

MCR 6.201(B)(6) PRESERVATION OF ELECTRONIC RECORDINGS

Issue

Should the Representative Assembly recommend the Michigan Supreme Court add a new subsection under MCR 6.201(B) of Criminal Procedure directing the discovery disclosure and preservation of pertinent electronic recording evidence made by a government agency or agent? The proposed subsection, designated as proposed (B)(6), is:

RULE MCR 6.201 DISCOVERY

(B) Discovery of Information Known to the Prosecuting Attorney.

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(6) any electronic recording evidence made by any governmental agency or agent pertaining to the matter known to the prosecuting attorney. Such records shall be preserved by the prosecuting attorney until after all appeals have been exhausted or all rights of appeal have expired, whichever date is later. Failure to preserve such evidence shall entitle the accused to a jury instruction that such evidence not produced should be presumed by jurors to have been adverse to the prosecution.

Synopsis

This proposal adds a new section to the court rule on discovery in criminal actions, by requiring discovery and preservation of electronic recordings made by a government agency or agent (e.g., by law enforcement of traffic stops, investigations, or interrogations). The new rule would not require a government agency to make any electronic recording, but only require that if an electronic recording was made it must be preserved until the criminal action is concluded and disclosed upon request.

Background

The proponent of this proposal believes the new rule is needed because electronic recording evidence is important to both sides to ensure justice and, unfortunately, often such evidence is not disclosed or preserved. The proponent believes the rule would have the public policy benefit of facilitating law enforcement adoption of policies that discourage or prevent the destruction of pertinent electronic evidence, and would encourage fairness and enhance justice.

Opposition

None known. However, the proponent believes law enforcement and prosecutors may object to the proposal on a claim that the new rule is unduly burdensome. The proponent believes the preservation of all evidence pertaining to active criminal matters rebuts the concern.

Prior Action by Representative Assembly

None known.

Fiscal and Staffing Impact on State Bar of Michigan

No fiscal or staffing impact would affect the State Bar. Law enforcement and prosecutors may require additional records storage to accommodate preservation of the evidence. The proponent believes the lower costs of and higher storage capacity of newer storage devices should make additional expense, if any, minimal. It is further expected that many of the electronic recordings are already created, stored, and transmitted electronically or soon will be.

STATE BAR OF MICHIGAN POSITION

By vote of the Representative Assembly on September 18, 2008

Should the Representative Assembly recommend the Michigan Supreme Court add a new subsection under MCR 6.201(B) as proposed directing the disclosure and preservation of pertinent electronic recording evidence made by a government agency or agent?

(a) Yes

or

(b) No