

# News & Views



## 2010-2011 OFFICERS

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## Events

### Council Meeting

The Council is on summer break. Monthly meetings will resume after the Annual Meeting.

### Biennial Criminal Law Section Policy Conference

June 17-19, 2011

Grand Hotel - Mackinac Island

Michigan citizens voiced their support for medical marijuana when they overwhelmingly voted in favor of the Michigan Medical Marihuana Act. But, is it too vague? Is it poorly written? Or are those merely excuses to undermine the law? Conference participants will collaborate with professionals to address these issues and draft a proposal to guide future action.

The Grand Hotel room reservation and conference pre-registration form is included in this newsletter. Rooms are still available despite the cut off date. Mission Point Resort, where children under eighteen stay free and children under twelve eat free, is offering rooms for \$199/night. **The Murray Hotel is now offering rooms for \$119.25 (Friday) and \$159 (Saturday).** Other accommodations can be found at [www.mackinac.com](http://www.mackinac.com).

Arnold Lines will provide discounted ferry service, free parking and valet service in both Mackinaw City and St. Ignace. Reduced ticket prices are \$18 for adults, and \$9 for children. To receive reduced ticket price, mention the Criminal Law Section.

For questions, contact Charles Marr: [marrlaw@msn.com](mailto:marrlaw@msn.com) or 248-596-1599.

### Annual Meeting & Program

September 16, 2011

Hyatt Regency - Dearborn

Save the date! The Criminal Law Section's annual program will discuss issues related to the new SORA. More information will be posted in future newsletters.

## Mackinac Policy Conference Details

The following professionals will help us address issues related to Michigan's Medical Marijuana Act:

**Arthur Cotter**

Berrien County Prosecutor, St. Joseph, Michigan

**Warren Edson**

Attorney, Edson, Maytin & Matz, Denver, Colorado

**Stephen Postema**

City Attorney, Ann Arbor, Michigan

**Jesse Williams**

Attorney, Amberg, Amberg & Williams North, Traverse City, Michigan

**Charles Marr**, Moderator

The conference agenda is as follows:

**Friday, June 17, 2011:**

4 pm – 7 pm	Registration	<i>Grand Hotel - Garden Terrace</i>
7 pm	Dinner*	<i>Grand Hotel - Dining Room</i>
9:30 pm – 10:30 pm	Welcome Reception	<i>Grand Hotel – Milliken Suite</i>

**Saturday, June 18, 2011:**

7:30 am	Breakfast*	<i>Grand Hotel - Dining Room</i>
9 am – 12:30 pm	<b>Opening Session “Michigan Medical Marijuana Act”</b>	<i>Grand Hotel - Theatre</i>
12:30 pm – 2:30 pm	Lunch on your own	
2:30 pm – 6 pm	<b>Afternoon Session “Michigan Medical Marijuana Act”</b>	<i>Grand Hotel - Theatre</i>
6 pm – 7 pm	Criminal Law Section Reception	<i>Grand Hotel - West Front Porch</i>
7 pm	Dinner*	<i>Grand Hotel - Dining Room</i>

**Sunday, June 19, 2011**

7:30 am	Breakfast*	<i>Grand Hotel - Dining Room</i>
9 am	Remarks by Hon. Dennis Kolenda Complimentary distribution of <i>Potentially Dispositive Pre-Trial Motions</i> by Judge Kolenda (2011 Edition)	<i>Grand Hotel - Theatre</i>
9:30 am - 12 pm	<b>Closing Session Final vote on conference resolutions</b>	<i>Grand Hotel - Theatre</i>

\*meals provided only for guests of the Grand Hotel

# State Bar of Michigan - Criminal Law Section

ARRIVE: Friday, June 17, 2011 DEPART: Sunday, June 19, 2011

ACCOMMODATIONS MAY BE AVAILABLE PRIOR TO AND FOLLOWING THE ABOVE DATES

**Return this form by: Tuesday, May 17, 2011**

To: Reservations Department  
 Grand Hotel  
 PO Box 286  
 Mackinac Island, Michigan 49757  
 Telephone: (906) 847-3331  
 Fax: (906) 847-0945



MR. \_\_\_\_\_  
 MS. \_\_\_\_\_  
 MR. AND MRS. \_\_\_\_\_  
(circle one) (please print or type)

Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_ Cell Phone (\_\_\_\_) \_\_\_\_\_

If sharing a room, name(s) of person(s) sharing with you: \_\_\_\_\_ Business Telephone (\_\_\_\_) \_\_\_\_\_

E-mail \_\_\_\_\_

Grand Hotel offers a variety of room types for conference attendees. Guests sometimes ask to arrive earlier or remain later than the conference's official dates. We welcome your request for a specific room, room type, or room dates either prior to or following the conference. While your request will receive careful attention, please understand that it cannot be guaranteed.

