

**State Bar of Michigan
Criminal Jurisprudence and Practice Committee
Friday, January 6, 2012 – 2 to 4 PM
at the 63rd District Court, 1950 East Beltline NE, Grand Rapids, MI**

MINUTES

Committee Members: Ryan Lee Berman, Thomas P. Clement, Nichole Jongsma Derks, John Freeman, Hon. David A. Hoort, J. Kevin McKay, Angela M. Povilaitis, Julie A. Powell, Gretchen A. Schlaff, Samuel R. Smith, Kimberley Reed Thompson
SBM Staff: Carrie Sharlow

1. Call to Order & Welcome

2. Old Business

a. [2010-20 Proposed Amendment of Rule 6.302 of the Michigan Court Rules](#)

This proposed amendment of MCR 6.302 would reinsert a requirement that a court advise a defendant who pleads guilty that the defendant's maximum possible prison sentence may be longer than the maximum possible prison sentence for a particular offense if the defendant falls within the parameters of the habitual offender statute (MCL 769.13). The statute allows a prosecutor to notify the defendant that the prosecutor intends to seek an enhanced sentence after the defendant pleads guilty. Thus, the sentence range given by the court may not take into account any sentence enhancement at the plea hearing.

Proposed statutory changes were prompted by the discussion of the proposed changes to MCR 6.302. A memo from Mr. Clement offered the following revision:

The prosecuting attorney may not file notice of intent to seek an enhanced sentence after the defendant has been convicted of the underlying offense or a lesser offense, upon his or her plea of guilty or nolo contendere if the defendant pleads guilty or nolo contendere at the arraignment on the information charging the underlying offense, or within the time allowed for filing of the notice under subsection (1) unless, at or before the time of the plea, the prosecuting attorney advises the court and the defendant either in writing or orally, on the record, of its intent to either file a notice of intent to seek an enhanced sentence or determine the defendant's eligibility for an enhanced sentence for the purpose of filing a notice of intent to seek an enhance sentence within the permissible timeframe of subsection (1)

The proposal will be tabled until ADM File No. 2010-20 is either adopted or closed by the court.

3. New Business

a. [2005-11 – Proposed Alternative Amendments of Code of Judicial Conduct](#)

Two alternative proposals are published for comment in this order. The first, Alternative A, combines Canon 4 and Canon 5 so that the obligations imposed with regard to extrajudicial activities are the same for both law-related and nonlaw-related functions. The proposal also clarifies various allowed and prohibited fundraising activities.

The second proposal is modeled loosely on the ABA Model Code of Judicial Conduct. The most recent iteration of the ABA Model Code splits the existing language of Michigan's Canon 4 through Canon 6 into 15 separate rules. For purposes of the proposed language of Alternative B, however, the separate model rules are combined in the proposed revised text of Michigan's current two Canons, and would retain nearly all the language that currently exists in Canon 4 and Canon 5. But the proposal is similar to the ABA Model Code in that proposed Canon 4 would begin with a description of the underlying foundational requirements for any extrajudicial activities (i.e., participation in the activity must not undermine the judge's independence, integrity, or impartiality) and other general requirements, and then would set out the allowed fundraising and other financial activities in Canon 5.

Either proposal would eliminate the language of Canon 7 that prohibits a judge from accepting a testimonial, and would clarify Canon 2 so that activities allowed under Canon 4 and Canon 5 would not be considered a violation of the principle of use of the prestige of office. Both proposals contain proposed language that is intended to clarify the scope of activities in which a judge may participate, especially if those activities also serve a fundraising purpose. In Alternative A, this language is included at Canon 4D; in Alternative B, this language is included at Canon 5A(3).

The committee supports 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.

An in-person vote was taken. An e-vote will be sent out.

b. [2010-25 - Proposed Amendment of Rule 7.210 of the Michigan Court Rules](#)

This amendment was proposed by James Neuhard, former director of the State Appellate Defender Office. The proposed amendment would require trial courts to become the depository for exhibits offered in evidence (whether those exhibits are admitted or not), instead of requiring parties to submit exhibits offered in evidence when a case is submitted to the Court of Appeals on a claim of appeal.

The Committee opposes this proposed amendment on the following grounds: (a) there is not a known issue generally with the maintenance and forward of exhibits such that a rule of general application needs to be modified; (b) the proposal would impose costs and burden upon the courts, which are already over-burdened; (c) the proposal creates a potential conflict with MCR 2.518 and existing file management standards.

The Committee also notes that (i) a similar rule exists for appeals to circuit court, MCR 7.109(c); and (ii) if the perceived problem relates to appointed counsel for indigent parties, a more targeted solution might be a better

solution, such as requiring the delivery of all trial exhibits to appellate counsel before fees are approved (such as proposed in File No. 2010-15, Proposed Amendment of Rule 6.005 of the Michigan Court Rules).

The countering position believes the proposed amendment is appropriate and addresses legitimate concerns. The countering position would even extend the requirement on the trial court to the time allowed to file leave to appeal in recognition that pre-plea legal issues sometimes merit appellate review.

An in-person vote was taken. An e-vote will be sent out.

c. [2010-26 - Proposed Amendment of Rule 7.210 and Rule 7.212 of the Michigan Court Rules](#)

The proposed amendments of MCR 7.210 and MCR 7.212 would extend the time period in which parties may request that a court settle a record for which a transcript is not available and would clarify the procedure for doing so.

