Michigan Supreme Court
State Court Administrative Office
Trial Court Services Division
Michigan Hall of Justice
P.O. Box 30048
Lansing, Michigan 48909
Phone (517) 373-4835

MEMORANDUM

DATE: December 20, 2005

TO: Judges
cc: Court Administrators
County Clerks

FROM: Dawn Childress, Management Analyst

RE: Amendment of Criminal Procedure Court Rules Effective January 1, 2006

On July 13, 2005, the Michigan Supreme Court adopted various amendments to the rules of criminal procedure that become effective January 1, 2006. Below is a discussion of those amendments reflecting significant changes in current court practices and procedures. Please note that not all amendments to the criminal court rules are discussed in this memo. Only those amendments that significantly impact court administration or procedure are included. Courts should thoroughly review the full amendments, which you can view at: http://courts.michigan.gov/supremecourt/Resources/Administrative/2003-04-071305-2.pdf

MCR 2.510 – JUROR PERSONAL HISTORY QUESTIONNAIRE

MCR 2.510 (D) was amended to conform the rule to MCL 600.1332[1] by eliminating the provision allowing a presiding judge to summon jurors for court attendance. The new court rule states:

> (D) Summoning Jurors for Court Attendance. The court clerk, the court administrator, the sheriff, or the jury board, as designated by the chief judge, shall summon jurors for

[1] MCL 600.1332 provides: The clerk, jury board, or sheriff shall summon jurors for court attendance at such times and in such manner as directed by the chief judge or by the judge to whom the action in which jurors are being called for service is assigned. For a juror's first required court appearance, service shall be by a written notice addressed to the juror at the juror's place of residence as shown by the records of the board, which notice may be by ordinary mail or by personal service. For subsequent service notice may be in any manner directed by the judge. The officer giving notice to jurors shall keep a record of the service of the notice and shall make a return if directed by the court. The return shall be presumptive evidence of the fact of service.

> court attendance at the time and in the manner directed by the chief judge, or the judge to whom the action in which jurors are being called for service is assigned….

MCR 2.511 – IMPANELING THE JURY

MCR 2.511 (D) was amended by striking section (2), which allowed a challenge for cause if a juror had been convicted of a felony. The court rule was amended to reflect the 2002 amendment to MCL 600.1307a[2] automatically disqualifying a convicted felon from serving as a juror.

MCR 2.511 (F) was also amended to allow more than one juror to be challenged, selected, and examined at any given time.

MCR 6.004 – SPEEDY TRIAL

MCR 6.004 (A) was amended to add the provision that "[w]henever the defendant's constitutional right to a speedy trial is violated, the defendant is entitled to dismissal of the charge with prejudice."

MCR 6.004 (C) governs recognizance release of a defendant when there has been a delay in criminal proceedings and the defendant has been incarcerated for 180 days or more. The amendments provide that a court is not required to release such a defendant on personal recognizance if it finds, by clear and convincing evidence, that the defendant is likely to either fail to appear for future proceedings or to present a danger to any other person or the community.

MCR 6.004 (D), commonly referred to as "the 180-Day Rule," was significantly changed, altering both the procedure for bringing Michigan Department of Corrections inmates to trial, as well as computing time pursuant to the rule. The amended court rule, reads:

> (1) The 180-Day Rule. Except for crimes exempted by MCL 780.131(2), the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment,

[2] The qualification portion of MCL 600.1307a provides: (1) To qualify as a juror a person shall:
(a) Be a citizen of the United States, 18 years of age or older, and a resident in the county for which the person is selected, and in the case of a district court in districts of the second and third class, be a resident of the district.
(b) Be able to communicate in the English language.
(c) Be physically and mentally able to carry out the functions of a juror. Temporary inability shall not be considered a disqualification.
(d) Not have served as a petit or grand juror in a court of record during the preceding 12 months.
(e) Not have been convicted of a felony.

> information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner. The written notice and statement shall be delivered by certified mail.