ARRIVAL DATE: \_\_\_\_\_ DEPARTURE DATE: \_\_\_\_\_

**PLEASE RESERVE THE FOLLOWING ACCOMMODATIONS:**

	DOUBLE Daily, Per Person, Based on Double Occupancy	SINGLE Daily
CATEGORY I - Smaller, interior-view rooms	_____ \$199.00	_____ \$323.00
CATEGORY II - Larger, interior-view and smaller, lake-view rooms	_____ \$239.00	_____ \$403.00
CATEGORY III - Special, deluxe lake-view guest rooms, some with balcony	_____ \$304.00	_____ \$533.00

Grand Hotel operates on the **Modified American Plan**. This means that your daily rate *includes* breakfast and dinner. In addition to our Grand Luncheon Buffet, other facilities are available at Grand Hotel for lunch.

**RESERVATIONS FOR ADDITIONAL PERSONS**

\_\_\_\_\_ 4 years of age and under, no charge  
 \_\_\_\_\_ 5 through 11 years of age, no charge  
 \_\_\_\_\_ 12 through 17 years of age, \$55.00 daily, per person  
 \_\_\_\_\_ 18 years of age and over, \$130.00 daily, per person

For an adult staying in a guest room with one or more children, the adult will pay the single convention rate, the children will be at the appropriate children's rates listed above. For two or more children staying in a guest room without an adult, the oldest child will be charged the single convention rate based on the category of room they are in and the remaining children will be at the additional persons rates listed above.

**PLEASE NOTE THAT A LIMITED NUMBER OF ROOMS ARE AVAILABLE FOR EACH RATE CATEGORY. IF THE RATE REQUESTED IS NOT AVAILABLE, THE CLOSEST AVAILABLE RATE WILL BE CONFIRMED.**

**NO TIPPING:** Tipping to any employee anywhere within Grand Hotel is not required, expected or permitted. Tipping is suggested at the following offsite restaurant locations: The Jockey Club at the Grand Stand, Woods, The Gate House and Fort Mackinac Tea Room.

**NOTE:** Michigan 6% Sales Tax applies to all charges, including a 19.5% added charge on the per person daily room rate. There is also a 2% Mackinac Island Assessment charge on the per person daily room rate. There is a one-time charge of \$7.50 per person for transfer of luggage from the dock to the Hotel and return. Taxi transportation to and from the boat docks and the Hotel is not included in the daily rate.

The block of rooms being held for this meeting is based on estimated attendance. Please make your reservation as promptly as possible. Requests received after the block is filled will be contacted and given an option of being placed on a waitlist. The waitlist is not a guarantee of a room. All rooms in the block which have not been reserved 30 days in advance of the meeting will be released for other guests. Individual group reservations are subject to a 10-day cancellation policy. Reservation deposits will be refunded if cancelled 10 or more days prior to arrival, less a \$40.00 processing fee. Reservations cancelled less than 10 days prior will forfeit the room deposit.

Once a guest confirms a departure date upon check-in, should check-out occur earlier than agreed, there will be a \$375.00 charge.

**DEPOSIT POLICY:** A deposit of either one night's stay or the full stays room charge must accompany this form in order to hold your room.

METHOD OF DEPOSIT:  Visa  MasterCard  Discover  AMEX  Check

Please charge one full night rate to my credit card  Please charge my full stay to my credit card

CREDIT CARD NUMBER: \_\_\_\_\_ EXPIRATION DATE: \_\_\_\_\_

SIGNATURE: \_\_\_\_\_ (Not valid without signature)

Grand Hotel accepts VISA, MasterCard, Discover, American Express, Diners Club, personal checks, and cash payments for bills.

**CHECK-IN TIME:** After 4:00 p.m. **CHECK-OUT TIME:** Before 11:00 a.m.

Visit our Web site at <http://www.grandhotel.com>

**Your hotel confirmation will be arriving to you via e-mail. Please check your confirmation to make sure it is correct and print it for your records. Please contact us with any questions or changes.**

**In accordance with Michigan law, all Grand Hotel guest rooms, meeting rooms, restaurants and bars are non-smoking.**

*Editor's Note:* This article is the second installment of a two-part series. The opening article appeared in last month's newsletter.

## **The 2011 Michigan Sex Offender Registry Amendments First Step Toward Reform**

by

**Cheryl A. Carpenter\***

### **How to Keep Your Client off SOR**

There are a handful of ways for defense counsel to shield their client from SOR:

