From: DeNault, Donald
To: ADMcomment
Subject: Comment Regarding ADM File No. 2018-23
Date: Friday, March 01, 2019 5:17:31 PM

Dear Supreme Court Clerk:

I am writing on behalf of municipal ordinance prosecutors throughout the state. Although I cannot speak for all of them, at the time of this writing I note than none have yet submitted comments regarding the proposed amendment of MCR 6.001 to include 6.201 within its scope. Perhaps they are unaware of the proposed change, or perhaps their lack of time for purposes of submitting comments foreshadows one of the many reasons the proposed amendment should not be enacted.

For context, my office prosecutes municipal ordinance violations for 7 communities, all of differing sizes, resources, budgets, and personnel. We have represented the 4th largest city in Michigan for over 50 years, and I personally have been part of that for more than 22 years. I have been fortunate to develop an expertise in ordinance prosecutions that many will never have the opportunity to develop, primarily by virtue of not having the time or resources to do so when working with smaller communities.

And in part, that alone is a significant reason to keep the current rules in place. Municipal ordinance cases are nothing like higher-level crimes. We address fact patterns ranging from the relatively innocuous with no potential jail consequences through, at worst, domestic violence matters that require municipal prosecutors to protect a victim's personal information (including the statement protected by the Victim's Rights Act). Within that range we see matters involving loitering, trespassing, disorderly conduct, theft, and, more prominently, vehicle crimes such as intoxicated and/or suspended driving and lower-level vehicle crimes such as Fail to Display License, Unsecured Load, Allowing an Unlicensed Driver to Drive, and a host of others scattered throughout the many pages of the Michigan Vehicle Code. All of these are misdemeanors, and under the proposed rule change, all would be subject to mandatory discovery.

In my experience, most defense attorneys understand the system and do not seek discovery in misdemeanor matters. In fact, I have never encountered a single defense attorney who actually *insists* on obtaining discovery for every case that attorney handles. Some do send the standard appearance and discovery request pleadings, but most of them apparently do so as a matter of routine rather than because of an insistence on actually obtaining any discovery materials. Obviously, I cannot speak for *all* defense counsel throughout the state, but within our 7 communities and over 22 years, we have not yet encountered that particular attorney.

For those attorneys who do, from time to time, really wish to have some discovery materials in order to prepare for a pretrial conference or a trial date, our policy has always been to assist them as a courtesy. Within practical limitations, we are happy to assist them with obtaining reports, statements, photographs, lab results, video recordings, audio recordings, and any of the other "routine" police department records that may happen to exist. The cost associated with that fulfillment is billed to the attorneys by the municipal police agency to recover its costs for time and materials, and the records are redacted to protect private and personal information that has no bearing on due process (i.e., notice of the charge(s) and the opportunity to defend).

On the subject of personal information and redaction, the proposed change would mean that disclosure of lay witnesses' names and addresses could be viewed as mandatory under MCR 6.201(A)(1). Quite frankly, our cases are extremely different from civil litigation, and disclosure of this kind of information would be a completely unnecessary and imprudent practice. In my early years, we encountered a few instances of witness tampering. Although the ethics rules should be a safeguard against that, municipal prosecutors will never know if a defense counsel or even a defendant contacted a witness to convince them not to come to court or to "drop" the charges. Insulating witnesses from that potential is essential to the integrity of our process. I recently spoke with a county employee from somewhere in Northern Michigan who needed advice about protecting her personal information from being released to a threatening individual. Apparently, the agency that released her information failed to redact anything, leaving her and her family very fearful now that the person knew how and where to find her. She eventually worked with the local court to ensure new protocols would be followed, but it was much too late for her own personal circumstances. Here, we never want a situation like that to occur, and we work very hard to ensure that it does not.

In fact, over the years we have defended occasional motions filed by attorneys who sought information that we felt should be protected. For example, we have briefed and argued against a request for personal and/or medical information of a victim, and for name and contact information for witnesses who could be subjected to harassment if their information were disclosed. A recent example involved a trespass at a local clinic that offered abortion services. The defense wanted information about the clinic's employees. The risk for those individuals was simply too great, and no municipal lawyer should be put in a position of being *required* to disclose such information. At the other extreme, we have addressed requests that simply go beyond any reasonable boundaries in asking for personnel file information of police officers, or for video recordings that are only in the possession of a third party (or perhaps on a private individual's cellular phone or other device). These are only a few examples, of course, and all of these, and many others, could get unnecessarily swept up in the proposed rule change, which in turn would lead either to more motions and disputes in court, or if the municipality or its ordinance prosecutor does not have the budget or wherewithal to contest the release of some records, to more violations of individual privacy.

To the ongoing theme regarding resources, many municipalities are so small that their employees only work part-time hours each week. Others are so large that their employees are already fully inundated with subpoenas fulfillments, FOIA requests, accident reports, and other records input and processing. In both cases, adding a new layer of mandatory discovery for cases that, 95% of the time, have no need for it will only lead to more disputes, more motions to contest, and more adverse impacts on the operations in those communities. And, whether the City/Township/Village Attorneys are in-house or outside counsel, the demands on their time will increase exponentially. Although the cost for the in-house crush may not be easily measured in dollars, it will have a significant impact on their time to handle all other municipal business, and for outside counsel, the time involved will require budgetary increases that many communities simply cannot afford. And in all instances, municipal attorneys simply do not have the resources of a county prosecutor's office. Our functions are so much broader, as we are always attending council and board meetings, drafting ordinances, preparing legal opinions, offering legal guidance, reviewing contracts, and doing so much more every day and every week than simply prosecuting crimes and other infractions.

