



THIRD JUDICIAL CIRCUIT
OF MICHIGAN

TIMOTHY M. KENNY
PRESIDING JUDGE
CRIMINAL DIVISION

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MEMORANDUM

To: Criminal Division Judges

From: Judge Timothy M. Kenny
Presiding Judge, Criminal Division

Date: August 17, 2011

Re: Amendments to Michigan Court Rules Impacting the Conduct of Criminal Jury Trials

Effective September 1, 2011, changes in the Michigan Court Rules will have an impact on how criminal jury trials are conducted. The previous court rule governing the conduct of criminal jury trials MCR 6.414, will be replaced by a new rule, MCR 2.513. The vast majority of rule changes are discretionary. A number of them, however, require changes in the way we have conducted jury trials in the past.

Attached for your review are:

- 1) The mandatory changes under MCR 2.513
- 2) The discretionary options under the new court rule, and
- 3) Guideline jury instructions approved by the Criminal Jury Instruction Committee of the State Bar.

MANDATORY CHANGES

1. Preliminary Jury Instructions – MCR 2.513 (A)
 - * Preliminary Instructions, “at a minimum, shall communicate the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence”. This would indicate that the preliminary instructions should include a reading of the elements of the crimes charged.
 - * Each juror shall have a copy of the preliminary instructions. MCR 2.513(A)

2. Final Instructions to the Jury – MCR 2.513 (N)
 - * As part of the final instructions, the jury must be advised that they can ask any questions in order to clarify the instructions before they deliberate. MCR 2.513 (N) (2).
 - * A written copy of the final jury instructions shall be provided for the jury to take into the jury room for deliberations. MCR 2.513 (N) (3)
 - * Jurors shall be permitted to take their notes and final instructions into the jury room for deliberations. MCR 2.513 (O).

DISCRETIONARY CHANGES

1. Note taking by jurors – MCR 2.513 (H)
 - * Note taking may be permitted by the trial court (previously permitted under MCR 6.414). Under the new court rule, if the judge permits jurors to take notes, they must be permitted to take them into the jury room during deliberations.

2. Juror questions – MCR 2.513 (I)
 - * The previous court rule, MCR 6.414 permitted juror questions. Under the new court rule MCR 2.513 (I):
 - Jurors’ questions are to be addressed to the witnesses by the court
 - The court must inform the jurors of the procedures to be followed for submitting questions to witnesses.

3. Jury View – MCR 2.513 (J)
 - * Under the amended court rule, the court may preclude a defendant from attending a jury view in the interests of safety and security.

4. Interim Commentary – MCR 2.513 (D)
 - * The court may allow interim commentary by the parties “at appropriate junctures of the trial.”

5. Judge’s Summary of the Evidence – MCR 2.513 (M)
 - ** The trial judge may summarize the evidence after the close of the evidence and the arguments of the attorneys.

A summary by the court must:

- “fairly and impartially” summarize the evidence
- Include an instruction to the jurors that to determine the weight of the evidence and the credibility of the witnesses
- Instruct the jurors they are not bound by the court’s summations
- Not be a commentary on the credibility of witnesses or a statement on the ultimate issue of fact before the jury

6. Reference Documents – MRC 2.513 (E)

- * The court may authorize or require the attorneys to provide jurors with reference documents or notebooks. The contents may include:

- Admitted exhibits

LIST OF WITNESSES

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- * For example, this section authorizes trial judges to require the parties to have copies of all exhibits for the jurors.

7. Jury Deliberations – MCR 2.513 (N) and (P)

- * If a “deliberating jury has reached an impasse, or is otherwise in need of assistance, the court may invite the jurors to list the issues that divide or confuse them in the event the judge can be of assistance in clarifying or amplifying final instructions.” MCR 2.513 (N) (4)
- * The court may provide a transcript, video or audio recording of witness testimony to the jurors to assist in their deliberations if the jurors request a review of certain testimony. MCR 2.513 (P)

GUIDELINE JURY INSTRUCTIONS

Copies attached to memo.