The Michigan Department of Corrections will now be required to send the prosecuting attorney, by certified mail, written notice of the place of imprisonment and a request for final disposition that includes the term of commitment and all time computations and parole board decisions relating to the prisoner. The 180 day time period begins running on the date that the department causes this document to be delivered to the prosecuting attorney.

The remedy for failing to bring an inmate to trial within 180 days was also amended. MCR 6.004(D) (2) now states:

> (2) Remedy. In the event that action is not commenced on the matter for which request for disposition was made as required in subsection (1), no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information, or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Therefore, beginning January 1, 2006, if an inmate has not been brought to trial within 180 days after the department of corrections delivers the requisite notice and request for final disposition to the prosecuting attorney, the courts of the state lose jurisdiction over the matter and the court must enter an order of dismissal with prejudice.

MCR 6.005 – RIGHT TO ASSISTANCE OF A LAWYER; ADVICE, APPOINTMENT FOR INDIGENTS; WAIVER; JOINT REPRESENTATION; GRAND JURY PROCEEDINGS

MCR 6.005 was amended to add the following language to subsection (E):

> The court may refuse to adjourn a proceeding to appoint counsel or allow a defendant to retain counsel if an

> adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel.

The amendment is designed to prevent manipulation of the judicial process by a defendant. It also reflects the current practice of courts, given the lack of specific statutory or case law guidance and the courts' need to implement more effective caseflow management.

MCR 6.005 (H) (1) was amended to exclude from the responsibilities of an appointed trial lawyer any proceedings leading to possible revocation of youthful trainee status. In addition, this section was amended to limit appointment responsibilities through initial sentencing only.

MCR RULE 6.006 – VIDEO AND AUDIO PROCEEDINGS

MCR 6.006 is a new rule establishing procedures for utilizing two-way interactive video technology to conduct certain criminal proceedings when a defendant is in a separate location, when a defendant is present in the courtroom, or when a defendant has waived the right to be present.

Section (A) provides that when a defendant is at a separate location, district and circuit courts may use two-way interactive video technology to conduct the following proceedings between a courtroom and a prison, jail, or other location: initial arraignment on the warrant, arraignments on the information, pretrials, pleas, sentencings for misdemeanor offenses, show cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, and waivers and adjournments of preliminary examinations.

Section (B) relates specifically to preliminary examinations. The rule allows that as long a defendant is either present in the courtroom or has waived the right to be present, and upon motion of either party, district courts may use telephonic, voice, or video conferencing, including two-way interactive video technology, to take testimony from an expert witness or, upon a showing of good cause, any person at another location.

Section (C) covers proceedings other than preliminary examinations. The rule provides that as long as a defendant is either present in the courtroom or has waived the right to be present, upon a showing of good cause, district and circuit courts may use two-way interactive video technology to take testimony from a person at another location in the following procedures: evidentiary hearings, competency hearings, sentencings, probation revocation proceedings, and proceedings to revoke a sentence that does not entail an adjudication of guilt, such as youthful trainee status. Furthermore, with consent of the parties, two-way interactive video technology may be used for trials. A party who does not consent to the use of the two-way interactive video technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.

Section (D) requires that the use of telephonic, voice, video conferencing, or two-way interactive video technology conform to any requirements and guidelines established by the State Court Administrative Office and all proceedings at which such technology is used must be recorded verbatim by the court.

In conjunction with the adoption of a new rule authorizing courts to use two-way interactive video technology in certain criminal proceedings, the Court also deleted all the substantive provisions of Administrative Order 2000-3. Under that administrative order, courts desiring to use two-way interactive video technology were required to submit a local administrative order (LAO) to SCAO for approval. Beginning January 1, 2006, MCR 6.006 governs the use of this technology. Thus, courts are no longer required to submit an LAO requesting approval for two-way interactive video technology use, and any existing LAOs authorizing its use will be rescinded.

MCR 6.104 – ARRAIGNMENT ON THE WARRANT OR COMPLAINT

MCR 6.104 (A), (B), and (C) were amended to allow the use of two-way interactive video technology in accordance with MCR 6.004 (A).

