

## **MCR 6.302(C)(1)—GUILTY PLEAS (ADM File No. 2009-11)**

### **Issue**

Should MCR 6.302(C)(1) – Pleas of Guilty and Nolo Contendere – be amended to mandate that all discussions regarding a defendant's plea take place in open court and be placed on the record, as proposed in ADM File No. 2009-11?

### **Synopsis**

On June 30, 2009, the Michigan Supreme Court published for comment ADM File No. 2009-11. The Michigan Supreme Court is considering whether to amend MCR 6.302(C)(1) to add a provision that mandates "all discussions regarding a defendant's plea" (i) take place in open court and (ii) be placed on the record. The comment period for this order ends on **October 1, 2009**. A copy of the order is attached as **Exhibit 1** (pp 1-2).

### **Background**

A fundamental principle of our criminal justice system is that a person should not be coerced into making a plea. The legal profession is committed to the concept that a court may not accept a plea of guilty or nolo contendere unless the plea is understanding, voluntary and accurate. In order to ensure the integrity of the system, the Michigan Supreme Court has promulgated procedural rules concerning the taking of such pleas. MCR 6.302(C) already requires the court to ask the prosecutor or defense attorney to state the terms of the agreement on the record and to confirm the terms of the agreement with the other lawyer and the defendant.

Under current practice, plea negotiations between a prosecutor and a defense attorney are more of an ongoing process, rather than an event. They often involve discussions during out-of-court meetings, telephone calls or other contacts. Each attorney argues the strengths of his or her case, without fully disclosing the weaknesses.

Contemporaneous with, or following such negotiations, the defense attorney will privately discuss these plea negotiations with the client. The defense attorney can be candid concerning the case as well as a recommendation regarding an offer.

The proposed amendment calls for "all discussions" concerning a plea agreement be done in court and on the record. A strict construction of such language would require a defense attorney to forego private discussions with his or her client and only discuss a plea offer in open court. This would hardly promote candor regarding the plea offer. It is unlikely that a defense attorney would disclose comparative weaknesses of the defense, or strengths of the prosecution, during in-court proceedings. There would be the possibility that the plea would not be accepted by the court and such candid admissions might assist a prosecutor with the case.

Furthermore, the proposed amendment could require substantially more court time in order to arrive at a negotiated plea. Under current practice, the prosecutor, after informal discussions with the defense attorney, can review a recommendation with his or her supervisor as well as any victim. If all negotiations are required to be done in open court, rather than informally, more court time would be necessary as final approval of potential offers would have to be delayed to a future date.

The proponents of the proposed amendment assert that it would reduce the possibility that a defendant would be coerced into agreeing to a particular sentence; however, there is already a procedure which protects against a coerced plea. MCR 6.302(C)(4) requires a court to ask the defendant whether anyone has promised anything beyond that which is stated in the plea agreement, whether anyone has threatened him or her, and whether it is the defendant's own choice to plead.

### **Opposition**

The proponent of this proposal before the Representative Assembly, State Bar Commissioner Richard L. Cunningham, opposes the amendment to the court rule. He believes the language is overly broad and could work great mischief. A strict construction of the amendment could inhibit an attorney from properly advising a client and could seriously jeopardize the negotiation process. At a minimum, it would require all *Cobbs*<sup>1</sup> evaluations to be done on the record.

Further, as of the date of publishing the Assembly booklet, only the Monroe County Assistant Prosecutor's Association has posted a response on the Michigan Supreme Court website. This response, attached as **Exhibit 2**, opposes the proposed amendment.

### **Support**

Justice Young and Justice Corrigan have expressed their approval of the amendment. (**Exhibit 1**, p 2).

### **Prior Action by Representative Assembly**

None known.

### **Fiscal and Staffing Impact on State Bar of Michigan**

None known.

## **STATE BAR OF MICHIGAN POSITION By vote of the Representative Assembly on September 17, 2009**

Should MCR 6.302(C)(1) – Pleas of Guilty and Nolo Contendere –be amended to mandate that all discussions regarding a defendant's plea take place in open court and be placed on the record, as proposed in ADM File No. 2009-11?

(a) Yes

or

(b) No

---

<sup>1</sup> *People v Cobbs*, 443 Mich 276 (1993) explicitly sanctioned judicial participation in formulating a sentencing agreement.

