Friedman
Legal Solutions, PLLC

Stuart G. Friedman
Attorney at Law
26777 Central Park Blvd., Suite 300
Southfield, MI 48076
p. (248) 228-3322
f. (248) 359-8695
e. stu@crimapp.com

*New Address

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Via Email ADMcomment@courts.mi.gov

Clerk
Michigan Supreme Court
Post Office Box 30003
Lansing MI 48909

Re: ADM FILE NO. 2018-23

Your Honors:

I am a criminal defense attorney with 27 years practice in the state. I am also a Board Member of the Criminal Defense Attorneys of Michigan and was involved in the fight in CDAM for it to support the above proposal. I believe that circuit court discovery rules should be extended (with some modification) to the District Court. My position did not carry the day and I am writing this letter in opposition to the position letter that I believe my colleagues will be filing with the Court. In my letter, I will also suggest several fixes which I think will help the rule (allowing a defendant to opt out of discovery in either direction, providing some flexibility on deadlines, and providing pro se friendly witness list and disclosure forms and instructions).

By way of background, as a law student, I did much of the research and writing and background work *People v Paris*.[1] *Paris* stood for many years as the decision prohibiting reciprocal discovery. I still continue to think reciprocal discovery is not a good situation because the parties are not on equal footing. This is particularly true where the prosecution can take a great deal of time to

[1] *People v Paris*, 166 Mich App 276; 420 NW2d 184 (1988)

investigate a case, file charges, and then demand the matter be swiftly processed. While I believe that a Rule which mimicked Fed R Crim P 16(b)(1)(A) and allowed a defendant to opt out of discovery in both directions would be the better approach, I believe the current proposal is immensely better than the situation Michigan currently has.

A. The Current System is Broken.

In our present system, we have a wide variety of discovery practices. Some prosecutor's office provide free and open discovery. That is commendable. Other prosecutor's office provide very little and take a narrow view of their *Brady* obligations. Applying MCR 6.201 to misdemeanors would make that obligation clear.

I anticipate that some well regarded drunk driving defense attorneys will argue that the rule is unneeded and that by circumnavigating a careful path of *Brady v Maryland*, Michigan's Freedom of Information Act, the Rule of Professional Responsibility, and some of the statutory disclosure provisions the material can be obtained in any event. In the next breath, they will argue that the proposed rule will handicap pro se litigants who may not file witness list on time and the indigent defendants who might be beholden to overworked public defenders.

I don't see how these positions can be reconciled, but I believe the tension can be mitigated through the creation of pro se friendly forms which are given to unrepresented individuals at arraignment which notify them clearly of their deadlines and what is required of them. In my experience, non-incarcerated pro se litigants who are properly informed miss filing deadlines far less than attorneys. The problem is that they often do not understand deadlines or what is expected of them.

Another problem with relying on ethics rules and the Freedom of Information Act is that it is difficult to obtain an appropriate remedy in the event of a breach. Because the Freedom of Information is an independent civil action, it is highly unlikely that a court would reverse the criminal conviction for a violation of such a request.

Lastly, the current rules place a criminal defendant with an attorney from a slightly different area of the state at a huge disadvantage. Local prosecutors are not required to publish local discovery policies. Work arounds that vary from jurisdiction to jurisdiction undercut the very notion of "one court of justice" which underscores the Michigan system.

B. *The Problems of the Pro Se Litigant.*

The problems of the pro se litigant are obviously troubling and greater resources should be expended to assist unrepresented individuals. The American Bar Association has promulgated Best Practices for Pro Se Assistance.[2] Many of these ideas should be implemented including some multimedia videos which can be streamed from the internet on the process and SCAO forms designed with the unrepresented individual in mine. I have attached a California form as a sample of a simple form which nearly meets the Michigan obligations. The form can be filled out on line with a simple web browser and saved or printed.[3]

