SBM STATE BAR OF MICHIGAN

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MEMORANDUM

TO: GOVERNOR JENNIFER M. GRANHOLM
ATTORNEY GENERAL MICHAEL COX
SEN. ALAN CROPSEY, CHAIR, SENATE JUDICIARY COMMITTEE
REP. WILLIAM VAN REGENMORTER, CHAIR, HOUSE JUDICIARY COMMITTEE
LAWYER-LEGISLATORS

FROM: STATE BAR OF MICHIGAN

SUBJECT: PRELIMINARY EXAMINATION LEGISLATION

DATE: 10/07/05

On September 21, 2005, the State Bar of Michigan's Board of Commissioners considered the eight bills that propose to change the current structure and use of criminal preliminary examinations in some felony cases. Its deliberations were informed by recommendations from various sections and committees of the State Bar, as well as the views of local bar organizations and individual members. Due to the diversity of views expressed on the issue, the State Bar did not consider it an appropriate measure to take an inclusive position that may not truly reflect all views of the profession, and the Board of Commissioners voted unanimously to take no position on the legislation. The State Bar does support the involvement of its sections and committees in the current discussions.

For your information, the following statements have been received to date by the State Bar (please note that these statements were adopted prior to amendments made to the legislation by the House Judiciary Committee on September 21, 2005):

- Criminal Jurisprudence and Practice Committee: Oppose
- Criminal Law Section: Adopted Resolutions
- Judicial Conference: Oppose
- Standing Committee on Justice Initiatives: Oppose the proposed legislation and work with others to find a more appropriate solution to the difficulties presented by the current preliminary exam laws.

Copies of these statements are enclosed.

If you would like to discuss this position in further detail or have questions, please contact Janet Welch, General Counsel, directly at (517) 346-6375, jwelch@mail.michbar.org; or Elizabeth Lyon, Public Policy Program Analyst, directly at (517) 346-6325, elyon@mail.michbar.org.

Report on Public Policy Position

Name of Committee:
Criminal Jurisprudence and Practice Committee

Contact Person:
Valerie Newman/Marty Krohner

Email:
valerie@sado.org/marty@mich.com

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:
June 16, 2005

Process used to take the ideological position:
Committee meeting

Number of members in the decision-making body:
12

Number who voted in favor and opposed to the position:
13 opposed to these packages of bills dealing with preliminary examinations and 2 in favor

Position:
Please see attached for the majority position.

The two who were in favor of these bills indicated that the objective of saving police officer time is a worthy goal and that this is a worthy first step because the courts will not do anything unless forced to by the legislature and there are serious problems with the way things work under the present system.

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:
See attached.

Arguments against the position (if any):
See above minority position indicating that this is a worthy first step in trying to correct problems with the preliminary examination process.

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:
This directly affects the functioning of the courts

Criminal Jurisprudence and Practice Committee –
Majority position in opposition to proposed legislation to eliminate preliminary examinations

The preliminary examination has long demonstrated its importance in the facilitation of an evenhanded felony prosecution, and the concrete benefits it is capable of providing for the prosecution, the defense, and the criminal justice system as a whole. Although not constitutionally mandated, where it is available, as in Michigan, the preliminary examination is a critical stage of the prosecution which aids in yielding more just and accurate outcomes at trial.[1] However, recently proposed legislation would effectively abolish preliminary examinations in most felony cases unless requested by the prosecution. The "More Cops on the Street Proposal" would retain the existing procedure only for those crimes designated by the legislature as serious felonies. It is imperative for several reasons that Michigan's current preliminary examination system be protected and improved upon instead of abandoned.

The preliminary examination serves as Michigan's conventional screening method, requiring the state to produce sufficient evidence before a district court judge that probable cause exists to believe that a crime has been committed and that it was committed by the accused. The exam is a critical stage in determining whether a subsequent trial is appropriate or necessary, in accordance with due process and equal protection under the Fourteenth Amendment.

The current procedure has properly ensured that district judges, acting as neutral representatives of the judicial branch, make the ultimate decisions regarding what charges the accused will face at trial. In this respect, the preliminary examination plays a crucial role in upholding traditional checks and balances within the criminal justice system, which benefit witnesses, prosecutors, victims, law enforcement, and the accused alike. Unsupported or overcharged cases are dismissed. Those with merit are allowed to proceed, which allows an early opportunity for a resolution that is fair and satisfactory to all involved.

