April 2005

MJI Publications Updates

Child Protective Proceedings Benchbook (Revised Edition)

Crime Victim Rights Manual

Domestic Violence Benchbook (3rd ed)

Juvenile Justice Benchbook (Revised Edition)

Managing a Trial Under the Controlled Substances Act

Michigan Circuit Court Benchbook

Sexual Assault Benchbook

Traffic Benchbook—Revised Edition, Volume 2

April 2005

Update: Child Protective Proceedings Benchbook (Revised Edition)

CHAPTER 12

Trials

Appendix: Child Protection Jury Instructions

Effective March 12, 2005, the Committee on Model Civil Jury Instructions adopted new jury instructions for use in child protective proceedings. These new jury instructions are substantially similar to instructions approved for use by the Michigan Probate Judges Association, and which are currently reproduced in the appendix to Chapter 12. Replace the appendix to Chapter 12 with the following new jury instructions:*

*The new jury instructions may also be viewed online at www.courts.mi.gov/mcji/adopted-instructions/ch97.htm.

I. INSTRUCTIONS PRIOR TO VOIR DIRE

Preliminary Instructions to Prospective Jurors—M Civ JI 97.01

(1) Ladies and gentlemen, I am Judge [_____] and it is my pleasure and privilege to welcome you to the [_____] County Circuit Court.

(2) I know that jury service may be a new experience for some of you. Jury duty is one of the most serious duties that members of a free society are called upon to perform.

(3) The jury is an important part of this court. The right to a trial by jury is an ancient tradition and is part of our legal heritage.

(4) Jurors must be as free as humanly possible from bias, prejudice or sympathy for any party. All parties in a trial are entitled to jurors who can keep an open mind until the time comes to decide the case.

Selection of Fair and Impartial Jury—M Civ JI 97.02

(1) A trial begins with the selection of a jury. The purpose of this process is to obtain information about you that will help us choose a fair and impartial jury to hear this case.

(2) During jury selection the lawyers and I will ask you questions. This is called the voir dire. The questions are meant to find out if you know anything about the case. Also, we need to find out if you have any opinions or personal experiences that might influence you for or against any of the parties or witnesses.

(3) The questions may probe deeply into your attitudes, beliefs and experiences. They are not meant to be an unreasonable prying into your private lives. The law requires that we get this information so that an impartial jury can be chosen.

(4) If you do not hear or understand a question, you should say so. If you do understand it, you should answer it truthfully and completely. Please do not hesitate to speak freely about anything you believe we should know.

Challenges—M Civ JI 97.03

During jury selection you may be excused from serving on the jury in one of two ways. First, I may excuse you for cause; that is, I may decide that there is a valid reason why you cannot or should not serve in this case. Second, a lawyer for one of the parties may excuse you without giving any reason for doing so. This is called a peremptory challenge. The law gives each party the right to excuse a certain number of jurors in this way. If you are excused, you should not feel bad or take it personally. As I explained before, there simply may be something that causes you to be excused from this particular case.

Brief Description—M Civ JI 97.04

You have been called here today as prospective jurors in the Family Division of the [_____] County Circuit Court. This is a child protection proceeding. It is not a criminal case.

Introduction to Parties, Counsel, and Witnesses—M Civ JI 97.05

(1) I will now introduce the parties to this case, the lawyers, and the witnesses, and you will be asked if you know any of them.

(2) The petitioner is [_____]. The petitioner's case will be presented by [Prosecutor, Attorney General, other Attorney]. The People of the State of Michigan are represented by [_____], an assistant prosecuting attorney for [_____] County.*

*This sentence should be read only if the prosecutor appears on behalf of the people, as opposed to appearing on behalf of or as a legal consultant to, for example, the Family Independence Agency. MCL 712A.17(4) and (5), and MCR 3.914.

(3) The [mother/father/parents/guardian/nonparent adult/ respondent/ custodian] [is/are] [_____/ and _____] and [he/she/they] [is/are] represented by lawyer _____.

(4) [_____], a lawyer, has been appointed by the Court to represent the [child/children]. (If both a lawyer-guardian ad litem and an attorney have been appointed for one or more of the children, give the following instead: [_____], a lawyer, has been appointed by the court to represent the best interests of the [child/children] and is called the lawyer-guardian ad litem for the [child/children]. [_____], a lawyer, has been appointed by the court to represent the wishes of child's name].)

(5) The witnesses who may testify in this case are: (read list of witnesses).

