

DISCOVERY COURT RULE

ISSUE:

Should the Representative Assembly request that the Michigan Supreme Court amend court rule MCR 6.201 to include the discovery requirements in U.S. Supreme Court and Michigan Supreme Court precedent and provide the protections thereof to criminal defendants?

RESOLVED, that the State Bar of Michigan supports amendment of the Michigan Court Rules to incorporate the protections for criminal defendants set forth by U.S. Supreme Court and Michigan Supreme Court precedent.

FURTHER RESOLVED, that the State Bar of Michigan proposes the amendment to Chapter 6 of the Michigan Court Rules by amending MCR 6.201, as follows:

(A) Mandatory Disclosure. In addition to disclosures required by provisions of law other than MCL 767.94a, a party upon request must provide all other parties:

- (1) the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview; the witness list may be amended without leave of the court no later than 28 days before trial;
- (2) any written or recorded statement, including electronically recorded statements, pertaining to the case by a lay witness whom the party may call at trial, except that a defendant is not obliged to provide the defendant's own statement;
- (3) the curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion;
- (4) **the** criminal record **of any witness** that ~~the party~~ may **be used** at trial to impeach a witness;
- (5) a description or list of criminal convictions, known to the defense attorney or prosecuting attorney, of any witness whom the party may call at trial; ~~and~~
- (6) a description of and an opportunity to inspect any tangible physical evidence that **any** party may introduce at trial, including any document, photograph, or other paper, with copies to be provided on request. ~~A party may request a hearing regarding any question of costs of reproduction, including the cost of providing copies of electronically recorded statements. On good cause shown, the court may order that~~ A party **is allowed** to test—without destruction—any tangible physical evidence.

~~(B) Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant:~~

- ~~(7) any **material or** exculpatory information or evidence known to the prosecuting attorney **or police**;~~
- ~~(8) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation;~~
- ~~(9) any written or recorded statements, including electronically recorded statements, by a defendant, codefendant, **witness**, or accomplice pertaining to the case, even if that person is not a prospective witness at trial;~~

(10) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and

(11) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

(12) the name of all res gestae witnesses;

(13) all audio and video recordings made during investigation, pre-arrest, arrest, and post-arrest activity, including the booking procedure and advice of rights;

(14) notes made by police officers that are to be used at trial or to refresh recollection prior to testimony;

(15) all arrest reports, notes, dispatch tapes, sworn statements, or other recordings or documents that are material or exculpatory;

(16) any favorable statements of Defendant, prior criminal acts or allegations, or any other evidence that would impeach a government's witness;

(17) any evidence that a prospective witness is biased or prejudiced against the Defendant, or has a motive to falsify or distort his or her testimony;

(18) disclose the identification and location of any informants or cooperating witnesses, as well as the identity and location of any other witnesses unknown to the Defendant;

(19) any evidence that any prospective witness is under investigation by federal, state, or local authorities for any criminal conduct, including if the witness was under investigation at the time of Defendant's alleged illegal conduct;

(20) copy of the Defendant's prior criminal record;

(21) any treatment records of a witness, including school records, psychological records, medical records, disability records, employment records, and special education records, except where prohibited by law. An in camera review by the Court shall be made of any records where privilege is asserted;

(emphasis added).

SYNOPSIS

The proposed addition to the Michigan Court Rules ensures that all discovery is provided to Defendant or his/her counsel and that the prosecution is responsible for evidence in the possession of the police. MCR 6.201(A) and (B) should be combined as (A) because disclosure is mandatory and is not based on the prosecutor's knowledge of existing evidence. Currently, the prosecution relies heavily on the language in this court rule to allow the police to determine and control which evidence is relevant and to provide only that evidence to the prosecution. The proposed addition eliminates this anomaly and adds other discovery requirements.

BACKGROUND

The proposed rule is based upon MCL 767.40a, *People v Stanaway*, *United States v Pollack*, *Chambers v Mississippi*, *Davis v Alaska*, *Napue v Illinois*, *Rovario v United States*, *United States v Bagley*, *United States v Agurs*, *Brady v Maryland*, *Kyles v Whitley*, *United States v Stifler*, *Banks v Dretke*, *United States v Chitty*, *Pennsylvania v Ritchie*, *Thomas v United States*, both Michigan and Federal case law, and MRE 608, 609, and 613; which provide that the prosecution is required to provide more discovery than what is currently listed in MCR 6.201.

OPPOSITION

None known.

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 18, 2021

Should the Representative Assembly request that the Michigan Supreme Court amend MCR 6.201 to incorporate the protections for criminal defendants set forth by U.S. Supreme Court and Michigan Supreme Court precedent?

(a) Yes

or

(b) No