1. Holmes Youthful Trainee Act (HYTA)
  - young offenders between ages of 17-20 will remain off registry if they successfully complete their probation and are discharged pursuant to HYTA
  - HYTA is not a listed offense for SORA purpose
  - Only applies to defendants who received HYTA after 10/1/04. Those who received HYTA prior to 10/1/04 are considered to have a conviction for SORA purposes and are required to register. MCL 28.722(b)(ii)(A)
  - defendants can receive HYTA for the following offenses:
    - a) 750.520d(1)(a) - CSC 3 - victim 13-15
    - b) 750.520e(1)(a) - CSC 4 - victim 13-15 and defendant not more than 5 yrs older
    - c) 750.520g - Assault with intent one of the above
    - d) any other listed offense unless it carries life imprisonment or is CSC 1, 2, or any other CSC 3 or 4 other than listed above
2. Prove consent in Romeo and Juliet cases in a hearing before sentencing
  - applies to cases pending on or after 7/1/11
  - HYTA is not required so the sentencing judge has more options in sentencing
  - see below section for detailed description of procedure
3. Constitutional challenges for cruel or unusual punishment for HYTA defendants
  - see *People v Dipiazza*, 286 Mich App 137 (2009)
4. Consent calendar for juvenile offenders between the ages of 14-16 with tier III offense
  - consent calendar is only necessary for juveniles in this category because all others will not have conviction for SORA purposes
5. Set aside for juvenile adjudications
  - see previous section
6. Petitions for reduction in registration length for tier I or III offenders
  - see below section

### **New Petitioning Procedures for Removal or Reduction of Registration on SOR**

Effective 7/1/11, there are four distinct opportunities for petitioning for removal or reduction of time on SOR:

- A. Removal in consensual cases (Romeo and Juliet).
- B. Reduction in length of registration for Tier I and III offenses.
- C. Removal of some juvenile adjudications.
- D. Removal for individuals convicted of offenses no longer considered listed offenses.

### **A. Consensual case petitions (Romeo and Juliet)**

This section applies to cases that have been sentenced prior to 7/1/11. This gives broader relief for removal from SOR than old law which required that the defendant be sentenced pursuant to HYTA. HYTA is no longer a required element for petitioning. In addition, old Romeo and Juliet petitions reduced registration from 25 to 10 years. New law allows for immediate removal. Consent is the essential element of this petition along with the ages of the parties. Any tier can petition for immediate removal under this section.

MCL 28.728c(14) states:

The court shall grant a petition by an individual if the court determines the listed offense was the result of a **consensual** sexual act and ANY of the following apply:

(A) ALL of the following:

- (i) The victim was 13 or older but less than 16 years old at the time of the offense.
- (ii) The petitioner is not more than 4 years older than the victim.

(B) ALL of the following:

- (i) Petitioner was convicted of
  - Crime against nature or sodomy against victim under 18 (MCL 750.158) or
  - Gross Indecency victim 13-17 years old (MCL 750.338, 750.338a, or 338b).
- (ii) Victim was 13 or older but less than 16 years old at the time of offense.
- (iii) Petitioner is not more than 4 years older than the victim.

(C) ALL of the following:

- (i) Petitioner was convicted of
  - Crime against nature or sodomy against victim under 18 (MCL 750.158) or
  - Gross Indecency victim 13-17 years old (MCL 750.338, 750.338a, or 338b) or
  - CSC 2<sup>nd</sup> and “that other person is under the jurisdiction of the department of corrections and the actor is an employee or a contractual employee of, or a volunteer with, the department of corrections who knows that the other person is under the jurisdiction of the department of corrections.” (MCL 750.520c(1)(i)).
- (ii) Victim was 16 years or older at the time of the offense.
- (ii) Victim was not under the custodial authority of the petitioner at the time of the offense.

### **B. Petitions for Reduction in Registration Length for tier I or III only**

Tier I offenders can petition after 10 years for removal from the registry if they can prove certain criteria as explained below. MCL 28.728c(1). Tier III offenders who were juveniles at the time of their offense can petition after 25 years for removal if they can prove certain criteria as explained below. Adult defendants have no relief. MCL 28.728c(2). Tier II offenders have no relief for reduction of their 25 year registration period.

#### **Court Uses These Factors for both Tier I and III reductions in registration length**

The following is applicable for both tier I and III petitions for reductions in registration. There are additional criteria that must be proven for tier I and III reductions which are described below.

MCL 28.728c(11) states that the court shall consider ALL of the following in determining whether or not to allow the discontinuation of registration but shall NOT grant the petition if the court determines that the individual is a continuing threat to the public:

- The individual’s age and level of maturity at the time of the offense.
- The victim’s age and level of maturity at the time of the offense.
- The nature of the offense.

- The severity of the offense.
- The individual's prior juvenile or criminal history.
- The individual's likelihood to commit further listed offenses.
- Any impact statement submitted by the victim.
- Any other information considered relevant by the court. This should include letters of support by family, friends and others in the community who know the petitioner.

### **Tier I Petition for Reduction of Registration from 15 to 10 years**

MCL 28.728c(12) states the court may grant a petition under Tier I if ALL of the following apply:

- (a) Ten or more years have elapsed from the date of conviction or from release from any period of confinement.
- (b) The petitioner has not been convicted of any felony since the date of conviction or release from confinement.
- (c) The petitioner has not been convicted of any listed offense since the date of conviction or release from confinement.
- (d) The petitioner completed their sentence or assignment without revocation.
- (e) The petitioner successfully completed an appropriate sex offender treatment program certified by the US Attorney General or another appropriate SO treatment program. The court may waive this requirement if successful completion was not a condition of petitioner's sentence.