MCR 6.106 – PRETRIAL RELEASE

MCR 6.106 (D) (2), which lists conditions a court may require for pretrial release of a defendant, was amended to add a provision limiting or prohibiting contact with any other named person or persons. Furthermore, if the limitation or prohibition on contact conflicts with another court order, the most restrictive provision of each order shall take precedence until the conflict is resolved.

In addition to some minor wording changes, MCR 6.106 (E) was amended to reflect the 2004 amendments to MCL 765.6[3] regarding bond amounts.

MCR 6.106 (G) was amended to allow a prosecuting attorney, in addition to the defendant, to request a custody hearing when a defendant is in custody pursuant to MCR 6.106 (B).

MCR 6.106 (I) (2) (b) was amended to include the following language:

> (b) …If the amount of a forfeited surety bond is less than the full amount of the bail, the defendant shall continue to be liable to the court for the difference, unless otherwise ordered by the court.

[3] MCL 765.6(2) states: "If the court fixes a bail amount…and allows for the posting of a 10% deposit bond, the person accused may post bail by a surety bond in an amount equal to 1/4 of the full bail amount…and executed by a surety approved by the court."

This language was included to clarify that if bail or bond is revoked due to a defendant's failure to comply with conditions of release, and the bail or surety bond is forfeited, the defendant is still responsible for the full amount of the bail, less the amount of the forfeited surety bond.

MCR 6.110 – PRELIMINARY EXAMINATION

MCR 6.110 (B) was amended to more closely mirror MCL 766.7.[4] The new language reads:

> (B) Time of Examination; Remedy. Unless adjourned by the court, the preliminary examination must be held on the date specified by the court at the arraignment on the warrant or complaint. If the parties consent, for good cause shown, the court may adjourn the preliminary examination for a reasonable time. If a party objects, the court may not adjourn a preliminary examination unless it makes a finding on the record of good cause shown for the adjournment. A violation of this subrule is deemed to be harmless error unless the defendant demonstrates actual prejudice.

Under the amended rule, the court can adjourn a preliminary examination for a reasonable time upon good cause, if the parties consent. If a party objects, a court may still adjourn a preliminary examination if it makes a finding on the record of good cause shown for the adjournment. If this process is violated, the violation is deemed harmless error unless the defendant can show actual prejudice.

MCR 6.112 – THE INFORMATION OR INDICTMENT

MCR 6.112 (B) was amended to clarify that when a defendant is a fugitive from justice or is subject to grand jury proceedings and a preliminary examination is not held, the indictment acts to commence judicial proceedings.

MCR 6.112 (C) was amended to add the provision that an indictment must be filed on or before the date set for the arraignment.

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[4] MCL 766.7 provides as follows: "… An adjournment, continuance, or delay of a preliminary examination shall not be granted by a magistrate except for good cause shown. A magistrate shall not adjourn, continue, or delay the examination of any cause by the consent of the prosecution and accused unless in his discretion it shall clearly appear by a sufficient showing to the magistrate to be entered upon the record that the reasons for such consent are founded upon strict necessity and that the examination of the cause cannot then be had, or a manifest injustice will be done. An action on the part of the magistrate in adjourning or continuing any case, shall not cause the magistrate to lose jurisdiction of the case."

MCR 6.112 (F) was amended to clarify that notice of intent to seek an enhanced sentence must be filed within 21 days after the defendant's arraignment. If the defendant waives arraignment, the notice of intent must be filed within 21 days after the information is filed

MCR 6.113 – THE ARRAIGNMENT ON THE INFORMATION OR INDICTMENT

MCR 6.113 (D) was amended to conform to the statutory language regarding the ordering of preliminary examination transcripts set forth in MCL 766.15.[5] Effective January 1, 2006, preliminary examination transcripts will no longer be required to be prepared and filed when a defendant pleads guilty at arraignment. Instead, a transcript will be required to be prepared only upon written demand by the prosecutor, defense counsel, or a defendant if not represented by an attorney, or when ordered sua sponte by the trial court.