NEW SECTION

INTERIM COMMENTARY BY ATTORNEYS

The court will now allow each party to provide interim commentary. The lawyers' commentaries are not evidence. They are only meant to help you understand the evidence and each side's legal theories. You should only accept things that the lawyers say that are supported by the evidence or by your own common sense and general knowledge. All of my earlier instructions regarding basing your decision on the evidence and law continue to apply.

CJI2d 1.8 READING OF INFORMATION

(1) This is a criminal case. The paper used to charge the defendant with a crime is called an information[*]. The information in this case charges the defendant, _____, with the crime of _____, and reads as follows:

[Read information.]

(2) To prove the charge, the prosecutor must prove the following beyond a reasonable doubt:

[Since the elements of the offense(s) may contain legal terms, definitions of those terms should also be given.] [Read elements of the offense(s)]

(3) The defendant has pled not guilty to this charge. You should clearly understand that the information I have just read is not evidence. An information is read in every criminal trial so that the defendant and jury can hear the charges. You must not think it is evidence of [his / her] guilt or that [he / she] must be guilty because [he / she] has been charged.

CJI2d 2.3 - TRIAL PROCEDURE

(1) A trial follows this procedure:

(2) First, the prosecutor makes an opening statement, where [he / she] gives [his / her] theories about the case. The defendant's lawyer does not have to make an opening statement, but [he / she] may make an opening statement after the prosecutor makes [his / hers], or [he / she] may wait until later. These statements are not evidence. They are only meant to help you understand how each side views the case.

(3) Next, the prosecutor presents [his / her] evidence. The prosecutor may call witnesses to testify and may show you exhibits like documents or objects. The defendant's lawyer has the right to cross-examine the prosecutor's witnesses.

(4) After the prosecutor has presented all [his / her] evidence, the defendant's attorney may also offer evidence, but does not have to. By law, the defendant does not have to prove [his / her] innocence or produce any evidence. If the defense does call any witnesses, the prosecutor has the right to cross-examine them. The prosecutor may also call witnesses to contradict the testimony of the defense witnesses.

(5) After all the evidence has been presented, the prosecutor and the defendant's lawyer will make their closing arguments. Like the opening statements, these are not evidence. They are only meant to help you understand the evidence and the way each side sees the case. You must base your verdict only on the evidence.

(6) You have been given a written copy of instructions I have just read to you. You may refer to them during the trial. Since no one can predict the course of a trial, these instructions may change at the end of the trial. At the close of the trial, I will provide you with a copy of my final instructions for your use during deliberations.

CJI2d 2.9 – QUESTIONS BY JURORS ALLOWED

(1) During the trial you may think of an important question that would help you understand the facts in this case. You are allowed to ask such questions.

(2) You should wait to ask questions until after a witness has finished testifying and both sides have finished their questioning. If you still have an important question after this, do not ask it yourself. Raise your hand, write the question down, and pass it to the bailiff, who will give it to me. Do not show your question to other jurors.

(3) There are rules of evidence that a trial must follow. If your question is allowed under those rules, I will ask the witness your question. If your question is not allowed, I will either rephrase it or I will not ask it at all. If your question is not asked, do not speculate about why not. If it is not asked, it is because I determined under the law that the question should not be asked. You should draw no conclusions or inferences about the facts of the case nor should you speculate about what the answer might have been. Also, in considering the evidence in this case you should not give greater weight to other testimony, merely because it was given in answer to questions submitted by members of the jury.

(4) On the other hand, if you cannot hear what a witness or lawyer says, please raise your hand immediately and ask to have the question or answer repeated.

CJI2d 2.17 – NOTETAKING ALLOWED

You may take notes during the trial if you wish, but of course you don't have to. If you do take notes, you should be careful that it does not distract you from paying attention to all the evidence. When you go to the jury room to decide your verdict, you may use your notes to help you remember what happened in the courtroom. If you take notes, do not let anyone except the other jurors see them. [You must turn them over to the bailiff during recesses.]

Your notes will not be examined by anyone and when your jury service concludes, your notes will be collected and destroyed.

CJI2d 3.5 - EVIDENCE

(1) When you discuss the case and decide on your verdict, you may only consider the evidence that has been properly admitted in this case. Therefore, it is important for you to understand what is evidence and what is not evidence.

(2) Evidence includes only the sworn testimony of witnesses [, the exhibits admitted into evidence, and anything else I told you to consider as evidence][FN 1].

