



Report on Public Policy Position

Name of Committee:

Standing Committee on Justice Initiatives

Contact Person:

Richard McLellan, Candace Crowley

Email:

ccrowley@mail.michbar.org

Bill Numbers:

HB 4796 (McConico) Criminal procedure; preliminary examination; right to preliminary examination for certain crimes; eliminate. Amends secs. 1 & 4, ch. VI of 1927 PA 175 (MCL 766.1 & 766.4).

HB 4797 (Elsenheimer) Criminal procedure; preliminary examination; right to preliminary examination for certain crimes; eliminate. Amends sec. 1a, ch. IV of 1927 PA 175 (MCL 764.1a). TIE BAR WITH HB 4796, HB 4799, HB 4800

HB 4799 (Van Regenmorter) Criminal procedure; preliminary examination; right to preliminary examination for certain crimes; eliminate. Amends secs. 40 & 42, ch. VII of 1927 PA 175 (MCL 767.40 & 767.42). TIE BAR WITH: HB 4796, HB 4797, HB 4800

HB 4800 (Van Regenmorter) Criminal procedure; preliminary examination; right to preliminary examination for certain crimes; eliminate. Amends sec. 8311 of 1961 PA 236 (MCL 600.8311). TIE BAR WITH: HB 4796, HB 4797, HB 4799.

SB 542 (Cropsey) Criminal procedure; preliminary examination; right to preliminary examination for certain crimes; eliminate. Amends secs. 40 & 42, ch. VII of 1927 PA 175 (MCL 767.40 & 767.42). TIE BAR WITH: SB 0543, SB 0544, SB 0545

SB 543 (Patterson) Criminal procedure; preliminary examination; right to preliminary examination for certain crimes; eliminate. Amends sec. 1a, ch. IV of 1927 PA 175 (MCL 764.1a). TIE BAR WITH: SB 0542, SB 0544, SB 0545

SB 544 (Cropsey) Criminal procedure; preliminary examination; right to preliminary examination for certain crimes; eliminate. Amends secs. 1 & 4, ch. VI of 1927 PA 175 (MCL 766.1 & 766.4).

SB 545 (Patterson) Criminal procedure; preliminary examination; right to preliminary examination for certain crimes; eliminate. Amends sec. 8311 of 1961 PA 236 (MCL 600.8311). TIE BAR WITH: SB 0542, SB 0543, SB 0544

Date position was adopted:

August 17, 2005

Process used to take the ideological position:

In-person/teleconference discussion and vote

Number of members in the decision-making body:

Sixteen

Number who voted in favor and opposed to the position:

Eight in favor, one abstention, none opposed

Position:

Four separate bills sponsored by Senators Patterson (SB543, 545) and Cropsey (SB542, 544) and four separate bills sponsored by Representatives McConico, (HB4796) Elsenheimer (HB 4797), and VanRegenmorter (HB4797, 4799, 4800) propose to eliminate preliminary examinations in certain felony matters. Complete text for all legislation can be accessed through the accompanying document.

Oppose the proposed legislation and work with others to find a more appropriate solution to the difficulties presented by the current preliminary exam laws.

The text (may be provided by hyperlink) of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report:

<http://www.legislature.mi.gov/mileg.asp?page=getObject&objName=2005-HB-4796>

<http://www.legislature.mi.gov/mileg.asp?page=getObject&objName=2005-HB-4797>

<http://www.legislature.mi.gov/mileg.asp?page=getObject&objName=2005-HB-4799>

<http://www.legislature.mi.gov/mileg.asp?page=getObject&objName=2005-HB-4800>

<http://www.legislature.mi.gov/mileg.asp?page=getObject&objName=2005-SB-0542>

<http://www.legislature.mi.gov/mileg.asp?page=getObject&objName=2005-SB-0543>

<http://www.legislature.mi.gov/mileg.asp?page=getObject&objName=2005-SB-0544>

<http://www.legislature.mi.gov/mileg.asp?page=getObject&objName=2005-SB-0545>

RECOMMEND STATE BAR ACTION ON THIS ISSUE:

Arguments for the position:

Role of exam in overall prosecution

The preliminary exam requires the state to produce probable cause to believe that the crime was committed, and probable cause to believe that the defendant committed it. It is necessary in determining whether a trial is appropriate or necessary, in accordance with due process and equal protection under the Fourteenth Amendment. As such, it is a critical stage of the prosecution, which aids in yielding more just and accurate outcomes at trial. Coleman v Alabama, 399 US 1 (1970).

Nearly all states require either a grand jury indictment or a preliminary exam before an accused is made to stand trial for a felony. The few states without these screening methods provide for a probable cause review by the trial judge prior to trial. The federal system requires either a preliminary hearing or a grand jury indictment in every felony cases. Eliminating the exam would put Michigan in the position of providing less critical screening than any other state in the country before requiring a person to stand trial for a felony.

Exams are waived in seventy five percent of the cases, but crucial to a fair resolution in the other twenty five percent. One factor that could possibly affect the high waiver rate is that Michigan assigned counsel, who are among the lowest paid in the country, may be choosing between fair compensation and the more time consuming process of asserting full rights for felony defendants.