Reading of Petition—M Civ JI 97.06

We are here today on a petition filed by [_____], a Children's Protective Services worker for the [_____] County Family Independence Agency*, alleging that the Court has jurisdiction over [names of children], who [was/ were] born on [_____], and [is/are] now [____] years of age. Under Michigan law, the Family Division of the Circuit Court has jurisdiction in proceedings concerning any child under 18 years of age found within the County: (read pertinent statutory allegations from MCL 712A.2(b)(1),(2),(3),(4) and/or (5)).

*Because others may file petitions, this sentence may need to be modified accordingly.

The allegations which the petitioner will attempt to prove are as follows: (read factual allegations in petition.)

Juror Oath Before Voir Dire—M Civ JI 97.07

(1) I will now ask you to stand and swear to truthfully and completely answer all the questions that you will be asked about your qualifications to serve as

jurors in this case. If you have religious beliefs against taking an oath, you may affirm that you will answer all the questions truthfully and completely.

(2) Please raise your right hand. Do you solemnly swear or affirm that you will truthfully and completely answer all questions about your qualifications to serve as jurors in this case?

Seating of Jurors—M Civ JI 97.08

The bailiff/clerk will now draw the names of [six/seven] prospective jurors. As your name is called, please come forward and take your seat in the jury box, starting in the back row with the seat closest to the back of the courtroom, and filling in across the back row and then the front row in the same manner.

II. INSTRUCTIONS PRIOR TO PROOFS

Juror Oath Following Selection—M Civ JI 97.09

Ladies and gentlemen of the jury, I will now ask you to stand and swear or affirm to perform your duty to try this case justly and to reach a true verdict. Please rise and raise your right hand:

Do you solemnly swear or affirm that, in this case now before the court, you will justly decide the questions submitted to you and unless you are discharged by the Court from further deliberation, you will render a true verdict; that you will render your verdict only on the evidence introduced and in accordance with the instructions of the Court?

Description of Trial Procedure—M Civ JI 97.10

(1) Now I will explain some of the legal principles you will need to know and the procedure we will follow in this trial.

(2) First, [Prosecutor, Attorney General, other Attorney] will make an opening statement in which [he/she] will give [his/her] theory of the case. The other lawyers do not have to make opening statements, but if they choose to do so, they may make an opening statement after [Prosecutor, Attorney General, other Attorney] makes [his/her], or they may wait until later. These opening statements are not evidence. They are only meant to help you understand how each party sees the case.

(3) Next, [Prosecutor, Attorney General, other Attorney] will present [his/her] evidence. [He/she] may call witnesses to testify and may show you exhibits such as documents or physical objects. The other lawyers have the right to cross-examine, that is, to question, [Mr./Ms. _____'s] witnesses.

(4) After [Prosecutor, Attorney General, other Attorney] has presented all of [his/her] evidence, the other lawyers may also offer evidence, but they do not have to. If they do call any witnesses, [Prosecutor, Attorney General, other Attorney] has the right to cross-examine them. [He/she] may also call witnesses to contradict the testimony of the other parties' witnesses.

(5) After all the evidence has been presented, the lawyers for each party will make their closing arguments. Like opening statements, they are not evidence. They are only meant to help you understand the evidence and the way each party sees the case. You must base your verdict only on the evidence.

Function of Judge and Jury—M Civ JI 97.11

(1) My responsibility as the judge in this trial is to make sure that the trial is run fairly and efficiently, to make decisions about evidence, and to instruct you about the law that applies to this case. You must take the law as I give it to you. Nothing I say is meant to reflect my own opinions about the facts of the case. As jurors, you are the ones who will decide this case.

(2) Your responsibility as jurors is to decide what the facts of the case are. That is your job and no one else's. You must think about all the evidence and then decide what each piece of evidence means and how important you think it is. This includes how much you believe what each of the witnesses said. What you decide about any fact in this case is final.

Jury Must Only Consider Evidence; What Evidence Is—M Civ JI 97.12

When it is time for you to decide the case, you are only allowed to consider the evidence that was admitted in the case. Evidence includes only the sworn testimony of the witnesses, the exhibits, such as documents or other things which I admit into evidence, and anything else I tell you to consider as evidence.

Judging Credibility and Weight of Evidence—M Civ JI 97.13

(1) It is your job to decide what the facts of this case are. You must decide which witnesses you believe and how important you think their testimony is. You do not have to accept or reject everything a witness says. You are free to believe all, none, or part of any person's testimony.

