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Mr. Corbin Davis
Clerk of the Court
Michigan Supreme Court
925 W. Ottawa Street
Lansing, MI 48913

Via E-Mail
Via U.S. Mail

RE: Proposed Amendment to MCR 2.516(B) (ADM File No. 2008-33)

Dear Mr. Davis:

At its April 18, 2009, meeting the Representative Assembly of the State Bar of Michigan deliberated on the proposed amendment to MCR 2.516(B). In his remarks in support of the proposed amendment, the proponent of the proposal before the Assembly, Washtenaw County Assistant Prosecuting Attorney John Reiser, emphasized the constitutional concerns that the proposed amendment would address. He called the Assembly's attention to a recent article in *The New York Times* on March 17, 2009, describing an eight-week federal drug trial in Florida in which one of the jurors researched evidence that had been excluded by the judge. When one of the jurors reported this to the judge, further inquiry revealed that other jurors had done the same, and they had also researched the attorneys, the defendant, read news articles about the case, and turned to *Wikipedia* for legal definitions. Mr. Reiser stressed that the proposal was an effective response to juror activities such as these that undermine the integrity of the trial process.

After discussion, the Assembly approved the proposed amendments to MCR 2.516, with the following five modifications¹:

- 1: **(B)(1)(a)**
 (a) discuss the case with others, including other jurors ~~until~~
 deliberation begins, except as otherwise authorized by the court;

Subsection (B)(1)(a) is consistent with a position that the Representative Assembly adopted in September 2006 in response to the Supreme Court's proposed jury reform package. One of the jury reform proposals, an amendment to MCR 2.513(K), proposed allowing jurors to discuss the evidence of the case among themselves in the jury room during trial recesses. The Assembly unanimously opposed this rule change.

The Assembly's proposed modification to (B)(1)(a) is consistent with a comment posted on the Supreme Court website regarding the addition of the words "including other jurors" so as to prevent discussions among jurors except as authorized by the court. The discussion of the need for this modification focused on incidents in two states where jurors were discovered to be writing about a case on Facebook and Twitter during the course of the trial. The Assembly was concerned that the words "until deliberation begins" implies that jurors may discuss a case with others (other than fellow jurors) once deliberation begins.

¹ Words added by the Assembly are underlined; words deleted by the Assembly contain strikethrough lines.

2. **(B)(1)(d)**
(d) use a computer, cellular phone, ~~or~~ other electronic device with communication capabilities, or any other means to obtain or disclose information about the case, ~~when they are not in court~~. As used in this subsection, information about the case includes, but is not limited to, the following:

The Assembly believes that the words "any other means" should be added to make clear that all types of electronic communications, such as Blackberries, are included in this rule. The Assembly recommends deleting the words "when they are not in court" so that it is clear that the prohibition applies wherever the juror happens to be.

3. **(B)(1)(d)(i)**
(i) seeking information about ~~the~~ a party, criminal record of a party or witness, or attorney involved in the case;

The Assembly's proposed modification is consistent with a comment posted on the Supreme Court website that advocates expanding the scope of the proposed restriction. The Assembly believes that it is improper for a juror to seek any information about a party, witness, or attorney, beyond the information that is conveyed to the jury during the course of the trial.

4. **(B)(1)(d)(iv)**
(iv) researching any other information the juror might think would be helpful, ~~such as an aerial map of the scene.~~

The Assembly believes that the use of the words "such as an aerial map of the scene" does not add to the comprehensive language of this provision, but would rather limit it.

5. **B)(1)(e)**
(e) Any juror who observes or has reason to believe that another juror ~~has used an electronic device in violation~~ has violated ~~of~~ this rule shall immediately inform the court of the violation.

The Assembly believes that the words "has used an electronic device" unnecessarily and inappropriately limits the scope of the proposed prohibition. .

The Assembly appreciates the opportunity to make these recommendations to the Court for its consideration.

Sincerely,



Kathy Kakish, Chair
Representative Assembly

cc: Anne Boomer, Administrative Counsel