### **Tier III Petition for Reduction of Registration from Lifetime to 25 years**

MCL 28.728c(13) states the court may grant a petition under Tier III if ALL of the following apply:

- (a) The petitioner was adjudicated as a juvenile and required to register.
- (b) 25 or more years have elapsed since the date of adjudication or release from any period of confinement.
- (c) The petitioner has not been convicted of any felony since the date of conviction or release from confinement.
- (d) The petitioner has not been convicted of any listed offense since the date of conviction or release from confinement.
- (e) The petitioner completed their sentence or assignment without revocation.
- (f) The petitioner successfully completed an appropriate sex offender treatment program certified by the US Attorney General or another appropriate SO treatment program. The court may waive this requirement if successful completion was not a condition of petitioner's sentence.

### **C. Juvenile Adjudication Removals**

Juveniles aged 13 or younger at the time of their offense will be removed from the registry if they were adjudicated as a juvenile. MCL 28.728c(15)(a). It cannot have been a designated case. See above section entitled Juveniles under age of 14 will be removed from registry for a discussion on whether this requires a petition and court order or if it will be an automatic removal by MSP.

Juveniles aged 14-16 who were adjudicated of tier I or II offenses as a juvenile (not designated as adult case) are not required to register since these offenses are not considered convictions for SOR purposes. MCL 28.722(B)(ii)(b). Petitions for removals for these juveniles are filed pursuant to MCL 28.728c(15)(b)

#### **D. Removals Due to Offenses Taken Out of SORA**

If an individual was registered under this act before July 1, 2011 for an offense that required registration but for which registration is no longer required on or after July 1, 2011, they can petition for removal from SOR. MCL 28.728c(15)(b). These offenses required three convictions to trigger registration. They were commonly known as the “peeing in public” offender. Offenses that were previously required to register but required anymore are:

1. Disorderly Person/Indecent or Obscene Conduct; MCL 750.167(1)(f).
2. Indecent Exposure; MCL 750.335a(2)(a).

#### **Pending or New Cases on or after July 1, 2011 - Pre-sentence Hearing to Determine if Defendant Required to Register - Romeo and Juliet Consent Exemption Under MCL 28.723a**

Under old law, Romeo and Juliet offenders could only avoid SOR if they received HYTA (as adults) or were placed on the consent calendar (juveniles). The new law still exempts HYTA defendants and juveniles on consent calendar from SOR, but it goes one step further. Starting July 1, 2011, individuals can avoid SOR even if they do not receive HYTA or consent calendar if the sentencing court finds the offense was consensual. Also required is a specific age group for victims and defendants. Consent is the essential element in these cases. Below are the steps a court must take when making the determination whether a person charged in a Romeo and Juliet case has to register.

A hearing does not have to be held if the prosecuting attorney agrees the following factors apply. If the prosecuting attorney disputes the below factors, a hearing shall be held. The prosecutor’s dispute will mainly revolve around the issue of consent. However, the age of the complainant at the time of the offense or the age difference between the parties may be in dispute.

The Romeo and Juliet exception for SORA on cases pending or after July 1, 2011 section only applies to the following offenses and the elements below the offenses **must be proven by the defense** at the hearing in order to keep defendant off SOR:

- 750.158 Sodomy against a minor  
 Defendant must prove either of the following::
- a) victim consented
  - b) 13 up to the age of 16
  - c) no more than 4 years age difference between parties.
- OR
- a) victim consented
  - b) victim was 17 or older and was not under custodial authority of the individual.

- 750.338, 750.338a or 750.338b Gross indecency, victim 13 up to the age of 18
- a) victim consented
  - b) victim 13 up to the age of 16

c) not more than 4 years age difference.

OR

a) victim consented

b) victim 16 or 17

c) victim was not under custodial authority of the individual.

750.520b 1<sup>st</sup> Degree CSC

750.520d 3<sup>rd</sup> Degree CSC

750.520g(1) Assault w/Attempt to commit penetration,  
Defendant must prove:

a) victim consented

b) victim 13 up to the age of 16

c) less than 4 yr. age difference.

#### Important Points For Romeo and Juliet Hearings:

1. Hearing held prior to sentencing (adult) or disposition (juvenile).

A hearing must take place prior to sentencing. However, the new law is unclear whether the hearing should take place before the plea. It is important for defense counsel to have this hearing prior to the plea so the defendant can make an intelligent and voluntary decision whether to plead guilty or go to trial. This may be an issue of conflict because prosecutors may argue that this is akin to a mini-trial and should not precede a trial. However, defense should argue that SOR is a direct consequence of a conviction and a client cannot make an informed decision on whether to plead guilty or go to trial if they do not know if the conviction will require SOR. *People v. Fonville*, \_\_\_ Mich App \_\_\_, 2011 WL 222127 (No. 294554; January 25, 2011).

2. Defendant has burden of proof by preponderance of evidence.

3. Rules of evidence, except Rape Shield Act, shall not apply to these hearing.

4. Victim does not have to attend hearing and may submit letter the court can use to determine consent.

It is important for defense counsel to hold preliminary examinations in the above four types of cases in order to cross exam the complaining witness about consent. This may be the only opportunity to do so.

