 or 25% of the arrearage, whichever is higher, upon arrest. If they remain in custody, the court shall order a cash bond to be continued at not less than \$500 or 25% of the arrearage and the court has the discretion to set the bond at an amount not more than 100% of the arrearage. The current practice of requiring the posting of a bond either equal to or a percentage of the arrears becomes an often-effective way to recover much needed unpaid child support money from those arrestees who have the resources yet chose to not pay child support. Many offenders also have a history of intimate partner violence.

The Board discussed and noted that Draft 7 would dramatically change the way bail is set in felony child support cases. Most arrests would be eligible for release on their own personal recognizance under the presumption outlined in Section 6 of Draft 3. The posting of a bond equal to a percentage or the entire arrears is an effective tool to force an otherwise able but unwilling, non-paying parent to pay child support. Intimate partner survivors with child support owed to them could be negatively impacted because draft 7 would make it easier for offenders to avoid paying child support.

MOTION: Moved by Y. Brantley to oppose draft 7 of the bail reform bill package and that board concerns and suggestions regarding draft 7 be expressed to the bill's sponsor by staff. Motion seconded by T. Cameron. Motion carried.

Draft 8 amends Chapter V of the Code of Criminal Procedure to create a new Section, Section 6f, that deals with actuarial risk assessment instruments for pretrial release decision making. The goal of these types of instruments is to assist judges and magistrates in assessing risk when making bond and release decisions. A county or court may request approval for use of a risk assessment instrument from SCAO (the State Court Administrative Office). SCAO may also approve a risk assessment instrument for statewide use. Before approving the instrument for use either statewide or locally, SCAO shall consult with relevant stakeholders, including the Michigan Domestic and Sexual Violence Prevention and Treatment Board, the Coalition to End Domestic and Sexual Violence, judges, prosecutors, defense attorneys, law enforcement agencies and other relevant organizations.

Board members have expressed concerns related to the use of actuarial risk assessment tools, noting they have been found to be racially biased. Concerns surrounding their validity when analyzing intimate partner risk factors have also been noted. Board members stated that they are not reliable tools in identifying lethality and harm risk in intimate partner violence cases. There is also concern that without statewide uniformity, there could be different tools used by different courts. The Board appreciates that they and other stakeholders would be consulted before the implementation of these tools, however the Board notes there should be stronger language included should a stakeholder object to the use of these tools.

MOTION: Moved by L. Hines to oppose draft 8 of the jail reform bill package and that board concerns and suggestions regarding draft 8 be expressed to the bill's sponsor by staff. Motion seconded by Y. Brantley. Motion carried.

L. Rogers presented the staff analysis and the suggested position regarding the Michigan Supreme Court's adoption of amendments to court rules MCR 2.407 and 6.006 that require courts to use remote participation technology (video or telephone conferencing) to the greatest extent possible in civil and criminal proceedings. Making virtual proceedings presumptively preferred will compromise victim/survivor privacy. There are concerns that virtual proceedings also jeopardize victims' ability and willingness to participate in criminal or civil proceedings. Virtual proceedings can adversely affect how fact finders determine the credibility of the people appearing via video. Current online platforms, such as using Zoom in conjunction with YouTube, do not appear to have functions that can make online proceedings safe and private for victims/survivors.

The amendments made to the Michigan Court Rules by the Michigan Supreme Court also create an ambiguity about whether courts can or must still apply the factors recited in MCR 2.407(C). Further the amendments address only a party's constitutional rights, and not a crime victim's rights under the Michigan's Constitution. Rogers presented possible alternative court rules for the Board to consider suggesting to Michigan Supreme Court. Board members asked if the memo could be made into a letter from D. Cain or A. Krause explaining why the alternative court rules are being offered.

MOTION: Moved by M. Pope to oppose the amendments to the court rule as currently written, for the reasons stated in the staff analysis, and to request that courts try to obtain a safer virtual platform that will not negatively affect victims. Motion seconded by M. Wiese. Motion carried.

Board members suggested replacing "when" with "after" in the memo regarding MCR 2.407 so that it reads:

"AO No. 2012-7 is suspended. Trial courts are encouraged to use remote participation technology (videoconferencing under this rule or telephone conferencing under MCR 2.402¹) to the greatest extent possible after considering and evaluating the factors set out in subparagraph (C) of this rule."

Board members suggested changing the last sentence of Section (B) regarding MCR 6.006 to make it clear that the court may permit remote testimony at preliminary examinations even over objection if the court determines it should be allowed after complying with the requirements of those two sections.

The Board recommended modifying the last sentence of Section (B) of the memo to read:

"(B) Defendant in the Courtroom - Preliminary Examinations. As long as the defendant is either present in the courtroom or has waived the right to be present, on motion of either party, district courts may use *remote participation technology (videoconferencing under MCR 2.407 or telephone conferencing under MCR 2.402)* to take testimony from an expert witness or, *in the absence of objection by defendant or prosecutor*, any person at another location in a preliminary examination. *The court may permit remote testimony at preliminary examinations over objection, if the court determines it should be allowed after complying with the requirements set forth in 2.407(C) and (G).*"

Board members said it is important for people to have access to the courtroom, but it is easy to misuse

permanent recordings of virtual court hearings that are available to anyone. L. Rogers suggested adding language at the end of Section (6) that says:

“The court shall not make a recording of proceedings available to the public on any website after the proceedings have ended.”

MOTION: Moved by Y. Brantley to approve the alternative court rule including the changes suggested by the Board members. Motion seconded by L. Hines. Motion carried.

MOTION: Moved by Y. Brantley to authorized D. Cain to sign and submit a letter to the Michigan Supreme Court with the comments and the proposed alternative court rule. Motion seconded by T. Cameron. Motion carried.

MOTION: Moved by Y. Brantley that Board members acknowledged that they had an opportunity to review House and Senate bills of interest to the Board’s constituency that had been introduced since the September 10, 2021 meeting. Motion seconded by T. Cameron. Motion carried.

BOARD ANNOUNCEMENTS

L. Hines thanked staff for their work, and thanked T. Cameron for chairing today’s meeting.

PUBLIC COMMENT

Elinor Jordan from the Michigan Coalition to End Domestic and Sexual Violence thanked Board members and staff for the great work they do.

ADJOURNMENT

MOTION: Moved by Y. Brantley to adjourn the meeting. Motion seconded by T. Cameron. Motion carried. The meeting ended at 4:10 p.m.

Respectfully submitted by
Michael Bobbitt
Board Secretary