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September 27, 2011

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

Re: ADM File No. 2010-12
Proposed Amendment of Rule 606 of the Michigan Rules of Evidence
and Proposed Amendment of Rule 2.512 of the Michigan Court Rules

Dear Mr. Davis:

I have reviewed the proposed amendment to MRE 606 and agree with the Wayne County Prosecutor's Office that the additional paragraph mirrors the federal rule and is a codification of existing law regarding juror impeachment of a verdict. I have no objection to the proposed amendment to MRE 606. However, the proposed amendment to MCR 2.512 is written too broadly and places a burden on the trial judge to entertain motions filed ostensibly under the authority of MRE 606 without allowing adequate inquiry or investigation into the basis of the motion brought by the party attorneys. The *proposed* amendment to the rule reads as follows:

(E) Attorneys, parties, or anyone acting for them or on their behalf shall not, *without filing a formal motion therefore with the court and securing the court's permission*, interrogate jurors in civil or criminal cases, either in person or in writing, in an attempt to determine the basis for any verdict rendered or to secure other information concerning the deliberations of the jury or any members thereof. The court itself may conduct such interrogation in lieu of granting permission to the movant. (emphasis added.)

The State Appellate Defender Office is virtually never involved in the trial process itself, but is required to investigate a wide variety of claims relating to errors that are believed to have occurred during trial. The vast majority of the investigations conducted on appeal have nothing to do with jurors; most investigative work involves consulting with the trial lawyers, the parties and/or witnesses in an effort to determine the relative merit of a potential appellate issue. Occasionally it is brought to appellate counsel's attention that issues involving the fairness of the jury or the trial process itself requires some inquiry into the jury's deliberative process. Juror misconduct is a serious claim requiring substantial investigation for presentation on appeal.

More subtle issues involve jurors interacting with witnesses – whether knowingly or unknowingly – which is equally improper and may have an impact on the verdict, such as a juror’s observance of the defendant wearing shackles or other indicia of incarceration. When enacting FRE 606, the Notes on Committee on the Judiciary observed that allowing testimony from jurors on such issues does not jeopardize the deliberative process:

The trend has been to draw the dividing line between testimony as to mental processes, on the one hand, and as to the existence of conditions or occurrences of events calculated improperly to influence the verdict, on the other hand, without regard to whether the happening is within or without the jury room. * * * The jurors are the persons who know what really happened. Allowing them to testify as to matters other than their own reactions involves no particular hazard to the values sought to be protected. The rule is based upon this conclusion. It makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity.

House Report No. 93-650; <http://www.law.cornell.edu/rules/fre/ACRule606.htm>

The proposed rule or amendment to MCR 2.512, which does not allow for any pre-motion investigation, is problematic for appellate counsel on multiple levels. It precludes counsel, parties, or anyone acting on their behalf from any questioning of a juror after trial into matters that may yield a legitimate basis for appeal. It is well established that a criminal defendant is guaranteed the effective assistance of counsel on appeal. *Evitts v. Lucey*, 469 U.S. 387, 395-97 (1985). A component of effective assistance contemplates adequate investigation of claims. *See generally Williams v. Booker*, 715 F. Supp. 2d 756 (E.D. Mich. 2010) (habeas relief granted in part due to ineffective assistance of appellate counsel for failure to investigate whether trial counsel communicated plea offer to defendant). Without investigation, appellate counsel is arguably *not* rendering effective assistance prior to filing a motion under the proposed MRE 606.

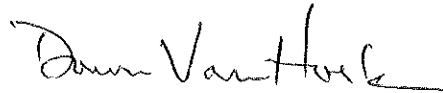
While the filing of a motion consistent with proposed MRE 606 arguably satisfies counsel’s *attempt* to investigate issues involving improper conduct by or influence upon jurors, it does so to what end? It would require counsel to file a motion without actually knowing whether the motion is “well grounded in fact,” as required by MCR 2.114(D)(2) which may result in frivolous motions which *some* investigation could have ferreted out before requiring a busy trial court’s attention. Further, the proposed rule is written broadly enough to invite the parties themselves, with or without the assistance of counsel, to file a motion in the trial court to investigate appellate claims that involve interrogating members of the jury. For a variety of reasons an attorney may decide to forego filing such a motion, a decision with which the defendant may himself disagree. To allow counsel to adequately investigate the claim *prior* to making this decision will undoubtedly ameliorate a client’s concerns, reducing the possibility of the client taking the matter into his or her own hands.

Mr. Corbin Davis
September 23, 2011
Page Three

Some investigation prior to the filing of any motion consistent with the proper purposes under proposed MRE 606 preserves counsel's duty to render effective assistance on appeal, discourages frivolous motions, promotes efficiency of the trial court's resources, and retains the goal of providing a mechanism for motions to be filed for only legitimate concerns involving investigation into potentially improper influences upon the jury. The proposed amendment to MCR 2.512(E) is unnecessary, overly broad, conflicts with these interests, and should not be adopted.

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Dawn Van Hoek". The signature is written in black ink and is positioned above the typed name.

Dawn Van Hoek
Director
State Appellate Defender Office