

AMENDMENT TO MCR 2.516(B) – INSTRUCTIONS TO THE JURY

Issue

Should the Representative Assembly recommend adoption of the following proposed amendment to MCR 2.516(B)?

MCR 2.516 Instructions to the Jury

(B) Instructing the Jury.

(1) After the jury is sworn and before evidence is taken, the court shall give such preliminary instructions regarding the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence. MCR 2.516(D)(2) does not apply to such preliminary instructions. The court shall specifically instruct the jurors that they shall not:

- (a) discuss the case with others until deliberation begins, except as otherwise authorized by the court;
- (b) read or listen to any news reports about the case;
- (c) use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation;
- (d) use a computer, cellular phone, or other electronic device with communication capabilities to obtain information about the case when they are not in court. As used in this subsection, information about the case includes, but is not limited to, the following:
 - (i) seeking information about the criminal record of a party or witness;
 - (ii) reviewing news accounts of the case;
 - (iii) conducting research on any topics raised or testimony offered by any witness;
 - (iv) researching any other information the juror might think would be helpful, such as an aerial map of the scene.
- (e) Any juror who observes or has reason to believe that another juror has used an electronic device in violation of this rule shall immediately inform the court of the violation.

Synopsis

In September 2006, and as part of the Jury Reform proposals, the Assembly unanimously voted *against* a proposal that would allow jurors to discuss a case before deliberation begins. (See *Prior Action by Representative Assembly* below, and the 2006 proposal attached as Exhibit B). An analogous provision is included as Subsection (B)(1)(a) in the above proposal that the Prosecuting Attorneys of Michigan submitted to the Michigan Supreme Court.

Background

The Prosecuting Attorneys Association of Michigan submitted the proposal to the Michigan Supreme Court, and the Court released the proposed amendment for public comment. The public comment period expires May 1, 2009. The Staff Comment to the proposed amendment summarized the matter as follows:

This proposal, submitted by the Prosecuting Attorneys Association of Michigan, would require judges to instruct jurors that they are prohibited from using computers or cell phones when they are in attendance at trial or during deliberation, and prohibited from using a computer or other electronic device to obtain information about the case when they are not in the courtroom. It would further require a juror who knows or has reason to know that another juror has violated these prohibitions to inform the judge. The proposal also would prohibit discussion among jurors until deliberation, and would prohibit jurors from reading about or listening to news reports about the case.

Opposition/Comments

Two comments from the public that were posted on the Michigan Supreme Court website at the time the Assembly Agenda was printed are attached as Exhibit A. Any comments submitted after that date will be provided at the Assembly meeting.

Prior Action by Representative Assembly

At the September, 2006 meeting, and as part of the Jury Reforms proposals, the Assembly unanimously voted against the following proposed amendment to MCR 2.513(K) – Juror Discussion {Exhibit B}:

After informing the jurors that they are not to decide the case until they have heard all the evidence, instructions of law, and arguments of counsel, the court may instruct the jurors that they are permitted to discuss the evidence among themselves in the jury room during trial recesses. The jurors should be instructed that such discussions may only take place when all jurors are present and that such discussions must be clearly understood as tentative pending final presentation of all evidence, instructions and argument.

The opposition to the proposal stated that strongly opinionated jurors would have an increased opportunity to compromise the neutrality of other jurors if permitted to discuss the evidence during trial recesses and that jurors may become prematurely entrenched in a position and not be open-minded to arguments, correct application of the law, and instructions at the close of proofs.

Fiscal and Staffing Impact on State Bar of Michigan

None known.

**STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 18, 2009**

Should the Representative Assembly recommend adoption of the above proposed amendment to MCR 2.516(B), currently open to public comment by the Michigan Supreme Court?

(a) Yes

or

(b) No

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March 6, 2009

Via E-Mail (MSC_clerk@courts.mi.gov)
Via U.S. Mail

Michigan Supreme Court
c/o Supreme Court Clerk
P.O. Box 30052
Lansing, MI 48909

RE: Proposed Amendment of MCR 2.516 (ADM File No. 2008-33)

Dear Honorable Court:

Although the proposed above-captioned amendment attempts to codify time-honored principles and address legitimate concerns presented by modern juries, the scope and design of the proposed amendment could be improved.

First, the proposed amendment requires the instruction to be given only after the jury is sworn. A provision should be included (in MCR 2.516 or another rule) permitting the trial court to give the instruction to the jury pool prior to empanelment. Jury selection occasionally cannot be completed without intermittent recesses and, particularly in highly publicized cases and multi-day selection processes, jurors may invoke their Internet research skills to learn more about a case before receiving the instruction.