(2) In deciding which testimony you believe, you should rely on your own common sense and everyday experience. However, in deciding whether you believe a witness's testimony, you must set aside any bias or prejudice you have based on the race, gender, or national origin of the witness.

(3) There is no fixed set of rules for judging whether you believe a witness, but it may help you to think about these questions:

(a) Was the witness able to see or hear clearly? How long was the witness watching or listening? Was anything else going on that might have distracted the witness?

(b) Does the witness seem to have a good memory?

(c) How does the witness look and act while testifying? Does the witness seem to be making an honest effort to tell the truth, or does the witness seem to evade the questions or argue with the lawyers?

(d) Does the witness's age or maturity affect how you judge his or her testimony?

(e) Does the witness have any bias or prejudice or any personal interest in how this case is decided?

(f) Have there been any promises, threats, suggestions, or other influences that affect how the witness testifies?

(g) In general, does the witness have any special reason to tell the truth, or any special reason to lie?

(h) All in all, how reasonable does the witness's testimony seem when you think about all the other evidence in the case?

Questions Not Evidence—M Civ JI 97.14

The questions the lawyers ask the witnesses are not evidence. Only the answers are evidence. You should not think that something is true just because one of the lawyers asks questions that assume or suggest that it is true.

Court's Questioning Not Reflective of Opinion—M Civ JI 97.15

I may ask questions of some of the witnesses. These questions are not meant to reflect my opinion about the evidence. If I ask questions, my only reason would be to ask about things that may not have been fully explored.

Questions by Jurors Allowed—M Civ JI 97.16

(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. If you still have an important question after all of the lawyers have finished asking their questions, don't ask it yourself. Instead, raise your hand, write the question down, and pass it to the bailiff. [He/she] will give it to me.

(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.

Objections—M Civ JI 97.17

During the trial the lawyers may object to certain questions or statements made by the other lawyers or witnesses. I will rule on these objections according to the law. My rulings are not meant to reflect my opinion about the facts of the case.

Disregard Out-of-Presence Hearings—M Civ JI 97.18

Sometimes the lawyers and I will have discussions out of your hearing. Also, while you are in the jury room I may have to take care of other matters that have nothing to do with this case. Please pay no attention to these interruptions.

Jurors Not to Discuss Case—M Civ JI 97.19

You must not discuss the case with anyone, including your family or friends. You must not even discuss it with the other jurors until the time comes for you

to decide the case. I will tell you when it is time for you to decide the case, and will send you to the jury room to begin your deliberations. You should then discuss the case among yourselves, but only in the jury room and only when all the jurors are there. When the trial is over, you may, if you wish, discuss the case with anyone.

Recesses—M Civ JI 97.20

(1) If I call for a recess during the trial, I will either send you back to the jury room or allow you to leave the building. During these recesses you must not discuss the case with anyone or let anyone discuss it with you or in your presence. If someone tries to do that, tell him or her to stop, and explain that as a juror you are not allowed to discuss the case. If he or she continues, leave them at once and report the incident to me as soon as you return to court.

(2) You must not talk to the parties, lawyers, or the witnesses about anything at all, even if it has nothing to do with the case.

(3) It is very important that you only get information about the case here in court, when you are acting as the jury and when the parties, the lawyers, and I are all here.

Caution about Publicity in Cases of Public Interest—M Civ JI 97.21

(1) During the trial, do not read, listen to, or watch any news reports about the case. Under the law, the evidence you consider to decide the case must meet certain standards. For example, witnesses must swear to tell the truth, and the lawyers must be able to cross-examine them. Because news reports do not have to meet these standards, they could give you incorrect or misleading information that might unfairly favor one side. So, to be fair to both sides, you must follow this instruction.

(2) (Give the instruction below when recessing)

Remember, for the reasons I explained to you earlier, you must not read, listen to, or watch any news reports about this case while you are serving on this jury.

Visiting Scene/Conducting Experiments—M Civ JI 97.22

Do not go to the scene of any of the incidents alleged in the petition. If it is necessary for you to view a scene, you will be taken there as a group under my supervision. Do not make any investigation of your own or conduct an experiment of any kind.

Notetaking by Jurors Allowed—M Civ JI 97.23

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 on 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/clerk] during recesses. If you do take notes, please write your name on the first page.

Notetaking Not Allowed—M Civ JI 97.24

I don't believe that it is desirable or helpful for you to take notes during this trial. If you take notes, you might not be able to give your full attention to the evidence. Therefore, please do not take any notes while you are in the courtroom.