Issued: November 10, 2011

Comment period expiration: March 1, 2012

Public hearing: To be scheduled

Liaisons: Samuel R. Smith and Scott R. Sanford

The Committee supports 7.210 but in paragraph 2b, requests that “shall” be changed to “may” to give the trial court discretion.

An in-person vote was taken. An e-vote will be sent out.

d. [HB 4920](#) (Scott) Cities; home rule; authority to enact local ordinances with criminal penalties of not more than 180 days in jail; provide. Amends secs. 3 & 4i of [1909 PA 279](#) (MCL [117.3](#) & [117.4i](#)).

Status: 11/30/11 Referred to Senate Committee of the Whole

[HB 4921](#) (Heise) Townships; charter; authority to enact local ordinances with criminal penalties of not more than 180 days in jail; provide. Amends sec. 21 of [1947 PA 359](#) (MCL [42.21](#)).

Status: 11/30/11 Referred to Senate Committee of the Whole

[HB 4922](#) (Walsh) Townships; general law; authority to enact local ordinances with criminal penalties of not more than 180 days in jail; provide. Amends secs. 1 & 4 of [1945 PA 246](#) (MCL [41.181](#) & [41.184](#)).

Status: 11/30/11 Referred to Senate Committee of the Whole

[HB 4923](#) (Constan) Villages; general law; authority to enact local ordinances with criminal penalties of not more than 180 days in jail; provide. Amends secs. 2 & 4, ch. VI of [1895 PA 3](#) (MCL [66.2](#) & [66.4](#)).

Status: 11/30/11 Referred to Senate Committee of the Whole

[HB 4924](#) (Muxlow) Villages; home rule; authority to enact local ordinances with criminal penalties of not more than 180 days in jail; provide. Amends secs. 23 & 24 of [1909 PA 278](#) (MCL [78.23](#) & [78.24](#)).

Status: 11/30/11 Referred to Senate Committee of the Whole
Liaisons: Richmond M. Riggs and Haytham Faraj

**The majority of the committee views the bills as not being Keller permissible.
The bills are removed from the agenda.**

- e. [HB 5113](#) (Heise) Courts; district court; population requirement for sitting of district court; eliminate, and provide for distribution of certain fines and costs. Amends sec. 8379 of [1961 PA 236](#) (MCL [600.8379](#)) & repeals sec. 8251 of 1961 PA 236 (MCL [600.8251](#)).

Status: 10/20/11 Referred to House Committee on Appropriations
Liaison: J. Kevin McKay

**The majority of the committee views the bills as not being Keller permissible.
The bill is removed from the agenda.**

- f. Veterans Treatment Court
[HB 5159](#) (Schmidt) Courts; circuit court; veterans treatment court; provide for the state drug treatment court advisory committee to monitor. Amends sec. 1082 of [1961 PA 236](#) (MCL [600.1082](#)).

Status: 11/10/11 Referred to House Judiciary

[HB 5162](#) (Damrow) Courts; circuit court; veterans treatment court; create. Amends [1961 PA 236](#) (MCL [600.101](#) - [600.9947](#)) by adding ch. 10B.

Status: 11/10/11 Referred to House Judiciary

Liaisons: Fred E. Bell and Daniel Corrigan Grano

The bills will be tabled to the February meeting.

- g. [HB 5191](#) (LeBlanc) Courts; judges; magistrates; require to be licensed attorneys. Amends sec. 8507 of [1961 PA 236](#) (MCL [600.8507](#)).

Status: 12/01/11 Referred to House Judiciary

Liaisons: J. Kevin McKay and Kimberly Reed Thompson

The committee supports the bill. Although the committee recognizes 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.

An in-person vote was taken. An e-vote will be sent out.

- h. Youth Trainee Program
[HB 5214](#) (Santana) Criminal procedure; youthful trainees; eligibility criteria for youthful trainee program; modify. Amends sec. 11, ch. II of [1927 PA 175](#) (MCL [762.11](#)).

Status: 12/13/11 Referred to House Judiciary

[SB 0880](#) (Johnson) Criminal procedure; youthful trainees; eligibility criteria for youthful trainee program; modify. Amends sec. 11, ch. II of [1927 PA 175](#) (MCL [762.11](#)).

Status: 12/14/11 Referred to Senate Judiciary

Liaisons: John A. Jarema and John L. Livesay

The bills will be tabled to the February meeting.

- i. [SB 0809](#) (Schuitmaker) Traffic control; other; eligibility for sobriety court; clarify. Amends secs. 304, 319 & 319b of [1949 PA 300](#) (MCL [257.304](#) et seq.).

Status: 11/09/11 Referred to Senate Judiciary

Liaisons: Ryan Lee Berman and Julie A. Powell

The committee has some disagreement as to the Keller permissible.

The bills will be tabled to the February meeting.

4. Reports

- a. Criminal Law Section
Judge Hoort provided an update on the Criminal Law Section.
- b. Eyewitness Task Force
Carrie Sharlow provided a brief update as to the beginning of this Task Force.
- c. Indigent Defense Advisory Commission
Carrie Sharlow provided the upcoming meetings dates of the Commission.
- d. Custodial Interrogation Recording Legislation
In Elizabeth Lyon's absence, a report was not given.

5. Adjournment.