5. These hearings only apply to the four offenses listed above (not CSC 2 or 4).

#### **Cannot file second petition if previous petition was denied after a hearing**

A petition shall not be filed under this section if a previous petition was filed under this section and was denied by the court after a hearing. MCL 28.728c(4). This raises questions on whether a petition can be filed under the amended SORA of July 1, 2011 if a prior petition for alternate registration was filed and denied under petitioning procedures of the old law. The amendments to SORA substantially change the petitioning requirements. Consent was never an issue in prior petitions for alternate registration. In prior petitions, Defendants had to prove lack of force or coercion in addition to many other factors that have been removed for new petitions.

In addition, what is the definition of a hearing for this section? If a prior petition was filed and denied under old law and the court only allowed oral arguments, should another petition be allowed since there was not a hearing? Does hearing mean evidentiary hearing or oral arguments? It is this writer's

argument that if a prior petition was denied under the old law, a petition under this new law should be allowed.

### **Immediate Removal for Registrants who had Petitions for Alternate Registration granted prior to 7/1/11**

A plain reading of the new law supports the proposition that individuals who received HYTA and were granted petitions for alternate registration (25 to 10 years) are to be immediately removed from SOR because they no longer have a conviction for SOR purposes. Some of these individuals still have a couple of years left to register. Convicted for SOR purposes is now defined as:

Being assigned to youthful trainee status (HYTA) before 10/1/2004. This does not apply if a petition is granted at any time allowing individual to discontinue registration, including reduced registration periods that extend to or past July 1, 2011.

MCL 28.722(b)(ii)(A)

### **Registrant's Information Required on public registry**

The new SORA amendments require much more personal information from a registrant. Much of the new information will go on the private law enforcement database but some information will go on the public registry. For example, a registrant's employer's address will be placed on the public registry. Although the employer's name is on private database, the employer's address will be public. This almost guarantees that registrants will be unemployable. Internet searches such as Google will make it easy for anybody to type in an address to find who it belongs to. Employers will be very hesitant to hire a registered offender because of social pressure and backlash. It is McDonald's corporate policy not to hire sex offenders. Below is the list of information that will be on a registrant's public listing:

- Legal name, aliases, nicknames, ethnic or tribal names, or other names by which the individual is or has been known.
- Date of birth.
- Address where the individual resides or will reside. If they do not have a residential address they shall provide the location or area used or to be used in lieu of a residence or, if they are homeless the city, village or township where they spend or will spend the majority of their time.
- Address of individual's employer. Includes contractor and any individual who has agreed to hire or contract with the registrant for their services. Must include the address or location of employment if different from the address of the employer. If individual lacks a fixed employment location, the general areas where the individual works and the normal travel routes taken in the course of their employment.
- Address of any school being attended or any school the individual has been accepted to and plans to attend. This includes public or private post-secondary school or school of higher education, including a trade school. This does not apply to an individual whose enrollment and participation at an institution of higher education is solely through mail or the internet.
- Address of any school of higher education where an individual works or volunteers.
- License plate number or registration number, and description of any motor vehicle, aircraft, or vessel owned or regularly operated by the individual.
- Brief summary of convictions for listed offenses regardless of when they occurred.
- Complete physical description.
- Photograph.
- Text of the law that defines the offense for which individual is registered.
- Registration status (compliant, non-compliant or absconder).
- Tier classification (I, II or III)

### **Registrant's Information required for private law enforcement database**

- Social security number and any social security number previously used by registrant.
- Alleged dates of birth.
- Name and address of any place of temporary lodging used or to be used, during any period the individual is away or is expected to be away from their residence, for more than 7 days. Must include the dates the lodging is used or will be used.
- Name of individual's employer.
- Name of any school being attended or any school the individual has been accepted to and plans to attend.
- Name of any school of higher education where an individual works or volunteers.
- All telephone numbers registered to the individual or routinely used by the individual.
- All electronic mail addresses and instant message addresses assigned to or routinely used by the individual and ALL login names or other identifiers used by the individual when using any electronic mail address or instant messaging system.
- The location, including where it is habitually stored or kept, of any motor vehicle, aircraft or vessel owned or regularly operated by individual.
- Individual's driver's license number or state ID number.
- Digital copy of registrant's passport and other immigration documents.
- Occupational and professional licensing information for individual including any license that authorizes the registrant to engage in any occupation, profession, trade or business.
- Brief summary of convictions for listed offenses regardless of when they occurred, including where the offense occurred and the original charge if the conviction was for a lesser offense.
- Registrant's fingerprints and palm prints. If not already on file with the MSP individual must have their fingerprints and/or palm prints taken not later than September 12, 2011.
- Electronic copy of registrant's MI driver's license or ID card, including photograph.
- Any outstanding arrest warrant information.
- Whether a DNA sample has been collected and the location where sample is stored.
- Complete criminal history record including dates of all arrests and convictions.
- Michigan Department of Corrections number and status of parole, probation or supervised release.
- Registrant's FBI investigation number.

