State Bar of Michigan
Criminal Jurisprudence and Practice Committee
Thursday, October 13, 2011, 2 – 4 PM
at the State Bar of Michigan Building, Room 3

Teleconference 1-877-352-9775, Passcode 9152168764#

MINUTES

Committee Members: Fred E. Bell, Ryan Lee Berman, Thomas P. Clement, James W. Heath, Hon. David A. Hoort, J. Kevin McKay, Richmond M. Riggs, Gretchen A. Schlaff, Samuel R. Smith
SBM Staff: Elizabeth K. Lyon, Carrie A.Sharlow

1. Call to Order & Welcome

    a. New members

    b. Court rules, Statutes/Keller permissible, Meetings, Absences, SBM SharePoint

2. Old Business

    a. 2008-36 Proposed Amendment of Rule 7.202 of the Michigan Court Rules and Proposed Adoption of Administrative Order No. 2011-XX

    Alternative A, the proposed amendment of MCR 7.202 would establish that an order suppressing material and substantial evidence is considered a final order, and therefore subject to an appeal by right. By contrast, Alternative B, a proposed administrative order, would establish a right to a mandatory stay while a prosecutor pursues interlocutory appeal of a trial court's decision to suppress a prosecutor's evidence. These proposals were prompted by the Court's decision in People v Richmond, 486 Mich 29 (2010), in which the Court held that a prosecutor's decision to move to dismiss the prosecutor's case makes the case moot on appeal.

    Issued: June 14, 2011
    Comment period expires: October 1, 2011
    Public hearing: To be scheduled

    After an online discussion, on September 19, 2011, the Committee took the following position:
    The committee feels 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 the trial court and the Court of Appeals wrongfully deny a stay, the Supreme Court can easily reverse and grant a stay pending the appeal.

    Alternative A changes Michigan law by its re-definition of a 'final judgment' or 'final order' and affords the prosecutor rights not similarly available to the defense. Alternative B bypasses established appellate rules and also affords to the prosecutor a right not similarly available to the defense. Both alternatives also eliminate the discretion by the trial court and Court of Appeals, as needed, to grant or deny a stay of proceedings.

After an email discussion, back and forth with Sam Smith, Judge Hoort offers the following suggested language:
"If any action, after jeopardy has attached in a criminal case, by the opposing party or court results in the loss of a previously stated non-frivolous cause of action or defense, the affected party shall be entitled to a stay upon the filing of an application for leave to appeal."
Committee Liaisons: Samuel R. Smith and Judge David A. Hoort

A motion was made and supported that the committee support the following language:

Further language for MCR 7.205(E)(3):
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.

An evote will be sent out.

3. New Business

   a. HB 4844 (Pettalia) Civil procedure; personal protection orders; statewide personal protection order registry; create, and provide for law enforcement information network (LEIN) access. Amends secs. 2950 & 2950a of 1961 PA 236 (MCL 600.2950 & 600.2950a) & adds sec. 2950n.
   Status: 06/30/11 Referred to House Judiciary
   Committee Liaisons: James W. Heath and Thomas P. Clement

   James W. Heath and Thomas P. Clement submitted a memo on HB 4844, recommending opposition.

   A motion was made and supported that the committee oppose the bill for the following reasons:

   First, the action requires that the issuance of a personal protection order be maintained in the LEIN system for ten years without considering the potential for improper issuance or issuance based upon unreliable or unsubstantiated allegations. This is especially concerning given that many personal protection order are issue ex parte and subsequently terminated following a hearing. The way the amendments are written seem to indicate that even personal protection order terminated in short order would be maintained for the ten year period.

   Second, the proposed public registry serves little practical purpose. The purpose of a personal protection order is to protect a specific individual and in some circumstances that individual's family. There is no judicial finding that the subject of the order is a danger to

others thereby requiring some notification beyond the scope of those who requested and received the order.

It has a long-term effect when the matter may only be temporary.

