

Recommendations of the Legal Systems Committee
September 20, 2022

1. Education

- a. The Michigan Supreme Court should require mandatory continuing education for attorneys in Michigan. As part of that program, any attorney appearing in a trial or appellate criminal proceeding should be required to include one annual course on forensic science evidence prior to appearing in a criminal proceeding.
- b. For appointed trial attorneys, the Michigan Indigent Defense Commission should modify their training standard per MCL 780.989(a) and MCL 780.991(2)(e) to add a mandatory forensic science requirement for a certain number of hours per year. Once the MIDC makes this modification process through the Department of Licensing and Regulatory Affairs, the state would be required to fund these new trainings as they are implemented by local indigent defense funding units.
- c. For appellate attorneys, a similar requirement should be adopted by the Appellate Defender Commission for attorneys from the State Appellate Defender Office and the Michigan Appellate Assigned Counsel System.
- d. Under the recent mandatory judicial education order of the Michigan Supreme Court, the Judicial Education Board should include an annual requirement for forensic science evidence education for all judges. The Supreme Court should appoint members of the Judicial Education Board who are experienced and/or knowledgeable in forensic science evidence.
- e. American Academy of Forensic Sciences accreditation should be a requirement for any school offering forensic science education. The Education Committee also supports laboratory procedures which train new employees who do not have degrees in criminal justice or forensic science in the Daubert basic requirements for the admissibility of forensic science evidence in court.

Note: Very recently, the newly appointed Director of the Michigan Judicial Institute has raised some questions concerning how the judicial continuing education requirement for forensic science education can be integrated with the process under consideration by the recently formed Michigan Judicial Education Board. Discussions are underway and Sections a and d of our recommendations may be modified.

2. Testimony

The Michigan Supreme Court should amend MRE 702 to correspond with proposed amendments to FRE 702 to improve the quality of Daubert hearings, set the evidentiary standard and burden at Daubert hearings, and reinforce the gatekeeping obligation of the trial judge. The revision is as follows:

FRE 702 current revision

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent has demonstrated to the court that it is more likely than not that:

a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

b) the testimony is based on sufficient facts or data;

c) the testimony is the product of reliable principles and methods; and

d) the expert has reliably applied expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

3. Evidence and Discovery

1. Amend MCR 6.202 (A) to read: This rule shall apply *to forensic science evidence, except DNA evidence governed by Rule 6.203*, in all criminal trials in the district and circuit courts.
2. Add the following provisions as MCR 6.203.

Rule 6.303 DNA TESTING RESULTS; APPLICABILITY; DISCLOSURE; DEFENSE TESTING AND RETESTING; DEFENSE EXPERTS

A. This rule shall apply to criminal proceedings in the district and circuit courts.

B. Disclosure. Unless waived by the Defendant in open court, the prosecutor shall be required, within a specified and reasonable time after arraignment in Circuit Court and prior to entry of a plea, to make available to the defense the following information and material relating to DNA evidence:

(1) laboratory reports, which should be sufficiently comprehensive so that an independent expert can identify the process used and the conclusions reached and should include:

(a) A summary of all DNA testing and data interpretation that is recorded promptly in the report;

(b) what items were tested;

(c) who conducted the testing;

(d) identification of the type of testing kit used for the testing;

(e) the data and results produced by the testing or data interpretation;

(f) all raw electronic data (including but not limited to any .hid and .fsa files);

(g) the examiner's interpretation of the results and conclusions therefrom;

(h) the method and results of any statistical computation;

(i) the name and results of any probabilistic genotyping software used; and

(j) any additional information that could bear on the validity of the test.

(2) the laboratory case file including but not limited to, if applicable, photos of evidence, all communications, bench notes, worksheets and summary sheets, electropherograms, and CODIS reports.

(3) the chain of custody documents showing the location where and the place or thing from which the evidence was collected or the person from whom or the entity from which it was collected, the date and time it was collected, the identity of the person who collected it, and the manner in which it was collected and preserved.

(4) reports of contamination and other problems affecting testing procedures or results relevant to the evaluation of the procedures and test results obtained in the case and corrective actions taken in response.

C. Thirty days before trial or upon request of defense counsel, the prosecutor shall produce:

(1) the curriculum vita for each testifying expert and for each person involved in the testing;

(2) reports of all proficiency examinations of each testifying expert and each person involved in the testing;

(3) a list of any collected items that there is reason to believe may have contained DNA evidence but which have been destroyed or lost, or have otherwise become unavailable.

D. Defense testing and retesting.

(1) Upon motion, made with notice to the prosecution, a court shall permit the defense to inspect and test DNA evidence in the government's possession or control. An affidavit in support of the motion may be presented to the court ex parte.

(2) The motion must specify the biological evidence to be evaluated, the type of anticipated testing, the name and qualifications of the expert/laboratory designated to conduct the testing, and the place of testing.

(3) The court may issue any orders necessary to make the evidence to be inspected or tested available to the designated expert and condition its order so as to preserve the integrity of the material to be tested or inspected.

(4) If the testing may involve complete consumption of the evidence. The court may limit or regulate defense testing under appropriate conditions.

(5) The defense shall be required, within a specified and reasonable time prior to trial, to make available to the prosecution the information and material in subdivisions B and C of this rule for each expert whose testimony the defense intends to offer.

(6) If an expert will not testify as a defense witness at trial, the prosecution may not be permitted to interview or call the defense expert as a prosecution witness, unless the court determines that the prosecution has no alternative means to obtain equivalent evidence that the expert possesses.

Note: This recommendation was not unanimous. One member, Prosecutor Wiese, was of the opinion that discovery of DNA materials should only be required at the request of the defense. The committee modified its original recommendation to provide for a defense waiver of the mandatory DNA discovery by the defense so that pleas could be entered without the necessity of disclosure of all of the background DNA testing materials (See section B). Mr. Weiss agreed with the waiver provision but still prefers to make the requirement for disclosure contingent upon a defense request.

4. Jury Instructions

- a. Expert Witness Instruction - the Michigan Supreme Court delete M Crim JI 5.10 Expert Witness and replace it with the statement that “No instruction regarding expert witness testimony should be given”.
- b. Anti “CSI” Instruction - the Michigan Supreme Court add a section to the Michigan Criminal Jury Instructions stating that “No instruction should be given concerning the adequacy of police investigation or the so-called “CSI effect”.