MCR 6.113 (E) was added allowing courts to eliminate circuit court arraignments for defendants who are represented by an attorney where other arrangements have been made to give the defendant a copy of the information. To take advantage of the provisions of MCR 6.113, courts are required to submit a local administrative order to the State Court Administrator.[6]

MCR 6.201 – DISCOVERY

MCR 6.210 (A) was amended to require a party, upon request, to provide all other parties certain information. In addition to the names and addresses of lay and expert witnesses a party may call at trial, the new language allows a party, in the alternative, to provide the name of the witness and make the witness available to the other party for interview. The rule also stipulates that a witness list may be amended without leave of the court up to 28 days before trial, and limits the disclosure of written or recorded lay witness statements to those pertaining to the case.

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[5] MCL 766.15 provides in pertinent part:

(2) A written transcript of the testimony of a preliminary examination need not be prepared or filed except upon written demand of the prosecuting attorney, defense attorney, or defendant if the defendant is not represented by an attorney, or as ordered sua sponte by the trial court. A written demand to prepare and file a written transcript is timely made if filed within 2 weeks following the arraignment on the information or indictment. A copy of a demand to prepare and file a written transcript shall be filed with the trial court, all attorneys of record, and the court which held the preliminary examination. Upon sua sponte order of the trial court or timely written demand of an attorney, a written transcript of the preliminary examination or a portion thereof shall be prepared and filed with the trial court.

(3) If a written demand is not timely made as provided in subsection (2), a written transcript need not be prepared or filed except upon motion of an attorney or a defendant who is not represented by an attorney, upon cause shown, and when granting of the motion would not delay the start of the trial. When the start of the trial would otherwise be delayed, upon good cause shown to the trial court, in lieu of preparation of the transcript or a portion thereof, the trial court may direct that the defense and prosecution shall have an opportunity before trial to listen to any electronically recorded testimony, a copy of the recording tape or disc, or a stenographer's notes being read back.

[6] Model Local Administrative Order 26 was developed by the State Court Administrative Office to assist courts wishing to utilize the provisions of this court rule.

The new rule language also requires the disclosure of a curriculum vitae for any expert that may be called at trial, and expands disclosure of expert reports to include any written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion. Previously, a party would only be required to disclose any report of any kind that had been prepared by the expert. In addition, a party, upon request, is now required to disclose a description or list of criminal convictions known to the defense attorney or prosecuting attorney of any witness the party may call at trial. Finally, the new language allows a party to request copies of any document, photograph, or other paper that may be introduced at trial. A party may request a hearing regarding any question of cost of reproduction.

MCR 6.201 (B) was amended to require the prosecuting attorney to provide each defendant, upon request, with interrogation records concerning the case. The disclosure of any written or recorded statements by a defendant, codefendant, or accomplice is limited to only those statements made pertaining to the case.

Additional language was added to MCR 6.201 (E) allowing a court to enter an appropriate protective order, on motion and a showing of good cause, when there is a risk to a person of undue embarrassment.

Under the amendments to MCR 6.201 (F), both the prosecuting attorney and the defendant must comply with requirements of the court rule surrounding disclosure of discovery materials within 21 days of a request. Previously, the prosecuting attorney was required to comply within 7 days of a request and the defendant was required to comply within 14 days of a request.

MCR 6.201 (J) was amended to provide specific remedies the court is allowed to order when a party fails to comply with a request for discovery. It also allows a court to order sanctions against an attorney if it finds the attorney willfully violated this rule, as well as setting forth the appropriate standard of review for any order entered pursuant to this section that is subsequently appealed.

MCR 6.304 – PLEA OF NOT GUILTY BY REASON OF INSANITY

MCR 6.304 (C) (2) was amended to change the burden of proof for pleas of not guilty by reason of insanity. Under the current rule, the court must establish support for a finding that a reasonable doubt exists about the defendant's legal sanity at the time of the offense. Under the amended rule, the court must establish that the defendant was legally insane by a preponderance of the evidence.