The prosecution usually has access to more investigative resources and tools than does the defense. The disclosure of information may be obtained by means of police interviews, search warrants, and subpoenas. The preliminary examination helps alleviate the consequences of this disparity by allowing the defense an opportunity to

[1] Coleman v Alabama, 399 US 1 (1970).

scrutinize and cross-examine prosecution witnesses. It also provides important opportunities for both sides to assess witnesses' credibility and demeanor, identify the strengths and weaknesses of their respective cases and determine which issues need to be addressed in discovery and other aspects of trial preparation. Conversely, abandoning the right to take deposition testimony or issue discovery subpoenas would result in felony cases going to trial with virtually no discovery process at all.

The preliminary examination also preserves as admissible substantive evidence the testimony of a witness who becomes unavailable to testify at trial.[2] This aspect of the system is frequently of considerable help to the prosecution.[3] But the proposal would allow for preliminary examinations only at the behest of the prosecution, thereby depriving the defense of a right that should be equally afforded to both sides, and arguably resulting in a breach of due process.

Preliminary examination testimony leads to a more precise and dependable record at trial, because it is taken under oath closest in time to the pertinent events – when witnesses' recollections are as fresh as possible. The prosecution and the defense may use this earlier testimony to bolster the reliability of trial witnesses, refresh a witnesses' memory, and/or impeach recollection which has been subsequently altered.

In addition, witness testimony at a preliminary examination has the potential to demonstrate to an overly confident defendant just how strong the prosecution's case is against them. As a result, the examination experience – a far more economical process than going to trial – will often persuade the accused to accept a negotiated guilty plea.

Although supporters of the proposal have attempted to frame Michigan's current preliminary examination system as antiquated, and atypical, nothing could be farther from the truth. The federal system requires either a preliminary hearing or a grand jury indictment in every felony case, unless the defendant waives those rights. Fed R Crim Pro 5.1 and 7(b) Nearly all states require either a grand jury indictment or a preliminary examination before an accused may be made to stand trial for the commission of any felony. The few states which allow a felony trial

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[2] California v Green, 399 US 149 (1970).
[3] Kamisar, *et al.*, Modern Criminal Procedure (11th ed) p 1030).

to proceed without one of these conventional screening methods provide, at the very least, for what is known as direct filing, a probable cause review conducted by the trial judge prior to trial.[4] Eliminating preliminary examinations would put Michigan in the embarrassing position of providing less critical screening than any other state in the country before requiring a person to stand trial for a felony.

In bringing about the dismissal of unsubstantiated cases, or the altering of unsupported charges, the preliminary examination's screening function can save both the prosecution and the defense valuable time, money, and other resources that would otherwise be spent on unwarranted trials. On the other hand, the judge or magistrate has authority to bind over on an offense for which probable cause has been established at a preliminary examination. Where appropriate, this will occasionally lead to greater or additional charges.

Because initial bond decisions are nearly always made with minimal information provided to the arraigning magistrate, another integral feature of Michigan's preliminary examination system is the opportunity it provides for examining magistrates to learn more about the accused's circumstances, adjust bond accordingly, and avoid the additional expenditure of a separate bond motion. While Supporters of the proposed legislation, particularly those within the law enforcement profession, assert that eliminating the preliminary examination would alleviate overcrowding in county jails, eradicating the opportunity for bond evaluation at an examination would cause more bond reduction motions to be brought in circuit court. In turn, this would magnify the workload of circuit judges, hinder a final decision on bond reduction, and increase rather than decrease the inmate population of a given jail.

As its name implies, the reform package also seeks to address the valid yet readily solvable goal of reducing time spent in court by officers who are needed to perform traditional enforcement duties in the field. Proponents cite that 75 percent of preliminary examinations are waived by defendants, only after police officers have spent hours in court.[5] But even if this contention is true, using it to fuel an attack on the system completely negates the 25 percent of felony accusations where a preliminary exam is crucial in properly preparing or positioning the case. Many of these individuals are innocent, or at least innocent of the actual charge. Furthermore, it is estimated that

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[4] Kamisar *et al.* at 1036: "All direct-filing systems provide an opportunity for judicial review of the decision to charge (typically by the felony trial court rather than the magistrate)."
[5] Pierce, Allison, "More Cops on the Street Proposal Unveiled", www.michigan.gov/ag (May 11, 2005).

the overwhelming majority of those preliminary examinations purportedly waived are for pleas that make speedy, efficient and economical dispositions of cases that would otherwise end up in circuit court for a much more time consuming and expensive process – a process that ties up law enforcement officers rather than to more readily free them to return to their regular public safety duties.

The high incidence of preliminary examination waivers can also be directly tied to poor representation by defense counsel. While it is often considered a strategic maneuver, incompetent defense attorneys are waiving exams in cases where they should not be waived. This problem is made worse by the fact that Michigan is among the three lowest states in the country when it comes to assigned counsel pay rates.[6] Because the current system creates a conflict between the attorney's need to be fully compensated for his services and acquiring the full cavalcade of rights for the client[7] it is vital that the reimbursement format be improved across the state.