# Order

Michigan Supreme Court  
Lansing, Michigan

June 30, 2009

Marilyn Kelly,  
Chief Justice

ADM File No. 2009-11

Michael F. Cavanagh  
Elizabeth A. Weaver  
Maura D. Corrigan  
Robert P. Young, Jr.  
Stephen J. Markman  
Diane M. Hathaway,  
Justices

Proposed Amendment of  
Rules 6.302 of the  
Michigan Court Rules

---

On order of the Court, this is to advise that the Court is considering amendment of Rule 6.302 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [www.courts.michigan.gov/supremecourt](http://www.courts.michigan.gov/supremecourt).

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

Rule 6.302 Pleas of Guilty and Nolo Contendere

(A)-(B) [Unchanged.]

(C) A Voluntary Plea.

- (1) The court must ask the prosecutor and the defendant's lawyer whether they have made a plea agreement. All discussions regarding a defendant's plea must take place in open court and be placed on the record.
- (2) If there is a plea agreement, the court must ask the prosecutor or the defendant's lawyer what the terms of the agreement are and confirm the terms of the agreement with the other lawyer and the defendant.
- (3) If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may

EXHIBIT 1

- (a) reject the agreement; or
- (b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to the sentence agreed to or recommended by the prosecutor; or
- (c) accept the agreement without having considered the presentence report; or
- (d) take the plea agreement under advisement.

If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow the sentence disposition or recommendation agreed to by the prosecutor, and that if the court chooses not to follow it, the defendant will be allowed to withdraw from the plea agreement.

(4) [Unchanged.]

(D)-(F) [Unchanged.]

YOUNG, J. (*concurring in part and dissenting in part*). I concur in the order publishing for comment a proposal that would require that plea discussions occur on the record and in public. However, I dissent from the majority's decision to decline to publish for comment a proposal that would eliminate a defendant's right to withdraw a knowingly, voluntarily, and intelligently tendered guilty plea when a sentencing judge declines to follow a prosecutor's *nonbinding* sentencing *recommendation*. I would welcome the opinion of the bench and bar on this proposal rather than the majority's decision to shelve the proposal without further debate or input.

Our current court rule, MCR 6.310(B)(2)(a), states that when a defendant pleads guilty in exchange for a nonbinding prosecutorial sentencing recommendation, the defendant is *entitled* to withdraw the guilty plea whenever a judge declines to follow the prosecutor's suggestion. This court rule is premised upon *People v Killebrew*, 416 Mich 189 (1982). However, the *Killebrew* rationale categorically prohibited the court from "participat[ing] in discussions aimed at reaching a plea agreement." *Id.*, 205.

*People v Cobbs*, 443 Mich 276, (1993), decided eleven years later, explicitly sanctioned judicial participation in formulating a sentencing agreement and undermined the foundational underpinnings of *Killebrew*. In a *Cobbs* plea, when the court is a participant in the plea agreement, the principles permitting withdrawal of a guilty plea simply have no applicability to a *Killebrew* plea. MCR 6.310(B)(2)(a) essentially binds a

judge to a sentencing agreement that the judge was not party to and to which he did not acquiesce. Otherwise, the defendant gets to withdraw his guilty plea and to begin the process all over again.

Where a defendant has obtained the full benefit of the bargain struck with the prosecutor—a *nonbinding* sentencing *recommendation*—there is no logical reason to permit a defendant to rescind his knowing, voluntary, and intelligent guilty plea when a court is unwilling to abide by the prosecutor’s recommendation.

I would publish the complete proposal for comment, as attached, and favor amending MCR 6.302(C)(3) and MCR 6.310(B)(2)(a).

CORRIGAN, J., concurs with YOUNG, J.

Staff Comment: The proposed amendment of MCR 6.302 would require all discussions regarding a defendant’s plea agreement to occur in open and on the record to reduce the possibility that a defendant would be coerced into agreeing to a particular sentence.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or [MSC\\_clerk@courts.mi.gov](mailto:MSC_clerk@courts.mi.gov). When filing a comment, please refer to ADM File No. 2009-11. Your comments and the comments of others will be posted at the following address: [www.courts.mi.gov/supremecourt/resources/administrative/index.htm](http://www.courts.mi.gov/supremecourt/resources/administrative/index.htm).

## APPENDIX A

ADM File No. 2009-11

Proposed Amendment of  
Rules 6.302 and 6.310 of  
the Michigan Court Rules

---

On order of the Court, this is to advise that the Court is considering amendments of Rules 6.302 and 6.310 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the

EXHIBIT 1

proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [www.courts.michigan.gov/supremecourt](http://www.courts.michigan.gov/supremecourt).