MCR 6.310 – WITHDRAWAL OR VACATION OF PLEA

MCR 6.310 was amended to provide additional guidance regarding withdrawals of pleas, as well as to consolidate the provisions of MCR 6.311 regarding challenging pleas after sentence with the provisions of MCR 6.310. MCR 6.311 will be deleted effective January 1, 2006. The

most significant change made to this court rule, other than its consolidation with MCR 6.311, is that it sets forth a determinate time period (six months) within which a defendant may file a motion to withdraw his or her plea after sentence. If a defendant fails to file a motion to withdraw the plea within six months after sentence, the defendant is limited to seeking relief under post-judgment procedures in subchapter 6.500. An additional modification to the court rule is that, on the prosecutor's motion, the court may vacate a plea at any time if the defendant has failed to comply with the terms of a plea agreement. Under the current rule, the court can only vacate a plea prior to sentence.

MCR 6.402 – WAIVER OF JURY TRIAL BY THE DEFENDANT

MCR 6.402 (A) was amended to provide that, in those circuit courts where circuit court arraignments have been eliminated pursuant to MCR 6.113(E), the court may not accept a waiver of trial by jury until the defendant has been provided with a copy of the information and has been offered an opportunity to consult with a lawyer.

MCR 6.414 – CONDUCT OF JURY TRIAL

MCR 6.414 (D) was amended to direct courts allowing jurors to take notes that they must instruct the jurors to keep their notes confidential except as to other jurors during deliberations. Additionally, the court may allow jurors to take their notes into deliberations. If jurors are not allowed to take their notes into deliberations, the court must explain that to the jurors at the same time it permits the note taking. The court must also ensure that all juror notes be collected and destroyed at the conclusion of the trial.

A major revision to MCR 6.414 is the addition of subsection (E). Pursuant to this new language, the court may, in its discretion, permit jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure to ensure that they do not ask inappropriate questions and it must allow the parties to have the opportunity to object to the questions.

MCR 6.414 (F) was amended to provide that no one other than the officer in charge of the jurors during a jury view, or any person appointed by the court to direct the jurors' attention to a particular place or site, may speak to the jury concerning a subject connected with the trial. Any such communication by the trial judge, the officer in charge of the jurors, or any other person must be recorded in some fashion.

MCR 6.414 (H) was amended to allow the court, at its discretion and on notice to the parties, to instruct the jury prior to closing arguments and give any appropriate further instructions after closing arguments. Previously, the court rule allowed this procedure only with the parties' consent.

MCR 6.419 – MOTION FOR DIRECTED VERDICT OF ACQUITTAL

A new section (C) was added to MCR 6.419 governing motions for directed verdict in bench trials pursuant to these amendments. Previously, there was no procedure in place for defendants to seek a directed verdict during a bench trial. The new section allows a defendant to seek an acquittal after the prosecution has rested its case-in-chief on the basis that reasonable doubt exists. The court may render an acquittal at that point, or may reserve the issue until all evidence has been presented. The court is required to make findings of fact if it renders an acquittal verdict.

MCR 6.420 – VERDICT

MCR 6.420 (C) was amended to allow a court to accept a jury's verdict on one or more counts on a multiple-count case when it determines that the jury is deadlocked and a mistrial must be declared.

MCR 6.428 – REISSUANCE OF JUDGMENT

MCR 6.428 is a new court rule that allows a court to issue an order restarting the time in which a defendant may file an appeal of right. The defendant who did not file a timely appeal must demonstrate his or her counsel either disregarded the defendant's instruction to perfect a timely appeal of right or otherwise failed to provide effective assistance, resulting in failure to perfect a timely appeal.

MCR 6.429 – CORRECTION AND APPEAL OF SENTENCE

MCR 6.429 (A) was amended to allow either party to file a motion to correct an invalid sentence.

MCR 6.429 (B) was amended to change the time within which a motion to correct an invalid sentence may be filed. Previously, a motion for resentencing was required to be filed within 42 days after entry of judgment. The rule was amended to provide that a motion to correct an invalid sentence may be filed before the filing of a timely claim of appeal. Additionally, if a defendant may only appeal by leave or fails to file a timely claim of appeal, a motion to correct an invalid sentence may only be filed within six months of entry of the judgment of conviction and sentence. The court rule previously provided that it could be filed within the time for filing an application for leave to appeal.

