

**STATE BAR OF MICHIGAN
2012 COMMITTEE ANNUAL REPORT**

Committee Name: Criminal Jurisprudence and Practice

Jurisdiction: Review proposed court rules and statutes related to criminal procedure and practice in state courts and make recommendations concerning improvements in the operation of criminal law and procedure to promote the fair, speedy and efficient administration of criminal justice, including the establishment and operation of systems for the representation of indigent persons charged with criminal offenses.

Co-Chairs and Committee Members:

| Officer | Name | Address | Telephone | Email |
|----------------------|---------------------|---|----------------|--|
| Co-Chair | Hon. David A. Hoort | 8 th Circuit Court, 100 E. Main St., Ionia, MI 48846 | (616) 527-5336 | dhoort@ioniacounty.org |
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|-------------------------------|---------------------------------|
| Member/Advisor/Other | Member/Advisor/Other |
| Fred E. Bell, Member | Donna McKneelen, Member |
| Ryan Lee Berman, Member | Julie A. Powell, Member |
| Thomas P. Clement, Member | Richmond M. Riggs, Member |
| Nichole Jongsma Derks, Member | Scott R. Sanford, Member |
| Haytham Faraj, Member | Samuel R. Smith, Member |
| John Freeman, Member | Kimberley Reed Thompson, Member |
| Daniel Corrigan Grano, Member | |
| James W. Heath, Member | Erika S. Julien, Advisor |
| John A. Jarema, Member | Leonard A. Kaanta, Advisor |
| John L. Livesay, Member | Angela M. Povilaitis, Advisor |
| J. Kevin McKay, Member | |

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Committee Meeting Schedule:

Please attach any additional information needed regarding Committee meetings as an addendum.

| Meeting Type | Date | Location |
|-------------------|------------------|---|
| Description | | |
| In Person Meeting | October 13, 2011 | State Bar of Michigan |
| In Person Meeting | November 3, 2011 | State Bar of Michigan |
| In Person Meeting | January 6, 2012 | 61 st District Court, Grand Rapids, MI |
| In Person Meeting | February 2, 2012 | State Bar of Michigan |
| In Person Meeting | May 10, 2012 | State Bar of Michigan |
| In Person Meeting | June 7, 2012 | State Bar of Michigan |

Resources provided by the State Bar of Michigan in support of committee work: The committee receives staff support from Elizabeth Lyon and Carrie Sharlow. The State Bar covers meeting expenses.

Committee Activities:

During 2011-12 the Criminal Jurisprudence & Practice Committee (The Committee) reviewed in excess of thirty public policy items and offered eighteen recommendations to the State Bar of Michigan Board of Commissioners and Executive Committee.

In May of 2011 the Committee offered three recommendations to the governing bodies of the Bar:

- The Committee supported a proposal by the Civil Procedure & Courts Committee that the term of the Michigan Supreme Court correspond with the calendar year, beginning in January rather than the current October start.
- The Committee voted to adopt the position of the Criminal Law Section on proposed juvenile competency standards, to-wit: 'While the Section sees this legislation as necessary in filling a gap in the juvenile system, we are not in favor of only social workers doing the competency evaluations. The Section has an issue with the qualifications of the examiners, and believed an amendment was required, stating that if a forensic mental health examiner is not available the court should appoint another qualified person for the competency exam.' SBM voted to support with the amendments requested by the Criminal Law Section and authorized the Committee to advocate its position.
- The Committee opposed HB 4472 prohibiting the appointment of legal counsel for prisoners under certain circumstances. The Committee opposed the bill because it takes away the discretion of the judge in appointing counsel for the prisoner. The Committee was authorized to advocate its position by the Bar.

In June of 2011 the Committee offered three recommendations to the governing bodies of the Bar:

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- The Committee voted to support and amend ADM File No. 2010-11. The Committee supported the proposed amendment to MCR 2.511 requiring a court to discharge an unqualified juror regardless of whether a party challenges a juror for cause, but suggested retaining the challenge for cause language in the existing court rule thereby maintaining an additional safeguard to ensure the removal of unqualified jurors. The Bar supported ADM File No. 2010-11 with recommendations from the Civil Procedure and Courts Committee position. The Committee was authorized to advocate its position.
- The Committee supported HB 4703 relating to the requirements of notice to the prosecuting attorney of a prisoner's parole. The Committee recognized the universal support that this legislation has received from the examining entities.
- The Committee supported HB 4647 allowing for expert witness testimony to be presented by video communications equipment. The position of the Committee was that the Confrontation Clause requires two-way interactive communication and that an exception should also be made for chain of custody witnesses. The Bar supported the concept, but believed that the changes be made by court rule or rule of evidence. Due to differing positions, the Committee was not authorized by the Bar to advocate its position.

As a result of the October 2011 Meeting, the Committee offered three recommendations to the governing bodies of the Bar:

- The Committee opposed both alternatives suggested in ADM File No. 2008-36 allowing for a stay while a prosecutor pursues an interlocutory appeal of a trial court's decision to suppress. The Committee opined that neither alternative is needed. Under Michigan law there is already a procedure in place for the prosecutor to file an application for leave to appeal and request a stay. If, however, the Supreme Court believes an amendment to MCR 7.205(E)(3) is needed, the committee proposed the following language:

“Where the trial court makes a pretrial 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 Committee was authorized to send its recommendations to the court and the committee's comments were included in the Bar's position letter. The amendment proposed by the Committee was adopted by the Supreme Court and made effective January 1, 2012.

