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The Honorable Robert Young

Chief Justice

Michigan Supreme Court

Post Office Box 30052

Lansing, Michigan 48909

re: *ADM File No. 2011-19*

Proposed Amendment of MCR 6.302, 6.310

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Dear Chief Justice Young:

On behalf of the Criminal Defense Attorneys of Michigan, I am writing to oppose the proposal contained in ADM File No. 2011-19. In our view, the rule will unnecessarily constrain trial judges and parties in their efforts to negotiate fair resolutions of contested cases.

It is well known that parties, in negotiating a case resolution, are motivated in large part by the desire for certainty, relative to the uncertainty of outcome inherent in a trial. This is as true in the criminal case context as with the civil case. In civil cases, the most common form of remedy sought is monetary damages for a civil wrong alleged; in criminal cases, it is appropriate punishment for a crime. When parties negotiate towards settlement, typically the predominant factor driving them is the "amount" of remedy to be accepted by the defendant, whether that is measured in dollars or quantum of punishment. If parties cannot be certain that their agreed-upon remedy in settlement will be recognized and enforced by a court, it is substantially less likely they will forfeit their rights to a trial by entering into such an agreement.

In Michigan, sentencing negotiation practices differ from court to court, and even from judge to judge within a particular court. Some prosecutors prefer to leave imposition of punishment more completely in the trial judge's hands, and require sentencing agreements to be between the defendant and the sentencing judge pursuant to *People v Cobbs*, 443 Mich 276 (1993). Some judges prefer not to engage in *Cobbs* discussions at all, and require any sentencing agreement to be between prosecutor and defendant pursuant to

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People v Killebrew, 416 Mich 189 (1982). In jurisdictions where *Killebrew* agreements between parties are more the norm, the proposed modifications to MCR 6.302 and 3.110 would impair the parties' ability to reach what they believe to be a fair and appropriate resolution in any given case. Defendants will be less likely to waive their right to trial in such an environment, and as a result both sides will be less motivated to fully engage the negotiations process where certainty of punishment is an essential element of those negotiations.

It might be useful to consider and compare the potential impact on the criminal justice system of the proposal, if adopted, versus that of the present court rule. On the one hand, as discussed above, adopting the proposal risks making *Killebrew*-type negotiations less effective because their outcomes will be less certain. It would seem that the likely impact in cases where such negotiations might take place will be fewer negotiated resolutions and more trials. This is not insignificant, given that negotiated pleas at present account for approximately 95% of all case outcomes. Furthermore, the severity of this impact will probably increase with the seriousness of the case, because the more serious the case the more important is certainty of punishment when negotiating a resolution.

On the other hand, opponents of the current rule would argue that, if a trial judge accepts the parties' plea and sentencing agreement, that judge's discretion is unduly constrained and may result in imposition of an inappropriate sentence, rather than the judge rejecting the parties' agreement and forcing a trial. Such a constraint, the argument might go, is particularly indefensible in more serious cases. In response, however, we routinely recognize that parties to a lawsuit best know the strengths and weaknesses of their respective positions, and therefore are best suited to negotiate the suit's settlement on realistic and appropriate terms. This truth applies as fully in the criminal case context as in civil cases, and it seems unlikely that in *Killebrew* jurisdictions a judge's sensibilities of fairness and propriety would regularly differ in a material way from that of the parties in terms of a negotiated settlement, even in serious cases.

Moreover, even in jurisdictions where a trial judge wishes to retain her or his unfettered discretion in imposing an appropriate sentence in a given case, s/he already has ample authority to do so under MCR 6.302(C)(3)(a) by rejecting the parties' sentencing agreement. In such cases, a defendant who tenders a guilty plea does so knowing that the tendered plea may not be withdrawn merely because the sentence to be imposed is contrary to expectations.

Timothy Baughman, in his letter to this Court supporting the proposal, observes that in the federal system an agreement between prosecutor and defendant for a sentence recommendation is not binding on the court and will not entitle a defendant to plea withdrawal if rejected by the sentencing judge. This statement is true so far as it goes, but incomplete in terms of what the federal rule provides in its entirety. Under Fed.R.Cr.P. 11(c), a plea agreement between prosecutor and defendant may contain an agreement as to charges or potential charges but be silent as to sentence (Rule 11(c)(1)(A)), or it may provide for a recommendation as to the appropriateness of a particular sentence (Rule 11(c)(1)(B)), or it may provide for an agreement as to a specific sentence (Rule 11(c)(1)(C)). As in Michigan, the federal trial judge may accept, reject, or take under advisement whichever one of these Rule 11 plea agreements the parties present. If the Court accepts a (c)(1)(A) or (c)(1)(C) plea agreement, and later determines that it cannot follow its terms, the defendant must be given the option of withdrawing his plea. However, if the Court accepts a (c)(1)(B) plea agreement, and later refuses to follow the parties' sentencing recommendation, the defendant has no right to plea withdrawal.

In the *Killebrew* context, Michigan's present system is more like the federal system than would be the case if ADM 2011-19 were adopted. At present, a Michigan trial judge has discretion to accept, reject, or take under advisement the parties' plea and sentence agreement. Furthermore, depending on which option the trial judge chooses in considering such an agreement, the defendant may retain the right to plea withdrawal, or not. On the other hand, if ADM 2011-19 is adopted, Michigan will severely narrow the parties' and a trial judge's procedural options in the *Killebrew* context. CDAM opposes that narrowing, believing it to be both unnecessary, and counter-productive from the standpoint of effective, efficient, and appropriate negotiated outcomes.

For the reasons discussed above, CDAM urges this Court to reject the proposed amendments to MCR 6.302 and 6.310.

Sincerely,



John A. Shea, Co-Chair
Rules and Laws Committee
Criminal Defense Attorneys of Michigan

cc: Corbin R Davis, Clerk, Michigan Supreme Court