### **Recapture Provision**

This is a murky area of the new law. This provision puts individuals back on the registry who were removed early if they are convicted of ANY felony after 7/1/11. The subsequent felony does not have to be a listed sexual offense. Felony is defined as a conviction that carries imprisonment of 1 year or more. MCL 28.722(f). It is this writer's belief that this section only applies to HYTA defendants with convictions prior to 10/1/04 who had petitions granted for reduction in registration from 25 to 10 years. However, the language of the new statute is not clear as to who this recapture provision applies. It is important for defense counsel to argue that this section does not apply to juveniles whose petitions for immediate removal were granted since juvenile adjudications are not mentioned in any of the sections addressing the recapture provision. Sections of the new law that reference the recapture provision are:

Convicted means . . . being assigned HYTA . . . before 10/1/04 if the individual is convicted of any other felony on or after 7/1/11.

MCL 28.722(b)(ii)(B)

Subject to subsection (2), the following individuals who are domiciled . . . in this state . . . are required to be registered under this act . . . [a]n individual who was previously convicted of a

listed offense for which he or she was not required to register under this act, but who is convicted of any other felony on or after 7/1/11.

MCL 28.723(1)(e)

Subject to section 3, an individual convicted of a listed offense in this state after 10/1/95 and an individual who was previously convicted of a listed offense for which he or she was not required to register under this act, but who is convicted of any other felony on or after 7/1/11, shall register before sentencing, entry of order of the family division or assignment to HYTA for that listed offense or that other felony.

MCL 28.724(5)

For an individual who was previously convicted of a listed offense for which he or she was not required to register under this act, but who is convicted of any other felony on or after 7/1/11, any period of time that he or she was not incarcerated for that listed offense or that other felony and was not civilly committed counts toward satisfying the registration period for that listed offense as described in this section.

MCL 28.725(14).

### **Changes that must be made, in person, with law enforcement within 3 business days:**

#### **MCL 28.725(1)**

- Individual changes or vacates a residence.
- Individual changes place of employment, or employment is discontinued.
- Individual changes student status including enrollment and when enrollment is discontinued.
- Any changes in name
- Individual intends to temporarily reside at any place other than their residence for more than 7 days.
- Individual establishes any electronic mail or instant message address, or any other designations used in internet communications or postings.
- Individual purchases or begins to regularly operate any vehicle, and when ownership or operation of the vehicle is discontinued.

### **Notify Law Enforcement within 3 days of a move of residence to out of state**

If a registrant moves out of Michigan to a new state, they must report in person and notify law enforcement within 3 days before they change their residence to another state and, if known, indicate the new address. MCL 28.725(6)

### **Penalties for non-compliance:**

- ANY failure to change required information, within 3 business days, is a felony conviction.
  - No prior convictions for a violation: imprisonment for not more than 4 years or a fine of not more than \$2000, or both.
  - 1 prior conviction for a violation: imprisonment for not more than 7 years or a fine of not more than \$5000, or both.
  - 2 or more prior convictions for a violation: imprisonment for not more than 10 years or a fine of not more than \$10,000, or both.
- ANY failure to verify information periodically (annually, bi-annually or quarterly) is guilty of a 2 year misdemeanor (which is treated like a felony) or a fine of not more than \$2000, or both.
- An individual who willfully fails to sign a registration and notice is guilty is a misdemeanor punishable by imprisonment for not more than 93 day or a fine of not more than \$1000 , or both.

- An individual who willfully refuses or fails to pay the one time registration fee within 90 days of the day the individual first reports is guilty of a misdemeanor punishable by imprisonment for not more than 90 days.

### **Must Report Travels out of Country Greater than Seven Days**

A new requirement for sex offenders is that they must report travels to any foreign country if out of the United States for more than 7 days. MCL 28.725(7). The individual must notify law enforcement not later than 21 days before travel.

### **Homeless**

A new provision has been added to SORA to allow homeless to register "the location or area used or to be used by the individual in lieu of a residence or, if the individual is homeless, the village, city, or township where the person spends or will spend the majority of his or her time." MCL 28.727(d). This will alleviate some of the problems homeless has had in the past in fulfilling their registration requirements.

### **MSP Shall Remove Registrants within 7 days after determination they no longer need to register**

A new provision in SORA mandates that Michigan State Police remove a registrant from both the public internet website and law enforcement database within 7 days of determining that the registrant no longer is required to register. MCL 28.728(9). The time frame for removal had not been specified in the old law but it was this writer's experience that MSP always complied quickly with court orders for removals.