An evote will be sent out.

b. HB 4906 (Kurtz) State; symbol; English; establish as the official state language. Creates new act.
Status: 09/07/11 Referred to House Committee on Government Operations
SB 0638 (Kahn) State; symbol; English; establish as the official state language and provide for its use. Creates new act.
Status: 09/13/11 Referred to Senate Committee on Government Operations
Committee Liaisons: Nichole Jongsma Derks and Daniel Corrigan Grano

These two bills are not Keller permissible and therefore the committee should not take a position.

c. SB 0688 (Schuitmaker) Crimes; perjury; unsworn declaration made under penalty of perjury; include as a statement punishable as perjury. Amends sec. 423 of 1931 PA 328 (MCL 750.423).
Status: 09/20/11 Referred to Senate Judiciary
SB 0689 (Schuitmaker) Civil procedure; evidence; uniform unsworn foreign declarations act; create. Amends sec. 2102 of 1961 PA 236 (MCL 600.2102) & adds ch. 21A.
Status: 09/20/11 Referred to Senate Judiciary
Committee Liaisons: J. Kevin McKay and Fred E. Bell

Committee Questions on the Bills:
If the primary change is just to include the electronic media, electronic signature? What is the basic premise of the bill?
Is there anything in regards to time-line, eg. credit card applications online?
What is the background of this bill?

Elizabeth K. Lyon will pass the above questions onto Kieran Marion at the Uniform Law Commission.

A motion was made and supported that the committee oppose both bills for the reason that imprisonment should only be possible if an individual is actually placed under oath and that the penalties of perjury should only apply to sworn averments. The committee otherwise support the alternative means of placing one's signature on a related document or averment.

An evote will be sent out once the committee receives answers from Kieran Marion.

d. 2010-14 Proposed Adoption of New Rule 6.202 of the Michigan Court Rules
The intent of this proposed new rule is to create a "notice and demand" rule that would allow forensic reports to be admitted into evidence without the forensic analyst's presence if the defendant does not object. The proposed rule is based on favorable discussion by the United States Supreme Court in Melendez-Diaz v Massachusetts, 557 US ___; 129 S Ct 2527 (2009). Although the Supreme Court struck down the Massachusetts procedure for

admitting forensic evidence without attendance by the forensic analyst, it noted that some states have adopted "notice and demand" provisions that create a procedure by which forensic reports may be admitted into evidence if the defendant does not object to the report's entry.
Issued: July 7, 2011
Comment period expires: November 1, 2011
Public hearing: To be scheduled
Committee Liaisons: Haytham Faraj and Leonard A. Kaanta

A motion was made and support that the committee support the concept with recommended amendments, it applies to both prosecution and defense and the cut-off dates be modified, and recommend the following language:

Rule 6.202. Disclosure of Forensic Laboratory Report and Certificate; Admissibility of Report and Certificate; Adjournment.
(A) Disclosure. Upon receipt of a forensic laboratory report and certificate by the examining expert, a party may serve a copy of the laboratory report and certificate on the opposing party's attorney, or party if not represented by an attorney, within 14 days after receipt of the laboratory report and certificate. A proof of service of the report and certificate on the opposing party's attorney, or party if not represented by an attorney, shall be filed with the court.
(B) Notice and Demand.
(1) Notice. If a party intends to offer the report as evidence at trial, the party's attorney or party, if not represented by an attorney, shall provide the opposing party's attorney, or party if not represented by an attorney, with Notice of that fact in writing when the report is served as provided in subrule (A)(1). The analyst who conducts the analysis on the forensic sample and signs the report shall complete a certificate on which the analyst shall state (i) that he or she is qualified by education, training, and experience to perform the analysis, (ii) the name and location of the laboratory where the analysis was performed, (iii) that performing the analysis is part of his or her regular duties, and (iv) that the tests were performed under industry-approved procedures or standards and the report accurately reflects the analyst's findings and opinions regarding the results of those tests or analysis. Except as provided in subrule (B)(2), the report and certification is admissible in evidence to the same effect as if the person who performed the analysis or examination had personally testified.
(2) Demand. Upon receipt of a copy of the laboratory report and certificate, the opposing party's attorney, or party if not represented by an attorney, may file a written Objection to the use of the laboratory report and certificate. The written objection shall be filed with the court in which the matter is pending, and shall be served on the opposing party's attorney or party if not represented by an attorney within 14 days of receipt of the Notice. If a written objection is filed, the report and certificate are not admissible except as otherwise allowed by law. If no objections is made to the use of the laboratory report and certificate within the time allowed by this section, the report and certificate are admissible in evidence as provided in subrule (B)(1).
(3) Adjournment. Compliance with this court rule shall be good cause for an adjournment of the trial.

An evote will be sent out.

4. Reports from Other Committees

a. Criminal Law Section
b. Indigent Defense Funding
c. Custodial Interrogation Recording Legislation

5. Adjournment.