Also of significance in this analysis is the practical impact of being required to fulfill every

request. Even if defense lawyers actually want the discovery materials (which, again, is very rare), many municipal prosecutors do not maintain hard copy files. The nature of the work simply does not require it, cost efficiency and "going green" dictates against it, and at most a small file might only be needed if the matter moves forward to a trial or a motion hearing that requires a response. As a result, changing the rules will require that the local prosecutor either create a file for every single case or, at a minimum, be involved in processing every single discovery request in coordination with the local police agency. Such a burden is simply untenable. Worse, MCR 6.201(A)(4) and (5) mandate the disclosure of "any criminal record that the party may use at trial to impeach a witness" and "a description or list of criminal convictions, known to the defense attorney or prosecuting attorney, of any witness whom the party may call at trial." Michigan's LEIN rules forbid the former exchange, and the latter will be nearly impossible for a municipal prosecutor to obtain prior to the first pretrial conference. Although MCR 6.201(C) allows records and information to be protected from disclosure when the law (or a privilege) protects it, it does not go far enough to protect innocent bystanders, concerned citizens, neighbors, or anyone else whose name and information is only part of a police report for doing the right thing. If the proposed change is implemented, municipal lawyers will no longer be able to protect those individuals from potential harassment and influence absent a motion for a protective order, which once again falls within the ongoing theme throughout this writing – they simply will not have the resources to do so. And the alternative – not having the resources to even comply in the first place – may invite sanctions against that municipal prosecutor under MCR 6.201(K).

Quite a few years ago, after spending my first few years of practice trying to accommodate the "routine" discovery pleadings that we often received, we implemented a new protocol to afford discovery only when counsel truly needed or wanted it. At that time, we determined that 95% or more of the attorneys who handled local misdemeanor cases simply did not want the materials. The Police Department would prepare the requested items, but the attorneys would not pick them up. The process became a tremendous drain on the personnel in the records department – not to mention the waste of paper and other resources to create the items that would then simply be destroyed – so we created a courtesy option instead. If defense counsel sends us a less formal request (not a pleading), and the request identifies actual "things" that are clearly identifiable (no ambiguous or sweeping language that laypersons, or even lawyers, should be challenged to interpret), we are happy to accommodate. Our office filters each request and then advises the Police Department to respond accordingly. In our largest community, we prosecute perhaps 400 to 500 misdemeanor violations every month. Although not scientific, I can attest that we only processed about 80 "courtesy requests" in 2018. Statistically, that amounts to only about 1.3% to 1.6% of the cases we handle.

Other defense attorneys, of course, may have chosen to pursue the records through FOIA rather than the discovery process. As we all know, and agree with it or not, our courts have established that FOIA remains a tool that counsel may utilize when they need (or want) to obtain materials related to their clients' criminal matters. Although I am not involved and therefore cannot track how many FOIA requests were processed by our communities, the fact that our largest community was only asked to process about 80 courtesy requests of the 5,000 to 6,000 cases handled in 2018 is further evidence that the current system is working. Attorneys who need the records have a means to obtain them; those who do not are not burdening the system. The FOIA system also works well because it provides exemptions for information that the public should not have, which allows the municipality to protect people. Those exemptions translate nicely to the discovery realm as well.

In summary, changing the rules without first identifying a need, as well as the consequences and impacts of then attempting to fill that need with too broad a brush, is simply ill-advised (in my modest opinion). Although I understand the conceptual reason behind the MDJA's request for the change, I do not know if the MDJA consulted the Michigan Association of Municipal Attorneys or the Michigan Municipal League to truly work through the issues the change would create, and without such a consultation, the MDJA likely has very little familiarity with the day-to-day operations of municipal government. I recognize that the Staff Comment suggests that subsection (I) could be used to limit its application where "full-blown discovery may not be appropriate," but that option simply invites disputes, motions, and hearings that local governments simply do not have the resources to absorb. The status quo has created a very level playing field, because both sides of every local criminal case have essentially the same access to relevant information. The local prosecutor and defense counsel learn the facts and identify issues at the same time, typically at the first pretrial conference. In fact, defense counsel may even know the nuances of the case much sooner than the local prosecutor, either through FOIA or through a courtesy discovery process. Changing the system in the manner proposed will create a burden on the system that has never before been seen, and for which no municipalities are prepared.

As we all know, the United States Supreme Court has made it clear that "[t]here is no general constitutional right to discovery in a criminal case." *Weatherford v Bursey*, 429 US 545, 559 (1997). Yes, we have an ethical duty to provide exculpatory information, and our communities have a statutory duty to honor FOIA requests. However, those systems and processes are working, and our municipal prosecutors throughout the state continue to honor those obligations within the constraints that the size and scope of their communities can absorb. The proposed change is a dramatic one, and its impacts should not be underestimated. At a minimum, much more study and review is needed, and at most, only something well short of simply adding 6.201 into the scope of MCR 6.001(B) should even be considered.

For the reasons set forth above, and likely many more that did not come to mind during this writing, I respectfully request that MCR 6.001 ***not*** be amended as proposed in ADM File No. 2018-23.

Thank you for your consideration, and I am at your disposal if I may offer any additional information or assistance with the review process.

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