

**State Bar of Michigan
Criminal Jurisprudence and Practice Committee
Thursday, November 3, 2011, 2 – 4 PM
at the State Bar of Michigan Building, Room 3**

Teleconference 1-877-352-9775, Passcode 9152168764#

MINUTES

Committee Members: Ryan Lee Berman, Thomas P. Clement, Nichole Jongsma Derks, Daniel Corrigan Grano, Hon. David A. Hoort, J. Kevin McKay, Richmond M. Riggs, Scott R. Sanford, Samuel R. Smith

SBM Staff: Elizabeth K. Lyon, Carrie A. Sharlow

1. Call to Order & Welcome

The meeting was called to order at 2:07 PM.

2. Old Business

- a. [2008-36 Proposed Amendment of Rule 7.202 of the Michigan Court Rules and Proposed Adoption of Administrative Order No. 2011-XX](#)

On October 13, 2011 a motion was made and supported to propose the following court rule:

MCR 7.205(E)(3) Where the trial court makes a decision on the admissibility of evidence and the prosecutor or the defendant files an interlocutory application for leave to appeal seeking to reverse that decision, the trial court shall stay proceedings pending resolution of the application in the Court of Appeals, unless the court makes findings that the evidence is clearly cumulative or that an appeal is frivolous because legal precedent is clearly against the party's position. The appealing party must pursue the appeal as expeditiously as practicable, and the Court of Appeals shall consider the matter under the same priority as that granted to an interlocutory criminal appeal under MCR 7.213(C)(1). If the application for leave to appeal is filed by the prosecutor and the defendant is incarcerated, the defendant may request that the trial court reconsider whether pretrial release is appropriate.

The Criminal Law Section opposes the proposed amendment entirely and does not care to offer an alternative. Should the Committee still submit the proposed language to the Court?

After further discussion the committee by consensus agreed to inform the Supreme Court of our original opposition to the proposed language but, if the Court believes action is necessary, the committee suggests alternative language. The same was submitted by letter to the Michigan Supreme Court on Tuesday, November 8, 2011.

b. 2010-14 Proposed Adoption of New Rule 6.202 of the Michigan Court Rules

Following recommendations by the Criminal Law Section to the amended language proposed by the committee, an evote was held and the amendments suggested by the Criminal Law Section was approved by the committee in October of 2011. At this meeting the committee discussed clerical or administrative concerns raised by the State Bar Executive Committee. The committee by consensus agreed that clerical corrections were appropriate to reflect that even with a demand the forensic report could otherwise still be admissible in court and that there should be a correction to MCR 6.001 (B) and (C) to include the proposed court rule 6.202 in misdemeanor and juvenile cases. With those clerical corrections the proposed MCR 6.202 was submitted to the Michigan Supreme Court.

3. New Business

- a. [SB 0464](#) (Schuitmaker) Criminal procedure; other; development of investigative protocols and abuse and neglect interview protocols for vulnerable adults; require by certain local agencies. Amends sec. 11b of [1939 PA 280](#) (MCL [400.11b](#)).
Status: 10/25/11 Referred to Senate Committee of the Whole w/ Substitute S-2
Committee Liaisons: Ryan Lee Berman and John Freeman

A motion was made and supported to support SB 0464. An e-vote will be sent out. The committee believed that the protocols, similar to that required in child abuse cases, was appropriate for vulnerable adults.

- b. [SB 0759](#) (Kahn) Courts; funding; transfer of certain revenue from the juror compensation fund into the general fund; provide for. Amends sec. 151d of [1961 PA 236](#) (MCL [600.151d](#)).
Status: 10/20/11 Reassigned to Senate Committee on Appropriations
Committee Liaisons: John A. Jarema and Frederick A. Neumark

The committee by consensus agreed to pass on this item for the reason that the legislation is already on track to be passed by the legislature, and committee action would have little if any effect.