Inability to Hear Witness or See Exhibit—M Civ JI 97.25

If you cannot hear a question by an lawyer, an answer by a witness, or anything I say, please raise your hand. When I recognize you, you should indicate what you did not hear. Do not hesitate to ask something be repeated, as it is very important that you hear everything that is said.

Defining Legal Names of Parties and Counsel—M Civ JI 97.26

From time to time throughout the trial I may address the lawyers as counsel, which is another word for lawyer.

Number of Jurors—M Civ JI 97.27

You can see that we have chosen a jury of seven. After you have heard all the evidence and my instructions, there will be a drawing by lot to decide which one of you will be excused in order to form a jury of six.

Instructions to be Taken as a Whole—M Civ JI 97.28

I may give you more instructions during the trial, and at the end of the trial I will give you detailed instructions about the law in this case. You should consider all of my instructions as a connected series. Taken together, they are the law which you must follow.

Deliberations and Verdict—M Civ JI 97.29

After all of the evidence has been presented and the lawyers have given their closing arguments, I will give you detailed instructions about the rules of law that apply to this case. You will then go to the jury room to decide on your verdict.

Maintaining an Open Mind—M Civ JI 97.30

It is important for you to keep an open mind and not make a decision about anything in the case until you go to the jury room to decide the case.

III. INSTRUCTIONS AFTER PROOFS

Duties of Judge and Jury—M Civ JI 97.31

(1) Members of the jury, the evidence and arguments in this case are finished, and I will now instruct you on the law. That is, I will explain the law that applies to this case.

(2) Remember that you have taken an oath to return a true and just verdict, based only on the evidence and my instructions on the law. You must not let sympathy or prejudice influence your decision.

(3) It is my duty to instruct you on the law. You must take the law as I give it to you. If an lawyer says something different about the law, follow what I say. At various times, I have already given you some instructions about the law. You must take all my instructions together as the law you are to follow. You should not pay attention to some instructions and ignore others.

(4) As jurors, you must decide what the facts of this case are. You must think about all the evidence and then decide what each piece of evidence means and how important you think it is. This includes whether you believe what each of the witnesses said.

(5) To sum up, it is your job to decide what the facts of the case are, to apply the law as I give it to you, and, in that way, to decide the case.

Evidence—M Civ JI 97.32

(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) The evidence in this case includes only the sworn testimony of witnesses (the exhibits which I admitted into evidence, and anything else I told you to consider as evidence).

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

(4) The fact that a petition was filed alleging that the Court has jurisdiction over [Children's names], and that [he/she/they] [was/were] placed in foster care pending this hearing, and that [Mother's, Father's, Guardian's, Nonparent Adult's or Custodian's names] [is/are] present in court today is not evidence.

(5) The lawyers' statements and arguments are not evidence. They are only meant to help you understand the evidence and the theory of each party. The questions which the lawyers ask witnesses are also not evidence. You should consider these questions only as they give meaning to the witnesses' answers. You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge.

(6) My comments, rulings, questions 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 of the evidence regardless of which party produced it.

(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 the trial.

Witnesses-Credibility—M Civ JI 97.33

(1) As I said before, it is your job to decide what the facts of this case are. You must decide which witnesses you believe and how important you think their testimony is. You do not have to accept or reject everything a witness said. You are free to believe all, none, or part of any person's testimony.

(2) In deciding which testimony you believe, you should rely on your own common sense and everyday experience. However, in deciding whether you believe a witness's testimony, you must set aside any bias or prejudice you may have based on the race, gender, or national origin of the witness.

(3) There is no fixed set of rules for judging whether you believe a witness, but it may help you to think about these questions:

(a) Was the witness able to see or hear clearly? How long was the witness watching or listening? Was anything else going on that might have distracted the witness?

(b) Did the witness seem to have a good memory?

(c) How did the witness look and act while testifying? Did the witness seem to be making an honest effort to tell the truth, or did the witness seem to evade the questions or argue with the lawyers?

(d) Does the witness's age or maturity affect how you judge his or her testimony?

(e) Does the witness have any bias or prejudice or any personal interest in how this case is decided?

(f) (Have there been any promises, threats, suggestions, or other influences that affected how the witness testified?)

(g) In general, does the witness have any special reason to tell the truth, or any special reason to lie?

(h) All in all, how reasonable does the witness's testimony seem when you think about all the other evidence in the case?