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

#### Rule 6.302 Pleas of Guilty and Nolo Contendere

(A)-(B) [Unchanged.]

(C) A Voluntary Plea.

- (1) The court must ask the prosecutor and the defendant's lawyer whether they have made a plea agreement. All discussions regarding a defendant's plea must take place in open court and be placed on the record.
- (2) If there is a plea agreement, the court must ask the prosecutor or the defendant's lawyer what the terms of the agreement are and confirm the terms of the agreement with the other lawyer and the defendant.
- (3) If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may
  - (a) reject the agreement; or
  - (b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to the sentence agreed ~~to or recommended by the prosecutor~~; or
  - (c) accept the agreement without having considered the presentence report; or
  - (d) take the plea agreement under advisement.

If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow the sentence disposition or recommendation agreed to by the prosecutor, and that if the court chooses not to

follow the sentence disposition#, the defendant will be allowed to withdraw from the plea agreement. A judge's decision not to follow the sentence recommendation does not entitle the defendant to withdraw the defendant's plea.

(4) [Unchanged.]

(D)-(F) [Unchanged.]

#### Rule 6.310 Withdrawal or Vacation of Plea

(A) [Unchanged.]

(B) Withdrawal After Acceptance but Before Sentence. After acceptance but before sentence,

(1) [Unchanged.]

(2) the defendant is entitled to withdraw the plea if

- (a) ~~the plea involves a prosecutorial sentence recommendation or an~~ agreement for a specific sentence, and the court states that it is unable to follow the agreement ~~or recommendation~~; the trial court shall then state the sentence it intends to impose, and provide the defendant the opportunity to affirm or withdraw the plea; or
- (b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose.

(C)-(E) [Unchanged.]

Staff Comment: The proposed amendment of MCR 6.302 would require all discussions regarding a defendant's plea agreement to occur in open and on the record to reduce the possibility that a defendant would be coerced into agreeing to a particular sentence. Further, the proposal would eliminate language in MCR 6.302 and MCR 6.310

that allows a defendant to withdraw a guilty plea if a prosecutor agrees to recommend a sentence but the judge refuses to sentence as recommended by the prosecutor.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by XXXXX, 2009, at P.O. Box 30052, Lansing, MI 48909, or [MSC\\_clerk@courts.mi.gov](mailto:MSC_clerk@courts.mi.gov). When filing a comment, please refer to ADM File No. 2009-11. Your comments and the comments of others will be posted at the following address: [www.courts.mi.gov/supremecourt/resources/administrative/index.htm](http://www.courts.mi.gov/supremecourt/resources/administrative/index.htm).



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 30, 2009

*Corbin R. Davis*

Clerk

EXHIBIT 1



# Monroe County Assistant Prosecutors Association

P.O. Box 426, Monroe, MI 48161

---

Michigan Supreme Court  
Clerk's Office  
P.O. Box 30052  
Lansing, Michigan 48909

2009-11

July 20, 2009

Dear Justices of the Michigan Supreme Court,

I am writing on behalf of the Monroe County Assistant Prosecutor's Association to comment on the proposed amendments to MCR 6.302.

It is our position that the proposed amendments to MCR 6.302 are cumbersome and unnecessary. A literal reading of the proposed amendments would require all plea negotiations between a Prosecuting Attorney and a Defendant or his counsel to take place on the record. This would tie up considerable court time and resources. Further, even a more conservative reading of the proposed amendments will require all *Cobbs* plea discussions to take place on the record and not in chambers. This is likely to have a chilling effect on plea negotiations and significantly slow down the resolution of criminal cases.

We are opposed to the proposed amendments to MCR 6.302. We ask the Court to not amend the rule. Thank you for the opportunity to comment.

Yours truly,



Michael Brown  
President  
Monroe County Assistant Prosecutors Association

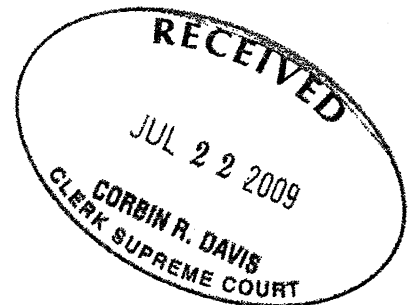


EXHIBIT 2