Charging review

District court judges use the preliminary exam to make ultimate decisions regarding what charges the accused will face at trial. Unsupported or overcharged cases are dismissed. Those with merit are allowed to proceed.

Access to evidence

The prosecution generally has access to more investigative resources than the defense. Information is obtained by police interviews, search warrants and subpoenas. The preliminary examination allows the defense an opportunity to cross-examine prosecution witnesses, assess credibility and demeanor, identify the strengths and weaknesses of the case and determine which issues need to be further addressed. It provides an opportunity to preserve the testimony of witnesses who are unavailable for trial. Preliminary exam evidence is oftentimes strongest because it occurs closest in time to the actual events; it can be used as a basis to refresh the memory of a witness or impeach testimony that has been altered in the ensuing time period. Without the preliminary exam, felony cases could proceed to trial with virtually no discovery process.

Witness testimony at a preliminary exam also has the potential to demonstrate the strength of the prosecution's case to an overly confident defendant. This will often persuade the accused to negotiate a guilty plea.

Bond setting

The exam process allows the judge to learn more about the accused's circumstances and adjust bonds accordingly. It avoids the added time and expense of a separate bond motion that must be held in circuit court, thereby pushing more work into the circuit court docket while the defendant waits in jail for a hearing date.

Civil consequences

From the civil practitioner's view, there is a strong incentive to make sure that the criminal process is fair. Preliminary exams provide a way of addressing possible overcharging. Because the collateral consequences of a felony conviction are so severe, it is important that felonies are reduced to misdemeanors in appropriate cases. Felony welfare fraud convictions increasingly prevent people from obtaining jobs in nursing homes and other work environments, when the charges should not have been felonies in the first place. Loss of certain government benefits and loss of employment that follows from felony convictions are severe enough that the procedural safeguards for all felonies should be preserved. *All* felonies are serious, especially when it comes to the collateral consequences.

High bonds are oftentimes adjusted downward at the exam stage. Without that relief, individuals who cannot post bond often lose their jobs, housing, and other necessary life items. In many cases, the pretrial detention of a family breadwinner will result in serious financial consequences to the rest of the family, whose members then need legal help with the civil consequences.

Possible alternatives

A valid goal of the legislation is to reduce the time spent in court by police officers whose time is better used in the field. This cost can be unreasonably high because officers are often paid overtime for the wasted time in court when the exam is waived. There are undoubtedly alternative means of reducing pre-trial costs and delays that do not compromise these most important procedural safeguards, but do achieve the goal of keeping police on the street for a great portion of their time. For example, to better meet the objectives of efficiency, economy and keeping police on the street, prosecutors and defense attorneys could schedule mandatory pre-examination

conferences where only they are present. If the prosecutor has some means of communicating with police officers, and the defense with the accused, the conference will formalize what often happens in the hallways prior to preliminary examinations.

Several local jurisdictions in Michigan have crafted local solutions that ameliorate the issues this package of bills attempts to address. The Committee urges the Bar to look carefully at the issues here, and to work with others to find an appropriate solution to the difficulties presented by the current preliminary exam laws.

Arguments against the position (if any):

The proposed reforms are designed to help local communities better use their law enforcement resources by reducing the number of cases in which preliminary examinations are required. Studies show that defendants waive preliminary exams in 75% of the cases, but only after police officers, victims, and other witnesses have spent hours in court. The package of bills presents an alternative charging procedure for all less-serious felonies that is less expensive, less time-consuming, and more efficient. The proposal would retain the current preliminary exam procedure for serious felonies. The reforms will free up a great deal of time for street and transportation officers. Condensing the timeframe for the cases that do not go to exam will also free up badly needed jail beds for new felony suspects.

On average, there are more than 75,000 felony cases filed in Michigan every year. Defendants waive their right to a preliminary examination in 75% of those cases. The current law allows defendants to waive their right to a preliminary exam without prior notice to the prosecution, subpoenaed witnesses, and police officers, causing a waste of time and resources. Prosecutors will have more time to prepare for trial and less time to spend on hearings that are waived at the last minute. The proposal would also save local governments millions of dollars each year in county jail costs, as county jails spent approximately \$193,000 per day just to house defendants who sit in jail before trial and sentencing. By eliminating the preliminary exam for less-serious felonies, the proposed reform would reduce the time spent in the county jail for tens of thousands of defendants and bring them to trial more quickly.

If the State Bar currently has a position on this subject matter, state the position, and an analysis of whether the recommended position and the current State Bar position are in conflict.

Given the diversity of views from the legal community on the issue, the State Bar of Michigan takes no position but supports the involvement of State Bar sections and committees to weigh in on the legislation.

Fiscal implications of the recommended policy to the State Bar of Michigan:

None.

This position falls within the following Keller-permissible category:

- The regulation and discipline of attorneys
- ✓ **The improvement of the functioning of the courts**
 - The availability of legal services to society
 - The regulation of attorney trust accounts
 - The regulation of the legal profession, including the education, the ethics, the competency, and the integrity of the profession.

Keller- permissible explanation:

Positions on this legislation are Keller permissible because it is related to the improvement of the functioning of the courts, and to the availability of legal services to society.