

STATE APPELLATE DEFENDER OFFICE

DAWN VAN HOEK
DIRECTOR

JONATHAN SACKS
DEPUTY DIRECTOR

www.sado.org
Client calls: 313.256.9822



MAIN OFFICE:
PENOBSCOT BLDG., STE 3300
645 GRISWOLD
DETROIT, MI 48226-4281
Phone: 313.256.9833 • Fax: 313.965.0372

LANSING OFFICE:
101 N. WASHINGTON, 14TH FLOOR
LANSING, MI 48913-0001
Phone: 517.334.6069 • Fax: 517.334.6987

September 27, 2011

Corbin Davis
Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, Michigan 48090

Re: ADM File No. 2010-13
Proposed Amendment of Rule 6.001 of the Michigan Court Rules

Dear Mr. Davis:

I write in opposition to the proposed amendment of MCR 6.001 in ADM File 2010-13. I believe the comments already submitted illustrate the fundamental problem with this proposal. Reasonable minds may disagree about whether the proposal simply clarifies MCR 6.001 to explain that discovery provisions do not apply to preliminary exams or whether it actively ends the practice of providing discovery at exams. Regardless of the state of the law though, there is certainly a strong perception that adding this language will eliminate the standard practice of providing some form of discovery at preliminary exams.

As is clear from the comments of both the both prosecution and defense bar, there is a practice in most Michigan counties to provide some degree of discovery at preliminary exams. The State Appellate Defender Office strongly supports this practice for three reasons:

- (1) By allowing parties to properly evaluate the charges, the discovery allows quick resolution of cases and eliminates the need for cumbersome hearings in every case.
- (2) Providing available discovery prior to the preliminary exam means an attorney may knowledgeably discuss the case with his or her client and effectively present mitigating and exculpatory information to the prosecution. The result is quick resolution of wrongful arrests or inappropriately charged offenses.
- (3) In the absence of discovery, preliminary exam testimony will likely be inadmissible at trial when a witness is unavailable due to an inadequate opportunity to cross-examine. MRE 804(b)(1); *see People v Farquharson*, 274 Mich App 268; 731 NW2d 797 (2007).

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- (4) At SADO, we see many cases where police car videos and 911 tapes are destroyed because the circuit court does not even have jurisdiction to enter an order to preserve before police department retention policy – often only thirty days – expires. Trial counsel does not even learn of these materials when discovery is only provided after the preliminary exam.

Although comments from the Kent County and Wayne County Prosecutor's offices suggest a simple clarification of current court rules, the proposed changes at the very least arguably eliminate this current practice. Since MCR 6.001 refers to cases "cognizable" in circuit court, the plain language of the current court rule seems to require provision of available discovery at the preliminary exam, because felony charges at the preliminary exam ultimately result in cases slated for trial in circuit court. The Court of Appeals has also recognized a requirement for provision of available discovery at the preliminary exam. *See In re Bay County Prosecutor* 109 Mich App 476; 311 NW2d 399 (1981).

Certainly the majority of comments from the criminal defense bar recognize a fear that by ending the application of MCR 6.201 to preliminary exams, this amendment will eliminate any practice of providing discovery at this stage in the process. The State Appellate Defender Office expects this proposed language to be interpreted similarly by many assistant prosecutors and district court judges, thereby greatly limiting a currently successful and necessary practice in our courts.

If the proponents of this court rule proposal are correct, and it makes no changes, then adoption of the proposal will accomplish nothing. If opponents are correct, then adoption will limit a successful practice. Given these possibilities, the proposal seems either unwise or unnecessary.

Instead, the State Appellate Defender Office urges this Court to clear up this confusion and expand the provision of discovery in district courts by:

- (1) Amending MCR 6.001(A) to explicitly require provision of available discovery at or before the preliminary exam; and
- (2) Amending MCR 6.001(B) to explicitly require provision of discovery in misdemeanor cases.

Thank you for this opportunity to comment and for your consideration.

Sincerely,



Dawn Van Hoek
Director
State Appellate Defender Office