(3) Many things are not evidence, and you must be careful not to consider them as such. I will now describe some of the things that are not evidence.

(4) The fact that the defendant is charged with a crime and is on trial is not evidence. [Likewise, the fact that (he / she) is charged with more than one crime is not evidence.]

(5) The lawyers' statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories. You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge. The lawyers' questions to witnesses, your questions, and my questions for the witnesses are also not evidence. You should consider these questions only as they give meaning to the witnesses' answers.

(6) My comments, rulings, questions, [summary of the evidence] and instructions are also not evidence. It is my duty to see that the trial is conducted according to the law, and to tell you the law that applies to this case. However, when I make a comment or give an instruction, I am not trying to influence your vote or express a personal opinion about the case. If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion. You are the only judges of the facts, and you should decide this case from the evidence.

(7) At times during the trial, I have excluded evidence that was offered or stricken testimony that was heard. Do not consider those things in deciding the case. Make your decision only on the evidence that I let in, and nothing else.

[(8) Your decision should be based on all the evidence, regardless of which party produced it.][FN 2]

(9) You should use your own common sense and general knowledge in weighing and judging the evidence, but you should not use any personal knowledge you may have about a place, person, or event. To repeat once more, you must decide this case based only on the evidence admitted during this trial.

CJ12d 3.12 - DEADLOCKED JURY

(1) You have returned from deliberations, indicating that you believe you cannot reach a verdict. I am going to ask you to please return to the jury room and resume your deliberations in the hope that after further discussion you will be able to reach a verdict. As you deliberate, please keep in mind the guidelines I gave you earlier.

(2) Remember, it is your duty to consult with your fellow jurors and try to reach agreement, if you can do so without violating your own judgment. To return a verdict, you must all agree, and the verdict must represent the judgment of each of you.

(3) As you deliberate, you should carefully and seriously consider the views of your fellow jurors. Talk things over in a spirit of fairness and frankness.

(4) Naturally, there will be differences of opinion. You should each not only express your opinion but also give the facts and the reasons on which you base it. By reasoning the matter out, jurors can often reach agreement.

[(5) If you think it would be helpful, you may submit to the bailiff a written list of the issues that are dividing or confusing you. They will then be submitted to me. I will attempt to clarify or amplify the instructions in order to assist you in your further deliberations.]

(6) When you continue your deliberations, do not hesitate to rethink your own views and change your opinion if you decide it was wrong.

(7) However, none of you should give up your honest beliefs about the weight or effect of the evidence only because of what your fellow jurors think or only for the sake of reaching agreement.

NEW SECTION

CJI2d 3.5a – SUMMARY OF EVIDENCE - [REDACTED]

I will now summarize the evidence for you. It is only intended as a summary and you should consider all of the evidence when deciding this case, even if I do not mention all of the evidence in this summary. Remember it is your job to decide what the facts of this case are. This is your job and nobody else's. It is for you to determine the weight of the evidence and the credit to be given to the witnesses, and you are free to decide that something I have not mentioned, but which has been admitted into evidence, is significant to your decision. You are not bound by my summary of the evidence.

[SUMMARIZE EVIDENCE]

Again, it is for you to determine for yourself the weight of the evidence and the credit to be given to the witnesses. You are not bound by my summation

MICHIGAN SUPREME COURT



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FOR IMMEDIATE RELEASE

NEW JURY REFORM RULES AIMED AT GREATER ENGAGEMENT BY JURORS **Chief Justice Young: New rules “permit jurors to be truly involved, not just sitting in enforced passivity”; better tools for “seeking the truth”**

LANSING, MI, June 29, 2011 – Jurors can ask questions of witnesses, take notes and use them during deliberations, and take trial exhibits into the jury room, under a comprehensive jury rule package announced by the Michigan Supreme Court today.

The new rules are aimed at “giving jurors the tools they need for their very demanding job: seeking the truth,” said Chief Justice Robert P. Young, Jr.