### **Constitutional Challenges to Information on Public Registry are specifically preserved**

It may be a foreshadowing of the numerous constitutional challenges that will be made to the vast changes in SORA, but the new law specifically states that "[i]f a court determines that the public availability . . . of any information concerning individuals registered under this act violates the constitution of the United States or this state, the department shall revise the public internet website . . . so that it does not contain that information." MCL 28.728(8)

### **Conclusion**

The above analysis of the 2011 SORA amendments is advisory only. Many of the amendments are vague and subject to judicial interpretation. This writer did her best to interpret the amendments; however, many questions remain unanswered. There will be many constitutional challenges and appellate reviews.

Prosecutors and judges are asked to remember the legislative intent behind SORA: to protect the public from dangerous individuals and prevent commission of future crimes. MCL 28.721a. Many of the 2011 amendments were enacted to give relief to juvenile and young adult offenders who are not dangerous and at low risk to re-offend. Judges have the power to remove individuals from the registry. Judges are encouraged to use this power freely so Michigan's sex offender registry contains only the dangerous pedophiles and sexual predators that are likely to re-offend. The over-inclusive nature of our registry makes gives Michigan the second highest per capita rate of registered sex offenders in the country. The real travesty is that the registry is destroying young people's lives forever. The registry is a scarlet letter that cannot be hidden from society. Should our young wear this letter for the rest of their lives? Should their lives be ruined because of a sexual exploration and experimentation? This is

not the intent of SORA, however, this is reality. Judges and prosecutors have the power to stop this injustice.

The next step in making our registry useful is to give discretion to judges to remove or reduce registration time for any offender they believe is low risk to society. Judges and prosecutors know the facts surrounding a case. Legislators in Lansing do not. Abraham Lincoln wisely said, "The best way to get a bad law repealed is to enforce it strictly." Michigan's registry should be risk based, not offense based. The amendments coming in July are a step in the right direction, but do not go far enough. Furthermore, the punishments on registrants are becoming so extreme that registrants cannot find any employment or housing. They cannot be involved in their children's educational activities. They are subject to harassment and isolation. They live a sentence that far exceeds the punishment given to them in court.

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**\*Cheryl A. Carpenter** serves on a multidisciplinary professional advisory board which includes judges, former prosecutors, probation officers, psychologists and other professionals who work together to address issues related to the Michigan Sex Offender Registry. Ms. Carpenter is also an adjunct professor at Thomas M. Cooley Law School, and on the teaching staff at Gerry Spence's Trial Lawyers College and Criminal Defense Attorneys of Michigan. She can be reached at (313) 541-9090 or [cheryl@carpenterlaw.us](mailto:cheryl@carpenterlaw.us).

## Michigan Public Defense Update

*Editor's Note: The Criminal Law Section has long advocated for reform of our system for appointing counsel to indigent defendants. The Michigan Campaign for Justice provided us with the following:*

The Campaign for Justice released a final report from its cultural competence and public defense workgroup. The workgroup was tasked with investigating how attorneys of color have fared in states that have implemented reforms similar to those proposed in Michigan, and how all attorneys are trained to work with diverse client communities. Here is the Executive Summary:

Public defense systems in the U.S. are facing budget cuts that lead to inadequate resources, soaring caseloads, and limited, if any, training opportunities. This seriously compromises the ability of our dedicated public defense attorneys to deliver effective defense services.

Overwhelming numbers of clients served by public defenders have special needs and cultural vantage points that differ from their attorneys. This has a profound impact on the credibility of our public defense systems. For example, African Americans are incarcerated at nearly six times the rate of whites.<sup>1</sup> A U.S. Department of Justice study found that public defense attorneys represented 77 percent of African Americans and 73 percent of Latinos in state prisons.<sup>2</sup> Yet this report finds that the majority of those providing public defense services in the states are still Caucasian.

Racial disparities such as these combine with the failures of public defense systems to ensure adequate representation to "exacerbate[e] community perceptions about the integrity and fairness of the criminal justice system."<sup>3</sup>

In 2008, the National Legal Aid and Defender Association released a report entitled *A Race to the Bottom: Speed and Savings Over Due Process: A Constitutional Crisis*, which found that Michigan's public defense system fails to implement or enforce national standards, the American Bar Association's Ten Principles of a Public Defense System,<sup>4</sup> and is 44th in the country in per capita trial-level public defense spending. Michigan is one of a handful of states with no state funding for trial-level or juvenile delinquency public defense services.

In 2010, the Michigan Campaign for Justice began recruiting key stakeholders to take part in a cultural competence and public defense Michigan workgroup. The workgroup was tasked with investigating how attorneys of color have fared in states that have implemented reforms similar to those proposed in Michigan and how all attorneys are trained to work with diverse client communities. The workgroup was comprised of judges, attorneys, and reform advocates who participated in eight conference calls between May and December 2010. Workgroup members assisted with cultural competence trainings for defense attorneys and community leaders that took place in October 2010.