MCR 6.431 – NEW TRIAL

MCR 6.431 (A) was amended to change the time periods within which a defendant may file a motion for new trial. The amended rule allows a motion for new trial to be filed only before the filing of a timely claim of appeal. If, however, the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion for a new trial may only be filed within six months of entry of the judgment of conviction and sentence.

DISTRICT COURTS

MCR 6.610 – CRIMINAL PROCEDURE GENERALLY

MCR 6.610 (D) was amended to add language that an indigent defendant has a right to an appointed attorney whenever the court determines that it might sentence the defendant to a term of incarceration, even if the sentence is suspended. If the indigent defendant does not have an attorney and has not waived the right to an appointed attorney, the court may not sentence the defendant to jail or to a suspended jail sentence.

MCR 6.610 (E) was amended to require the court to inform a defendant wishing to plead guilty or nolo contendere of the right to the assistance of an attorney if the court determines that it might sentence the defendant to a term of incarceration, even if the sentence is suspended. The rule was amended to require the court to inquire, while taking a guilty or nolo contendere plea if there is no plea agreement, whether anyone has promised the defendant anything. If there is a plea agreement, the court must inquire whether anyone has promised anything beyond what is in the plea agreement, whether anyone has threatened the defendant, and whether it is the defendant's own choice to plead guilty.

Furthermore, MCR 6.610 (E) (7) was amended to allow a defendant to plead guilty or nolo contendere in writing without support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading. The defendant must acknowledge guilt or nolo contendere in a writing to be filed in the district court file, and must waive, in writing, the rights enumerated in subrule (3)(b).[7] The court must also be satisfied that the waiver is voluntary, and that the situation is proper for a plea of guilty or nolo contendere.

MCR 6.610 (H) was amended to allow a district court, at arraignment on offenses not cognizable by the district court, to inform the defendant of the nature of the charge instead of reading the complaint or warrant into the record.

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[7] MCR 6.610(E)(3) The court shall advise the defendant of the following:
(b) that if the plea is accepted the defendant will not have a trial of any kind and that the defendant gives up the following rights that the defendant would have at trial:
(i) the right to have witnesses called for the defendant's defense at trial,
(ii) the right to cross-examine all witnesses called against the defendant,
(iii) the right to testify or to remain silent without an inference being drawn from said silence,
(iv) the presumption of innocence and the requirement that the defendant's guilt be proven beyond a reasonable doubt.

MCR 6.615 – MISDEMEANOR TRAFFIC CASES

MCR 6.615 (A) (3), which stated that a single citation may not allege both a misdemeanor and a civil infraction, has been deleted.

Additionally, under the amended MCR 6.615 (B), it is no longer necessary for a sworn complaint to be filed with the court in order to issue a warrant for a defendant's arrest.

MCR 6.615 (D) (1) was amended to give the court discretion to dismiss a citation if it is not signed and filed on paper, when the court requires a citation to be filed on paper and signed.

MCR 6.620 – IMPANELING THE JURY

MCR 6.620 (B), which governs peremptory challenges in district courts, was amended to more closely mirror the rules of criminal procedure applicable to circuit court cases. It now sets forth that a prosecutor is entitled to the same number of peremptory challenges as a defendant, as well as a provision allowing, on a showing of good cause, the court to grant one or more of the parties additional peremptory challenges. Each defendant is entitled to three peremptory challenges. The prosecutor is entitled to the same number of peremptory challenges as a defendant being tried alone, or, in the case of jointly tried defendants, the total number of peremptory challenges to which all the defendants are entitled.

As previously noted, a model local administrative order is available for those courts wishing to utilize the new provisions in MCR 6.113. If you have any questions or concerns, please feel free to contact Dawn Childress at (517) 373-3756 or childressd@courts.mi.gov or Sandi Hartnell at (517) 373-0122 or hartnells@courts.mi.gov.