It cannot be overemphasized that *all* felonies are serious offenses. The maximum statutory penalty is determined according to an individual's criminal history, and the indirect consequences of a felony conviction can often be far more devastating than the sentence imposed. For these reasons, the categorization of "lesser felonies" which should not require a preliminary examination emerges as misleading, arbitrary, and capricious. To the accused person who is innocent, there is no such thing as a less serious felony charge.

Ultimately, the aforementioned benefits derived from Michigan's preliminary examination system supersede the concerns of critics, which can be easily remedied through the employment of more effective, less drastic means than abandonment. To better meet the objectives of efficiency, economy and keeping police on the street, prosecutors and defense attorneys should begin scheduling mandatory pre-examination conferences where only they are present. So long as the prosecutor has some means of communication with law enforcement officers, and the defense with the accused, the conference will formalize what often happens in the hallways prior to preliminary examinations. If the meeting results in a plea agreement, there will be no need for officers or witnesses to appear at

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[6] Diehl, Nancy, "What If You Couldn't Afford Perry Mason?", Mich Bar J 83:11 (November 2004).
[7] Recorder's Court Bar Association v Wayne Circuit Court, 443 Mich 110, 115 (1993), findings of the Special Master Hon. Tyrone Gillespie.

a preliminary examination. This way, police officers can remain on the street placed on standby status, and called to court only if and when they are needed.

The Committee opposes this legislation and suggests that the Bar and the Supreme Court Administrative Office work together to explore alternative means of accomplishing the objective of making the preliminary examination process both meaningful and efficient for the court and all the parties involved in the process.

State Bar of Michigan
Criminal Law Section
Biennial Policy Conference; Pre-Trial Procedures in Criminal Cases
June 17 - 19, 2005
Grand Hotel - Mackinac Island

Resolution 1

The assembled conferees commend the initiative of Michigan Attorney General Michael Cox and the prosecuting attorneys of Michigan, to examine pre-trial procedures in criminal cases and recommend changes in statutory provisions governing preliminary examinations. We support and join in the search for new ways to expedite the processing of criminal cases and to eliminate unnecessary costs, while retaining a system that is just and fair to all parties.

We support a change from the requirement of mandatory preliminary examinations in all felony criminal cases unless waived, to one providing for mandatory PRE-HEARING CONFERENCES, FULL AND OPEN DISCOVERY, and for PROBABLE CAUSE HEARINGS only if demanded by either the state or the defendant.

Alternative Proposal:

Day 1 — INITIAL ARRAIGNMENT
Bond decision
A DISCOVERY ORDER is entered by the court for all available information upon which the charging decision was based, including police reports and all audio/video recordings made of defendant in-custody statements.
A PRE-HEARING CONFERENCE is scheduled within ten (10) days

Day 10 — PRE-HEARING CONFERENCE
Discovery order must be complied with
Prosecutor and defendant/counsel meet
Options: 1. Plea
2. Either party may file a written demand for a PROBABLE CAUSE HEARING
3. Parties may waive time frames for further action or exercise of right to demand a PROBABLE CAUSE HEARING upon good cause show
Revisit the Bond Decision

Day 14 — If no PROBABLE CAUSE HEARING demand has been filed in writing by either party, the case is bound over to Circuit Court for appropriate action.
A not-guilty plea shall be entered
The information filed, a copy to defendant/counsel
Either party may request Circuit Court Arraignment in writing/fax

Day 28 Deadline for commencement of PROBABLE CAUSE HEARING if timely demand has been made by either party.

We call for a LEGISLATIVE PAUSE in the processing of proposals addressing the use of Preliminary Examinations in criminal cases to allow for legislatively-authorized PILOT TESTING of components of this proposal in selected jurisdictions. We seek to evaluate the use of PRE-HEARING CONFERENCES and FULL AND OPEN DISCOVERY in the effort to expedite the processing of criminal cases and the elimination of unnecessary costs, while maintaining a system that is just and fair to all parties.

Adopted by the Criminal Law Section, State Bar of Michigan, June 19, 2005

Resolution 2

WHEREAS, police interrogation of criminal suspects held in custody frequently prompts questions regarding what was said and done by both interrogators and suspects, and

WHEREAS, recording of interrogation interviews creates a permanent account of police treatment of suspects during questioning and the statements made by all parties present, and

WHEREAS, recording of interrogation interviews by either audio or video systems serves to protect suspects from police abuse and to protect police from unwarranted accusations of abuse, and

WHEREAS, recordings of interrogation can assure that statements made by suspects are accurately recalled at later criminal justice proceedings, and

WHEREAS, we are informed that hundreds of police departments in over 40 states now electronically record in-custody interrogation interviews in major felony cases and that less-costly technology is now available.

