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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**

While I appreciate the proposed rule amendment submitted by the Michigan District Judges Association, the amendment of MCR 6.001 should not adopt MCR 6.201 to permit discovery in district court misdemeanor cases. The concerns raised by the MDJA can be addressed simply by adopting MCR 6.201(B) if there is any real or perceived problem facilitating discovery in the district courts.

My firm routinely obtains discovery in misdemeanor drunk driving cases across the state. I also use the Michigan Freedom of Information Act, MCL 15.231 et seq., to obtain access to many materials. The Michigan State Police as well as the vast majority of cities, townships, and police departments are more than happy to provide access to information under both discovery as well as FOIA. District court judges are generally helpful in nearly every jurisdiction.

In short, there is no problem that needs to be fixed.

But I am alarmed by the immediate proposal. Adopting MCR 6.201 in its entirety would inadvertently require reciprocal discovery in district court misdemeanor cases. Reciprocal discovery in the district courts on misdemeanor cases is unworkable and dangerous. In some cases, it may deny the accused a fair trial, result in an increase in the number of appeals to the circuit courts, and impose harsh penalties on defendants who proceed to trial in pro per.

There is no need for reciprocal discovery in misdemeanor cases.

Discovery is already available in district court misdemeanor cases, contrary to the position taken in a very few jurisdictions. These jurisdictions are clearly in the minority, since most prosecutors across the state routinely comply with discovery requests. Prosecutors are required to provide discovery in misdemeanor cases, even in the absence of a formal court rule. The criminally accused has a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or innocence. *Brady v Maryland*, 373 US 83 (1963); *People v Carter*, 415 Mich 558 (1982). See also, *United*

*States v Agurs*, 427 US 97 (1976); *Giglio v United States*, 405 US 150 (1972); *United States v Bagley*, 473 US 667 (1985); *Kyles v Whitley*, 514 US 419 (1995). These cases do not distinguish between felonies and misdemeanors. These due process cases are generally underutilized by defense attorneys. See, Denis M. deVlaming, *A Brady Primer: John Leo Brady -- The Defense Lawyer's Best Friend, The Champion* (Nat'l Ass'n of Criminal Def. Lawyers) Nov. 2018.

Prosecutors also have an ethical obligation to provide discovery to the accused, and they are mindful of these duties. Under MRPC 3.8 Special Responsibilities of a Prosecutor, a prosecutor is required to, “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the degree of the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor . . . .” The absence of a formal court rule does not alleviate the prosecutor’s ethical obligations, and it does not distinguish between felony and misdemeanor cases.

Prosecutors are also 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, and “[f]ailure to fully comply with the request bars the admission of the results into evidence by the prosecution.”

While discovery is available to the accused in misdemeanor cases, reciprocal discovery is not permitted under the Michigan Court Rules. There are persuasive reasons to reject reciprocal discovery in misdemeanor cases, despite the natural desire to be “fair” to both parties.

After MCR 6.201 was adopted, Oakland County prosecutors successfully attempted to expand the reciprocal discovery rule into misdemeanor cases in *People v Sheldon*, 234 Mich App 68 (1999), which ultimately held that the provisions of MCR 6.201 applied to misdemeanor cases. *Sheldon* was a simple reckless driving case, but it lingered in the courts for at least three years while the defendant proceeded in pro per. Both the district court as well as the circuit court denied the prosecutor’s demand for reciprocal discovery, but the prosecutor persisted. No clear or compelling reason for mandating reciprocal discovery was enunciated in the decision, but the Court of Appeals ruled that MCR 6.201 applied to misdemeanor cases. The unrepresented defendant never filed a brief in opposition. *Sheldon*, 68 at n 1 (“Defendant elected not to file a brief on appeal.”)

*People v Sheldon*, supra, was explicitly reversed by this Court in Administrative Order 1999-3, which held:

#### Discovery in Misdemeanor Cases

On order of the Court, in the case of *People v Sheldon*, 234 Mich App 68; 592 NW2d 121 (1999) (COA Docket No. 204254), the Court of Appeals ruled that MCR 6.201, which provides for discovery in criminal felony cases, also applies to criminal

misdemeanor cases. That ruling was premised on an erroneous interpretation of our Administrative Order No. 1994-10. By virtue of this Administrative Order, we wish to inform the bench and bar that MCR 6.201 applies only to criminal felony cases. Administrative Order No. 1994-10 does not enlarge the scope of applicability of MCR 6.201. See MCR 6.001(A) and (B).