C. *Public Defenders and Court Appointed Counsel*

Opponents of the rule may suggest that overworked public defenders, house counsel, and court appointed attorney might failure to comply with the time limits and that this is somehow an argument for not adopting discovery. It is respectfully submitted that the same attorneys are unlikely to navigate the Freedom of Information Act or other pathways to get these materials. This will also undercut the fairness of a trial but the absence of a formal rule for discovery would effectively "bury the problem." While an attorney could use the Freedom of Information Act to request some materials from law enforcement, many cities fight these requests and it is unrealistic to assume that an attorney will file an independent lawsuit to obtain the needed items. Moreover, it is unlikely that any court will find that any such suit is good cause to delay a criminal trial, particularly impaired diving offenses with the 77 day time limit discussed in the next section. Such an argument also ignores the plight of the incarcerated defendant who cannot invoke the Freedom of Information Act. MCL 15.231(2).[4]

Bringing the discovery process into the sunlight and the heartland of our criminal procedure will allow the District Court to address the issues. Further harmonizing the procedures between District Courts and Circuit Courts is likely to reduce the number of errors that are made.

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[2]https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/downloads/laproseguidelines.pdf

[3] It is available at:
https://www.courts.ca.gov/documents/fl321.pdf

[4] See also *Proctor v White Lake Tp Police Dept*, 248 Mich App 457, 462; 639 NW2d 332, 336 (2001) (upholding the validity of exemption from Freedom of Information Act for state or local inmates).

D. *"Rocket Dockets" and Discovery.*

Some criminal defense attorneys who are opposing this proposal are arguing that the "rocket dockets" in use in many district courts make it unrealistic to follow the circuit court rules. They can honestly argue there are cases where discovery obligations could be due at or before the time of arraignment and before the criminal defense attorney has had any opportunity to investigate the case. These concerns while real are obviated by MCR 6.201(H) and (I) which state that additional discovery shall be provided as the party learns of it and that the Court may modify the discovery schedule. Under MCR 6.201(J) the Court is given the authority to fashion a remedy, but this is of course tempered by *Michigan v Lucas*, 500 US 145; 111 S Ct 1743; 114 L Ed 2d 205 (1991) which states that exclusion of critical defense evidence due to counsel's failure to comply with a pretrial disclosure statute can constitute ineffective assistance of counsel and the Court must conduct a careful balancing of interests.

Not adopting the proposed amendments to MCR 6.201, however, will not assist the criminal defendant. The unrepresented individual will be the last person to be able to figure out how to obtain essential discovery. They will not have the ability to obtain these documents.

Complaints about "rocket dockets" in many district courts are real but giving the parties less information is not the solution. The source of the problem is MCL 257.625b which mandates drunk driving cases go to trial in 77 days. This rule provides:

> The court shall, except for delay attributable to the unavailability of the defendant, a witness, or material evidence, or due to an interlocutory appeal or exceptional circumstances, but not a delay caused by docket congestion, finally adjudicate, by a plea of guilty or nolo contendere, or the entry of a verdict, or by other final disposition, a case in which the defendant is charged with a misdemeanor violation of [Michigan's drunk driving laws] or a local ordinance substantially corresponding to section [those drunk driving laws], within 77 days after the person is arrested for the violation or, if an arrest warrant is reissued, not more than 77 days after the date the reissued arrest warrant is served.

First, this rule only applies to alcohol and drug related drunk driving offenses. A general opposition based on this point rather than a careful carve out is illogical. Secondly, the rule does contain a provision allowing exclusion based on the absence of material evidence or a witness. Presumably judges will use their discretion under the statute in appropriate cases to continue the matters beyond this point.[5]

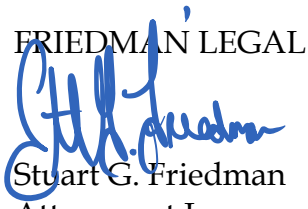
E. *Conclusion*

I believe the rule should be adopted, but probably not implemented immediately. The Court should insure that at minimum forms and a guide for the unrepresented defendant should be prepared explaining to the Defendant their obligations and including

Thank you for considering my comments.

Yours very truly,

FRIEDMAN LEGAL SOLUTIONS, PLLC



Stuart G. Friedman
Attorney at Law

[5] This Court has the authority through its rulemaking powers to abrogate this requirement. Const 1963, art 6, Sec. 5. Given the complexity of the modern drunk driving trial, the Court may wish to consider abrogating the 77 day rule.