BE IT RESOLVED the Criminal Law Section of the State Bar of Michigan urges

(1) all law enforcement agencies to consider requiring that in-custody interviews in major felony investigations be electronically recorded – from *Miranda* warnings to the conclusion of the interview, and
(2) a Michigan study be undertaken for the purpose of consideration of legislation that may require recording of in-custody interrogation in major felony investigations conducted by police in Michigan.

Adopted by the Criminal Law Section, State Bar of Michigan, June 19, 2005

REVISED MARCH 2, 2006

Report on Public Policy Position

Name of Section:
Judicial Conference

Contact Person:
Judge Milton Mack

Email:
mmack@wcpc.us

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.

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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

REVISED MARCH 2, 2006

Date position was adopted:
March 2, 2006

Process used to take the ideological position:
Via an electronic vote of the Judicial Conference

Number of members in the decision-making body:
27

Number who voted in favor and opposed to the position:
20 in favor, 0 opposed

Position:
Judicial Conference Position on Preliminary Examinations

The Judicial Conference unanimously supports elimination of the current right to a preliminary examination in favor of a procedure that preserves the benefits of preliminary examinations. The Judicial Conference recommends the following procedure:

- Require a pre-hearing conference within 14 days of the arraignment.
- On request of either party, and a showing of good cause, the court shall set a date for a probable cause hearing. A request for a probable cause hearing must be made by the close of the pre-hearing conference, or it will be deemed to have been waived, and the matter bound over to Circuit Court.
- The probable cause hearing would be held within 28 days of the arraignment.
- Good cause may include:
  a) Preservation of testimony,
  b) Assessing the credibility of witnesses,
  c) Testing the sufficiency and strength of the evidence,
  d) Evidentiary questions.

District Courts have long recognized that setting every felony case for preliminary examination results in wasted resources, not only by the courts, but also for the police, witnesses and parties. Under this proposal, if no one demands a probable cause hearing, neither party will need to prepare for the hearing, resources will not be wasted and the Court will not have to issue subpoenas for witnesses. At a pre-exam conference, discovery can be exchanged and bond can be addressed, but no witnesses need to be subpoenaed. In those cases where either the prosecutor or defendant feels the need for a preliminary exam, that right is preserved.

The proposed legislation would simply eliminate the right to preliminary examinations in most felony cases. This would not only profoundly affect the rights of the accused, but it will seriously impede the processing of criminal cases in the District and Circuit Courts of this state. Currently, the practical use of preliminary examinations is to test the strength of a case at an early stage of the proceedings. The scheduling of a preliminary exam will show whether witnesses will appear, the strength of their testimony and whether all the elements of the crime can be proved. This process allows the prosecutor to determine whether they want to proceed with a case, whether there are sufficient weaknesses to recommend a reduction of charges, or, if

REVISED MARCH 2, 2006

witnesses will not appear, or elements cannot be proved, a dismissal of the charges. It is not uncommon for the prosecutor to learn at the time of exam that there is sufficient evidence to warrant an increase in the charges. The process also allows the defendant to assess the strength of the prosecutor's case, and often leads to a decision that a guilty plea is the best means of resolving the case. Frequently the fact that a witness has appeared will lead the defendant to plead.

Without a probable cause review early in the case, those questionable cases that are now being resolved at the District Court level will be pushed onto the Circuit Court trial docket, as that will be the only forum for resolving these issues.

The District Courts are structured to handle a high volume of cases, at a fairly rapid rate of speed. Because the preliminary exam is heard by a judge and not a jury, District Courts routinely hear multiple cases in a single morning or afternoon. If that same case cannot be resolved until it is placed on the Circuit Court docket, the amount of time necessary to resolve the case, which in all likelihood would include evidentiary hearings and jury selection, would be dramatically increased. This will affect not only the workload of the Circuit Courts, but will increase the time police officers and other witnesses are required to spend in court. The delay can also increase the amount of time some defendants will be incarcerated, adding significant costs for taxpayers.

The proposed legislation, which draws a distinction between more and less serious offenses, ignores the very practical nature of a preliminary exam. The fact that 90% of all cases will result in a guilty plea is in large part because those questionable cases have been tested at the preliminary exam stage. Our experience as judges shows that there is no apparent correlation between the severity of the crime and the amount of time the courts will have to spend resolving it. Simple traffic offenses can take longer to hear than a serious violent crime. The severity of the crime does not impact on the use of judicial resources as courts are bound to hear every case, regardless of severity. Preliminary examinations are a practical tool for resolving cases, regardless of their severity. For this reason, the right to exam should be preserved regardless of the severity of the crime.

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

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

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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.