Order

Michigan Supreme Court
Lansing, Michigan

July 31, 2009

ADM File No. 2008-38

Proposed Amendment of
Rule 6.201 of the
Michigan Court Rules

Marilyn Kelly,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

On order of the Court, this is to advise that the Court is considering amendment of Rule 6.201 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

Rule 6.201 Discovery

(A) [Unchanged.]

(B) Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant:

(1) any exculpatory information or evidence known to the prosecuting attorney;

(2) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation;

(3) any written or recorded statements by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial;

(4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and

(5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

(6) any electronic recording evidence made by any governmental agency or agent pertaining to the case known to the prosecuting attorney. Such records shall be preserved by the prosecuting attorney until after all appeals have been exhausted or all rights of appeal have expired, whichever date is later. Failure to preserve such evidence will entitle the accused to a jury instruction that such evidence not produced may be presumed by jurors to have been adverse to the prosecution.

(C)-(J) [Unchanged.]

CORRIGAN, J. (*dissenting*). I would not publish the proposed amendment of MCR 6.201 because I do not think that this Court has the authority to govern the record keeping procedures of prosecutors and government agencies. Further, this proposal presents significant practical problems without any showing of the need for such a change.

Proposed subrule B(6) would penalize a prosecutor, without regard to his good faith, for failing to preserve "any electronic recording evidence made by any governmental agency or agent pertaining to the case known to the prosecuting attorney." It would further require retention of such evidence for an essentially indefinite period: "until after all appeals have been exhausted or all rights of appeal have expired." The rule thus would impose a duty on prosecutors to preserve evidence without regard to whether it is exculpatory or even admissible at trial for an indefinite period if the evidence may ultimately be said merely to "pertain[]" to any case. Accordingly, the rule effectively would require prosecutors to devise a method to obtain, permanently store, catalogue, and reproduce every audio or visual recording made by government agencies that could ever pertain to any case.[1] Further, because the rule addresses "evidence made by any governmental agency or agent," it would implicate the initial retention of all records of all agencies—including the field tapes of police and emergency personnel, tapes of 911 calls, digital booking photos, etc.—and would impliedly affect the normal processes of government agencies in erasing and reusing apparently outdated recording

[1] Because prosecutors would be subject to a penalizing jury instruction for failure to produce such evidence, prosecutors would be required to obtain and maintain equipment to reproduce the electronic recordings.

media. Such a court rule implicating the record retention practices of prosecutors and state agencies appears to violate the separation of powers required by our state constitution. Const 1963, art 3, § 2 ("The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.").[2] Accordingly, I cannot conclude that this Court has the power to direct and sanction the record keeping practices of these agencies or the prosecutor in this way. To the contrary, the concerns underlying the proposed amendment—which appear to be directed broadly at the record retention practices and policies of government agencies—are more appropriately addressed by the Legislature, the Attorney General, or the agencies at issue.

Significantly, prosecutors' duties with regard to *court* proceedings—which *are* properly governed by this Court—are already addressed by the existing rule. MCR 6.201(B) *already* requires prosecutors to provide defendants with "any exculpatory information or evidence known to the prosecuting attorney," police reports, interrogation records, and statements pertaining to the case, and records concerning any searches or seizures connected to the case, among other things. MCR 6.201(J), in turn, provides remedies for a violation of the provisions of MCR 6.201(B), including sanctions for willful violations.

YOUNG and MARKMAN, JJ., concur with CORRIGAN, J.

Staff Comment: This proposal was submitted to the Michigan Supreme Court by the State Bar of Michigan Representative Assembly. It would require prosecutors to maintain electronic recording evidence made by governmental agencies until the time for all appeals has expired. Failure to preserve evidence would entitle the defendant to a jury instruction that jurors may presume any evidence not produced was adverse to the prosecution.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by November 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No.

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[2] Local prosecutors operate under the supervision of the state Attorney General, MCL 14.30, who in turn is an elected official within the Executive Branch. Const 1963, art 5, § 21.

2008-38. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 31, 2009

Clerk