Among other things, the workgroup found that:

- The Kent County Office of Defender, Washtenaw Public Defender, and Legal Aid & Defender Association's State Defender Office (LADA) in Wayne County have a higher percentage of staff attorneys of color compared to the percentage of people of color in the entire State Bar of Michigan membership.
- The defense bar in Michigan has generally not been offered systematic cultural competence training yet public defense attorneys recognize that the cultural competence framework is useful.
- Most public defense systems studied by the workgroup have a smaller percentage of public defenders or public defense attorneys of color than the percentage of people of color in the state or relevant county population.
- The majority of jurisdictions studied do not have recruitment programs that target people of color.
- The majority of public defense systems studied that were funded 100 percent by the state did include at least some cultural competence training for defense attorneys.
- Eight of the fifteen jurisdictions studied have interpreters as staff in their public defender offices.
- Representation of people of color and women on state public defense commissions does not generally reflect the population of the states.

The report concludes with a set of recommendations for implementation as legislative changes regarding Michigan's public defense system are considered.

The entire report can be found at [http://www.michigancampaignforjustice.org/cultural\\_competence.php](http://www.michigancampaignforjustice.org/cultural_competence.php)

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<sup>1</sup> Mauer and King, "Uneven Justice: State Rates of Incarceration By Race and Ethnicity." The Sentencing Project (July 2007). Page 3.

<sup>2</sup> U.S. Department of Justice, Bureau of Justice Statistics, *Defense Counsel in Criminal Cases* (Nov. 2000). Available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf>.

<sup>3</sup> American Bar Association Criminal Justice Section, *Building Community Trust: Improving Cross-Cultural Communication in the Criminal Justice System* model curriculum and instructional manual (2010).

<sup>4</sup> The Ten Principles were adopted by the American Bar Association in 2002. The principles are: (1) independence; (2) state funding/mixed system; (3) eligibility/early appointment; (4) confidentiality; (5) availability; (6) competency; (7) consistency; (8) resources; (9) training; and (10) quality/supervision.

## Proposed Amendment to Court Rule

Comments on the following proposed amendment are due by September 1, 2011:

**Rule 2.511** (Impaneling the jury):

MCL 600.1337 requires a court to discharge an unqualified juror regardless whether a party challenges the juror for cause. The proposed amendment to the rule would eliminate the provision from the list of challenges that may be made for cause, and instead would clarify that the discharge must be made when the court learns that the juror is not qualified to serve. This clarification would foreclose the possibility that an unqualified juror could be allowed to sit because no one challenged his or her qualification. (ADM File No. 2010-11; May 3, 2011).

*Editor's Note:* The Criminal Law Section Council opposes the proposed amendment of MCR 2.511 as presented in the Michigan Supreme Court's Order in ADM File No. 2010-11.

To send your comment electronically, please submit it to: [MSC\\_Clerk@courts.mi.gov](mailto:MSC_Clerk@courts.mi.gov). To send your comment via mail, please write to:

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

When submitting a comment, please reference the relevant administrative file number.

## Legislative Update

**HB 4164.** This bill would provide the option of community service in lieu of payment of driver responsibility fees for certain low-income individuals.

*Editor's Note:* The Criminal Law Section Council opposes this legislation.

**HB 4472.** This bill would provide that a prisoner is not entitled to legal counsel appointed at public expense in an appeal of parole by the prosecutor or victim.

*Editor's Note:* The Criminal Law Section Council opposes this legislation.

**HB 4647.** This bill would provide that, if a court has determined that expert testimony will assist the trier of fact and that a witness is qualified to give the expert testimony, the court may allow the expert witness to be sworn and testify by video communication if all parties consent or for good cause.

*Editor's Note:* The Criminal Law Section Council opposes this legislation.

**SB 246 & 247.** These bills would revise standards for competency evaluations of juveniles, who are the subject of a delinquency petition, to allow evaluations by a "qualified forensic mental health examiner." Under the proposed legislation, a "qualified forensic mental health examiner" is defined as a psychiatrist or psychologist who possesses experience or training in: forensic evaluation procedures for juveniles; evaluation or treatment of children and adolescents with emotional disturbance, mental illness or developmental disabilities; clinical understanding of child and adolescent development;

familiarity with competency standards in the state. A licensed master's social worker or licensed professional counselor or limited license psychologist would also be a "qualified forensic mental health examiner" under the legislation.

*Editor's Note:* The Criminal Law Section Council supports this legislation in principle. The Council sees this legislation as necessary in filling a gap in the juvenile system, but is not in favor of social workers completing the competency evaluations. The Council believes that an amendment is required stating that, if a forensic mental health examiner is not available, the court has the discretion to appoint another qualified forensic mental health examiner for the competency exam.

## **Editor's Note**

In an effort to save costs and go "green," the Criminal Law Section is phasing out hard copies of the newsletter and phasing in electronic delivery. The electronic newsletter will provide a rich viewing experience, including clickable links and full color images, and a shorter delivery time. Through the summer, you will receive both the paper copy by mail and an e-mail invitation to view the newsletter from our website. Beginning in October, the newsletter will be available only from our website. Each time a new issue is available online, you will receive a friendly reminder e-mail that includes a password to access the newsletter. The Council hopes you find it helpful to have an issue that you can save to your own computer, print and carry with you, or read from our website.