- c. [2004-55 Proposed Amendment of Rule 3.211 of the Michigan Court Rules](#)
This proposed amendment would eliminate the requirement that the Supreme Court approve changes to the Uniform Support Order forms. Without explicit approval required by the Supreme Court, the forms would be updated like other forms that are revised on a regular basis within the State Court Administrative Office.
Issued: September 28, 2011
Comment period expiration: January 1, 2012
Committee Liaisons: Julie A. Powell and Richmond M. Riggs

The committee by consensus agreed to pass on this item for the reason that the proposed legislation is not within the parameters of the committee as having little or no effect in criminal cases.

d. [2010-15 Proposed Amendment of Rule 6.005 of the Michigan Court Rules](#)

This proposed amendment would clarify that trial counsel is required to make a defendant's file available to an appellate lawyer, and would be required to retain the file for at least five years. This file was prompted by reports of appellate counsel having difficulty obtaining trial materials (especially video or audio materials that were not transcribed as part of the transcript). The five-year period mirrors the five-year retention period contained in MRPC 1.15(b)(2).

Issued: September 28, 2011

Comment period expiration: January 1, 2012

Committee Liaisons: Haytham Faraj and Scott S. Sanford

A motion was made and supported to support the proposed amendment. An e-vote will be sent out. There was some discussion as to whether this information is otherwise available through the prosecutor's office, the court file, or whether there should be centralized location for this information. The consensus was that there may be information in the defendant's trial attorney's file that would not be otherwise available, and it was important for appellate counsel to be able to access any and all information related to the defendant's criminal case.

e. [2010-20 Proposed Amendment of Rule 6.302 of the Michigan Court Rules](#)

This proposed amendment of MCR 6.302 would reinsert a requirement that a court advise a defendant who pleads guilty that the defendant's maximum possible prison sentence may be longer than the maximum possible prison sentence for a particular offense if the defendant falls within the parameters of the habitual offender statute (MCL 769.13). The statute allows a prosecutor to notify the defendant that the prosecutor intends to seek an enhanced sentence after the defendant pleads guilty. Thus, the sentence range given by the court may not take into account any sentence enhancement at the plea hearing.

Issued: September 28, 2011

Comment period expiration: January 1, 2012

Committee Liaisons: Leonard A. Kaanta and John L. Livesay

A motion was made and supported to support the proposed amendment. An e-vote will be sent out. The Committee originally voted to support 2010-20 and the proposed amendment of Rule 6.302 of the Michigan Court Rules. An amended motion was then made to suggest language as an alternative to the language proposed by the Supreme Court. The committee believed that language is necessary to advise a defendant of the possible consequences if a habitual offender notice is filed within the 21 days allowed by statute after arraignment. The concern was, however, the wording of the proposed amendment to the Court Rule; the effect it may have on the plea process, the subsequent filing of a habitual offender notice, and the defendant's ability to withdraw one's plea. Advising a defendant, when appropriate, that if the prosecutor post plea files a habitual offender notice your possible maximum sentence may be increased under the Habitual Offender Act is an actual rendition of the law and avoids any undue speculation.

4. Reports from Other Committees

a. Criminal Law Section

Judge Hoort provided an update on the Criminal Law Section and what appears to be an opportunity for collaboration between the Section and the committee.

b. Indigent Defense Funding

Elizabeth Lyon reported that the Governor has issued an executive order that establishes a commission to investigate how to improve legal representation provided to low-income criminal defendants in Michigan. The commission will also make recommendations about how to ensure legal representation provided to low-income residents in the criminal justice system is consistent across the state. The commission is chaired by retired judge Fisher and includes prosecutors, judges and public representatives.

c. Custodial Interrogation Recording Legislation

Elizabeth Lyon provided an update on this committee.

d. Eyewitness task force

Elizabeth Lyon provided an update on this upcoming State Bar task force. Committee members interested in serving on this task force should contact Elizabeth.

5. Adjournment.