- The Committee supported the concept of ADM File No. 2010-14 and recommended amendments of the proposed MCR 6.202 to allow both prosecutor and defense to introduce forensic reports into evidence without the forensic analyst's presence. The Criminal Law

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Section voted to support the alternative language proposed by the Committee and further suggested that the rule be applicable to all three courts and that there be a good cause exception to rescind a waiver by a defendant's non-action. Upon reconsideration, the Committee voted to include in its recommendation the language requested by the CLS. The committee's recommendations were included in the Bar's position letter. While the file number was on the November 30, 2011 public hearing agenda, it currently has an open status.

- The Committee opposed HB 4844 requiring that the issuance of a personal protection order be maintained in LIEN for ten years. The proposed legislation fails to consider the potential for improper issuance or issuance based upon unreliable or unsubstantiated allegations; and the committee believed the proposed public registry serves little practical purpose. The Committee was authorized by the Bar to advocate its position, due to the Bar's opposition of the bill. The bill has yet to move in the Legislature.

As a result of the November 2011 Meeting, the Committee offered three recommendations to the governing bodies of the Bar:

- The Committee supported SB 0464 for the development of investigative protocols for vulnerable adults. The Committee believed that protocols, similar to that required in child abuse cases, was appropriate for vulnerable adults. The Bar voted to not take a position on the bill.
- The Committee supported ADM File No. 2010-15 amending MCR 6.005 to require trial counsel to make a defendant's file available to an appellate lawyer and retain the file for at least five years. The Committee believed that there may be information in a 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 a defendant's criminal case. The Committee was authorized to advocate its position. The proposed amendment was adopted by the court and made effective May 1, 2012.
- The Committee supported ADM File No. 2010-20 with a recommendation that a defendant be advised, when appropriate, that if the prosecutor post plea files a habitual offender notice a defendant's possible maximum sentence may be increased under the Habitual Offender Act. The Bar opposed ADM File No. 2010-20 recommending that a defendant be allowed to withdraw a plea if the prosecutor post plea files a habitual offender notice. Due to the differing positions, the Committee was not authorized by the Bar to advocate its position. The Committee's comments were included in the Bar's position letter. The Supreme Court declined to adopt the amendment, with two Justices supporting the Committee's recommendation, and the file was closed.

As a result of the January 2012 Meeting, the Committee offered four recommendations to the governing bodies of the Bar:

- The Committee supported ADM File No. 2005-11 Alternative A, with added language to Canon 2.G "Except as allowed in Canon 6 for campaign purposes no judge or other person, . . . or otherwise." with regards to extrajudicial activities and prohibited fundraising activities. The Bar supported the concept of the ADM File No. 2005-11, but not the current

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language. While the file number was on the March 28, 2012 public hearing agenda, it currently has an open status.

- The Committee opposed ADM File No. 2010-25 requiring trial courts to become the depository for exhibits offered into evidence. The Committee believed that there is not a known issue generally with the maintenance and forwarding of exhibits to the appellate court requiring any modification of existing procedures; and doing so would impose undue costs and burden upon the courts; and create a potential conflict with MCR 2.518. The Bar supported ADM File No.2010-25, and did not authorize the Committee to advocate its position. The Bar did include the Committee's comments in its letter to the court. While the file number was on the March 28, 2012 public hearing agenda, it currently has an open status.
- The Committee supported ADM File No. 2010-26 with a recommendation that paragraph 2b of the proposed amendment to MCR 7.210 be changed from 'shall' to 'may' to allow for discretion by the trial court. The Bar supported the ADM File No. 2010-26 with amendments recommended by the Civil Procedure & Courts Committee and the Criminal Jurisprudence & Practice Committee. The amendment was adopted by the Supreme Court with the Committee's recommended change.
- The Committee supported HB 5191 to require that magistrates be licensed attorneys. Although the Committee recognized the existing worth and value of non-lawyer magistrates, a best practice analysis would seemingly indicate a law degree should be required in conjunction with the judicial duties required of a magistrate. This bill is expected to be discussed by the Bar in the summer.

As a result of the February 2012 Meeting, the Committee offered two recommendations to the governing bodies of the Bar:

- The Committee supported in concept HB 5159 and HB 5162 providing for Veterans Courts. The Committee recommended that the legislation providing for veterans courts be expanded to provide for the opportunity for participation in the program to all offenders, except those prohibited by federal law. The concern being that the proposed legislation denies participation to those veterans most in need of treatment because of the restrictive language contained within the legislation. These bills were supported by the Bar in their existing form, and while the Committee was authorized to advocate its support of the bills, it was not authorized to advocate its suggested amendments.
- The Committee voted eight to six to support HB 5214 & SB 0880 with a recommendation that the mandatory requirements addressed in Section 4 be changed from 'shall' to 'may,' thus keeping with judicial discretion, and that the result of a conviction on another criminal offense would terminate the individual's eligibility for YTA status. The Bar did not view the proposed legislation as being Keller permissible.

Future Goals and Activities: The Committee will continue its public policy work and continue to look into various special projects as the need arises.