Second, to avoid any confusion, proposed subrule (B)(1)(a) should clarify that jurors may not discuss the case with non-jurors until discharge. The proposed language "with others" is indefinite in its coverage and, innocently misunderstood, may lead a juror to conclude that he may discuss the case with anyone after deliberation begins.

EXHIBIT A

Letter re Proposed Amendment to
MCR 2.516

Third, the outline of the proposed amendment lacks focus in several spots. For example, proposed subrule (B)(1)(c) targets electronic research or communication while performing jury functions. Proposed subrule (B)(1)(d), however, targets information-gathering activities while the jury is not in court. Why, then, is that sub-rule limited in scope to using “a computer, cellular phone, or other electronic device with communication capabilities”? Jurors should understand that library or conventional information-gathering is also inappropriate.

Fourth, subrule (B)(1)(d)(i) is suggestive. It could be improved by eliminating the phrase “the criminal record of,” or perhaps replacing it with the “the personal history of” a party or witness. It could also cover research regarding the attorneys and court officers.

Fifth, the use of the example “an aerial map of the scene” in subrule (B)(1)(d)(iv) arguably suggests that such a map *would* be helpful – particularly if a map is involved in the case. More important, if the instruction is simply recited by the trial court, the example may potentially and unnecessarily confuse jurors if there is no scene or map in dispute. Jurors have enough on their plates. As a general principle, fact-based examples embodied in a court rule are ill-advised.

Sixth, many trial judges have developed their own instructions that address all the underlying concerns of the proposed amendment, or instructions that could be easily modified to do so. Thus, to the extent intended, the proposed amendment should not require a specific recital of the court rule.

Seventh, the proposed court rule should clarify whether communication devices may be used during court recesses and deliberation breaks. In addition, given that many citizens rely on their cell phones and handheld communication devices to be contacted in family emergencies, the Court should provide jurors with a method by which they can be contacted in an emergency.

Best regards,



Allen L. Lanstra, Jr.

2008-33

>>> William Hupy <WHupy@Menomineeco.com> 1/15/2009 4:36 PM

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Dear Sirs:

I find this portion of the proposed rule to be fraught with problems:

(e) Any juror who observes or has reason to believe that another juror has used an electronic device in violation of this rule shall immediately inform the court of the violation.

In that the same requires one juror to inform on another. In the likely event that the accused juror denies the accusation, the trial judge would be required to conduct a hearing to ascertain the respective credibility of two jurors who could then later be asked to sit in deliberations together. This portion of the rule is ill advised.

Judge Hupy

EXHIBIT A

**(JURY REFORM PROPOSAL)
MCR 2.513(K)—JUROR DISCUSSION**

Issue

Should jurors be permitted to discuss the evidence of the case among themselves in the jury room during trial recesses?

Synopsis

Currently, jurors are not permitted to discuss the evidence of the case among themselves until they are in deliberations. The subrule provides that, after informing the jury that it is not to decide the case until it has heard all the evidence, instructions of law, and arguments of counsel, the court "may instruct the jurors that they are permitted to discuss the evidence among themselves in the jury room during trial recesses." Such instructions, however, may only take place "when all jurors are present" and such discussions "must be clearly understood as tentative pending final presentation of all evidence, instruction, and argument." The Staff Comment explains that this subrule would allow the jurors to discuss evidence as it is admitted and that such discussions "may promote timely questions to be propounded to the witnesses by the court." The Staff Comment also explains that the discussions are intended only to promote a better understanding of the evidence as it is introduced. This subrule is designed to reduce the frustration of jurors and practices that hamper their decision-making ability. It is also intended to help jurors seek the truth. See Exhibit B for the exact wording of this subrule.

Background

See Exhibit A.

Opposition to the Proposal

Strongly opinionated juror(s) would have an increased opportunity to compromise the neutrality of other jurors if permitted to discuss the evidence during trial recesses.

Jurors may become prematurely entrenched in a position and not be open-minded to arguments and instructions at the close of proofs.

The jury is very likely to have made up its mind in advance of having heard any of the instructions or arguments if this rule is adopted, thereby resulting in uninformed decision making. The purpose of arguments and instruction is to focus the jury and the deliberations on the law as it applies to the facts which have been presented to them during the course of the trial. Without advice concerning the law to be applied to the facts, the jury may very well have reached a conclusion based on a total misunderstanding of what the law is as it applies to the case submitted to them for decision.

Fiscal Impact on State Bar of Michigan

None known.

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on September 14, 2006

Jurors should be permitted to discuss the evidence of the case among themselves in the jury room during trial recesses.

UNANIMOUSLY FAILED.