BLANCHARD
LAW

March 1, 2019

Michigan Supreme Court
925 W. Ottawa St.
Post Office Box 30048
Lansing, MI 48909

Re: Proposed Amendment of MCR 6.001
ADM File No. 2018-23

I write to encourage the Court to reject the proposed amendment to MCR 6.001. The concerns raised by the MDJA can be addressed by adopting only MCR 6.201(B) in misdemeanor cases or, alternatively, conditioning a misdemeanor defendant's obligation to produce discovery on his demand for discovery from the prosecution.

Modifying MCR 6.001 to make MCR 6.201 applicable to misdemeanor matters would require reciprocal discovery in district court misdemeanor cases. Reciprocal discovery in the district courts is unworkable, will increase the costs of litigation, and result in an increase in the number of appeals to the circuit courts.

The American criminal justice system has long recognized that there are important procedural and substantive differences between misdemeanor and felony prosecutions. For example, the Sixth Amendment does not require a jury trial for misdemeanor offenses. *Lewis v United States*, 518 US 322 (1996). Appointed counsel is not constitutionally mandated in misdemeanor offenses where jail is not imposed. *Argersinger v Hamlin*, 407 US 25 (1972).

In the district courts more than any other court, we see pro se litigants, often on cases where a jail sentence is unlikely. MCR 6.201 imposes significant litigation costs, strict timelines, and harsh sanctions for violating the rule. If the Court makes MCR 6.201 applicable to misdemeanor cases, a pro se litigant will be expected to provide witness lists, expert disclosures, copies of recorded statements, produce criminal records of witnesses, and disclose exhibits. MCR 6.201 provides that if the party fails to comply, the court may prohibit the party from introducing evidence. MCR 6.201(J).

A misdemeanor defendant is already able to obtain sufficient discovery through the obligations imposed on the prosecution pursuant to *Brady v Maryland*, MRPC 3.8, the Freedom

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of Information Act, and *Bay County Prosecutor v. Bay County Dist. Judge*, 109 Mich.App. 476, 485, 311 N.W.2d 399, 403 (1981).

In many of the more serious misdemeanor cases, Prosecutors are already required to provide access to statutorily mandated materials in misdemeanor cases. For example, MCL 257.625a requires that the prosecution "shall furnish the [chemical test] results at least 2 days before the day of the trial" in drunk driving cases. MRE 404(b) requires that the prosecution provide at least 14 days notice of character evidence. MCL 768.27a and 768.27b require the prosecution to provide 15 days advance notice of their intent to introduce propensity evidence.

MCR 6.201(A) only permits a party to amend a witness list without leave of the court if it is done more than 28 days before trial. In many misdemeanor cases, this means the defendant needs to have disclosed all of his trial witnesses before conducting a pre-trial conference.

In one of my home counties, I had a client arraigned on a misdemeanor charge on October 23, 2018. At arraignment, the matter was set for a jury trial on November 30, 2018 — 37 days from arraignment to trial. The first pretrial was scheduled for November 6, 2018. Because of the timelines imposed by MCR 6.201(a)(1), if that case had proceeded as scheduled, I would have had only 7 business days to investigate and disclose my witnesses and would have been required to make disclosures four days prior to the first pretrial conference.

I encourage the Court to adopt one of two alternate solutions: 1) make only MCR 6.201(B) applicable to misdemeanor prosecutions, or 2) modify MCR 6.201(A) to track Fed. R. Crim. P. 16(b)(1) and only require a defendant to produce discovery if the defendant has first demanded discovery from the government.

Sincerely,
BLANCHARD LAW

Joshua A. Blanchard