This has been the prevailing law followed in the vast majority of jurisdictions for the last 20 years, and it seems to generally work with few exceptions. See, for example, *Mark Ryan Nickerson*, (Docket No. 271459, Unpublished March 13, 2007) (“MCR 6.201(A)(1) mandates discovery of witness lists. However, . . . this rule applies only to felony cases.”), and *People v Hammond*, \_\_\_NW2d\_\_\_; 2010 Mich. App. LEXIS 1918, at \*6-7 (Ct App, Oct. 12, 2010), (“[T]he district court wrongly precluded the witnesses from testifying. . . . Because our Supreme Court has declared that MCR 6.201 is applicable only to criminal felony cases and not misdemeanors , the district court erred in requiring defense counsel to fulfill a nonexistent duty of disclosure.”)

Reciprocal discovery is neither needed, nor justified, in misdemeanor cases. Prior to the adoption of MCR 6.201, the Michigan Court of Appeals reversed a lower court’s decision that ordered reciprocal discovery in a felony case, explaining why prosecutors should not be entitled to discovery, holding:

Moreover, we find that the discovery ordered in this case denied defendant a fair trial. While fundamental fairness entitles a defendant to broad criminal discovery, *People v Denning*, 140 Mich App 331; 364 NW2d 325 (1985), we do not believe that prosecutorial discovery enjoys the same protection. A prosecutor has the duty to disclose any mitigating or exculpatory evidence. *People v Wimberly*, 384 Mich 62, 66; 179 NW2d 623 (1970); *People v Browning (On Rehearing)*, 108 Mich App 281, 307; 310 NW2d 365 (1981). See also, *Code of Professional Responsibility and Canons*, DR 7-103(B) and EC 7-13. Any fairness due the prosecution, however, must be balanced with a defendant’s right to the effective assistance of counsel. **If defense attorneys are to do proper jobs, they must be free to plot trial strategy without fear that prosecutors will be allowed to discover and undermine their efforts.**

*People v Paris*, 166 Mich App 276, 279-80 (1988) [Emphasis added.]

I firmly believe that reciprocal discovery does not help facilitate resolution of criminal cases. Despite my bias, I believe that the analysis in *Paris* is accurate. Reciprocal discovery complicates cases and encourages prosecutors to file motions anticipating the defense trial strategy, challenging witnesses, defense theories, and the admissibility of evidence. This needlessly increases the cost of litigation without any real tangible benefit to the accused or to the public. But insofar as felony cases are concerned, reciprocal discovery is a ship that set sail a long time ago.

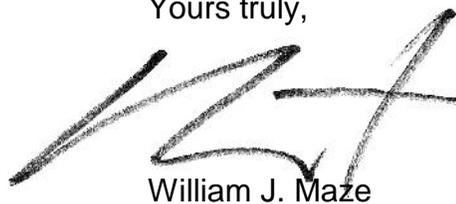
With reciprocal discovery in misdemeanor cases, in pro per defendants will be faced with a distinct disadvantage, and attorneys may find it impossible to satisfy the time

requirements for witness list disclosures and discovery exchanges because misdemeanor cases must be taken to trial quickly, without the procedural safeguards imposed in felony cases. District court judges set time deadlines based upon MCR 8.110(C)(5)(b), which impose a reporting requirement for all, “misdemeanor cases and cases involving local ordinance violations that have criminal penalties in which there has been a delay of more than 126 days between the date of the defendant’s first appearance on the warrant and complaint or citation and adjudication.” Many courts still enforce a 91 day rule based upon a prior version of MCR 8.110.

Reciprocal discovery would prove to be a nightmare in drunk driving cases in courts that enforce the “77 day rule” contained in 257.625b(3). This still occurs in some areas of the state, even though the 77 day rule no longer benefits the accused. Drunk driving cases are frequently the most difficult cases to defend, requiring a great deal of technical and scientific analysis. See, for example, P. Barone, *Defending Drinking Drivers* (2018 edition) and L. Taylor & S. Oberman, *Drunk Driving Defense* (7th ed. 2010). Obtaining the necessary information to adequately defend a drunk driving charge may take weeks. Dispositive motions might be critical, and these also take time. Finally, chemical testing may continue at Michigan State Police Toxicology while a case remains pending, with the forensic scientist performing secondary analysis of a blood sample for the presence of controlled substances after the initial alcohol test has been conducted. In the rare event that a chemical test result is disclosed only “2 days before the day of the trial” pursuant to statutory edicts, it would be impossible to make a timely disclosure of an expert witness prior to trial.

I encourage the Court to reject this proposed rule-change, despite its good intentions. I think that adopting reciprocal discovery in misdemeanor cases will open Pandora’s Box, mandating a number of other rule changes to facilitate its adoption. The rule will inadvertently increase the cost of litigation, decrease case clearance rates by clogging district court dockets, and impose severe penalties on the criminally accused.

Yours truly,

A handwritten signature in black ink, appearing to read 'WJ Maze', written over a light blue horizontal line.

William J. Maze