“Traditionally, the legal system has been somewhat conflicted about juries,” Young said. “On the one hand, lawyers and judges tell jurors how important they are to the justice system and how much we value their service. Then we proceed to tie their hands – they can’t take notes, ask questions, or talk to other jurors about the evidence while it’s still fresh in their minds. We ask them to make tremendously important decisions and then take their decision-making tools away. The last time any of us were expected to learn while sitting quietly like jurors was in kindergarten.”

By contrast, the new rules “permit jurors to be truly involved, rather than sitting in enforced passivity,” Young explained. “The rules allow jurors to be more engaged and make well-informed decisions.”

Young noted that other states, including Arizona and Massachusetts, have already adopted jury trial reforms and that about 30 other states have either made such changes or are studying them. “This is our future,” he said.

Noting that the Supreme Court has proclaimed July to be Juror Appreciation Month, Young said the Court is grateful to Michigan jurors for their service. “People make sacrifices to serve on juries – time away from family, time away from work,” he said. “Those of us in the court system owe it to them to make their service as meaningful as possible, and that includes freeing them to be more actively engaged in the trial process.”

The Supreme Court began working on jury reforms in 2005, publishing a proposed rule package for public comment and then, in 2008, authorizing a two-year pilot program involving 12 courts. In surveys, jurors who participated in the pilot program strongly favored the reforms. For example, 91 percent of jurors who participated in the survey agreed that being able to discuss the evidence before final deliberations helped them understand the case, focus on and recall the evidence, and reach a correct verdict.

Features of the jury reform package:

- Jurors can, with the judge's permission, submit questions to witnesses through the judge. Criminal procedure rules already contained such a provision, but the new rule includes jurors in civil cases as well.
- Jurors can, if permitted by the judge, take notes during trial and use those notes during the jury's deliberations.
- The jury can request to view "property or ... a place where a material event [such as a crime scene] occurred."
- In civil cases, the judge "may instruct the jurors that they are permitted to discuss the evidence among themselves in the jury room during trial recesses," as long as all jurors are present.
- After the jury is sworn, the judge "shall provide the jury with pretrial instructions reasonably likely to assist in its consideration of the case," covering "the duties of the jury, trial, procedure, and the law applicable to the case" The rule also requires the court to give jurors copies of the instructions.
- The judge may "authorize or require" attorneys to provide jurors with "a reference document or notebook," which would include a list of witnesses, relevant provisions in statutes, and copies of any documents at issue, such as a contract. Other items, such as preliminary jury instructions, trial exhibits, "and other admissible information," can also be added to the notebook.
- The judge may require attorneys to prepare "concise, written summaries of depositions" for the jury instead of having the full deposition read aloud.
- In addition to making opening and closing statements, attorneys may, "in the court's discretion, present interim commentary at appropriate junctures of the trial."
- Court can schedule expert testimony to assist jurors' understanding of the issues – for example, by having expert witnesses testify sequentially. Another option is to allow each expert to be present for the opposing expert's testimony, so that the expert can "aid counsel in formulating questions to be asked of the testifying expert on cross-examination."
- Judges may "fairly and impartially sum up the evidence" after closing arguments, while also reminding jurors that they must decide fact issues for themselves. The rule bars judges from commenting on a witness's credibility or stating a conclusion "on the ultimate issue of fact before the jury."
- Judges are required to give the jury a copy of the final jury instructions to take into the jury room for final deliberations. In addition, judges must invite jurors to ask any questions they may have to clarify the instructions.
- In addition to jurors' notes and final jury instructions, the judge "may permit the jurors to take into the jury room the reference document ... as well as any exhibits and writings admitted into evidence."
- The judge "may not refuse a reasonable request" from jurors to review evidence or testimony as they deliberate.
- If the jury appears to reach an impasse during deliberations, the judge "may invite the jurors to list the issues that divide or confuse them in the event that the judge can be of assistance in clarifying or amplifying the final instructions."

The complete rule package is available online at
http://www.courts.michigan.gov/supremecourt/Resources/Administrative/2005-19_06-29-11_order.pdf.

The jury reform rules go into effect on September 1, 2011. Both Justice Diane M. Hathaway, who expressed concerns about the rule changes, and Justice Stephen J. Markman, who supports the new rules, included statements with the Supreme Court's order adopting the reforms.

The Court plans to review the rules and their impact in fall 2014.

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