(4) Sometimes the testimony of different witnesses will not agree, and you must decide which testimony you accept. You should think about whether the disagreement involves something important or not, and whether you think someone is lying or is simply mistaken. People see and hear things differently, and witnesses may testify honestly but simply be wrong about what they thought they saw or remembered. It is also a good idea to think about which testimony agrees best with the other evidence in the case.

(5) However, you may conclude that a witness deliberately lied about something that is important to how you decide the case. If so, you may choose not to accept anything that witness said. On the other hand, if you think the witness lied about some things but told the truth about others, you may simply accept the part you think is true and ignore the rest.

Circumstantial Evidence—M Civ JI 97.34

(1) Facts can be proved by direct evidence from a witness or an exhibit. Direct evidence is evidence about what we actually see or hear. For example, if you look outside and see rain falling, that is direct evidence that it is raining.

(2) Facts can also be proved by indirect, or circumstantial, evidence. Circumstantial evidence is evidence that normally or reasonably leads to other facts. So, for example, if you see a person come in from outside wearing a raincoat covered with small drops of water, that would be circumstantial evidence that it is raining.

(3) You may consider circumstantial evidence. Circumstantial evidence by itself, or a combination of circumstantial evidence and direct evidence, can be used to prove a fact.

Statutory Grounds—M Civ JI 97.35

*The court should select the subsections that apply.

(1) The issue that you, the jury, will have to decide is whether one or more of the statutory grounds alleged in the petition have been proven. If you find that one or more of the statutory grounds alleged in the petition have been proven, then the Court will have jurisdiction over [Children's names]. I will now explain what those statutory grounds are. The Court has jurisdiction over a child:*

(a) If that child's parent or other person legally responsible for the care and maintenance of that child, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, or

(b) If that child is subject to a substantial risk of harm to his or her mental well-being, or

(c) If that child is abandoned by his or her parents, guardian or other custodian, or

(d) If that child is without proper custody or guardianship, or

(e) If that child's home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult or other custodian, is an unfit place for that child to live in, or

(f) If that child's parent has substantially failed, without good cause, to comply with a limited guardianship placement plan regarding the child, or

(g) If that child's parent has substantially failed, without good cause, to comply with a court-structured plan regarding the child, or

(h) If that child has a guardian appointed for him or her under the Michigan Estates and Protected Individuals Code and

(*i*) that child's parent, having the ability to support or assist in supporting the child, has failed or neglected, without good cause, to provide regular and substantial support for the child for a period of two years or more before the filing of the petition, or if a support order has been entered, has failed to substantially comply with the order for a period of two years or more before the filing of the petition, and

(*ii*) that child's parent, having the ability to visit, contact or communicate with the child, has regularly and substantially failed or neglected, without good cause, to do

so for a period of two years or more before the filing of the petition.

Definitions—M Civ JI 97.36

(1) Neglect means the failure of a parent, guardian, nonparent adult or custodian to provide the care that a child needs, including the failure to protect the physical and emotional health of a child. Neglect may be intentional or unintentional. It is for you, the jury, to determine from the evidence in this case, what care was necessary for the [child/children] and whether or not [his/her/their] parent(s), guardian, nonparent adult or custodian provided that care.

(2) The legal definition of cruelty is the same as the common understanding of the word cruelty. It implies physical or emotional mistreatment of a child.

(3) Depravity means a morally corrupt act or practice.

(4) The legal definition of criminality is the same as the common understanding of the word criminality. Criminality is present when a person violates the criminal laws of the State of Michigan or of the United States. Whether a violation of the criminal laws of the State of Michigan or of the United States by a parent, guardian, nonparent adult or custodian renders the home or environment of a child an unfit place for the child to live in is for you to decide based on all of the evidence in the case.

(5) A child is without proper custody or guardianship when he or she is: 1) left with, or found in the custody of, a person other than a legal parent, legal guardian or other person authorized by law or court order to have custody of the child, and 2) the child was originally placed, or came to be, in the custody of a person not legally entitled to custody of the child for either an indefinite period of time, no matter how short, or for a definite, but unreasonably long, period of time. What is unreasonably long depends on all the circumstances. It is proper for a parent or guardian to place his or her child with another person who is legally responsible for the care and maintenance of the child and who is able to and does provide the child with proper care and maintenance. A baby sitter, relative or other care-giver is not legally responsible for the care and maintenance of a child after the previously agreed-upon period of care has ended.

(6) Education means learning based on an organized educational program that is appropriate, given the age, intelligence, ability, and any psychological limitations of a child, in the subject areas of reading, spelling, mathematics, science, history, civics, writing, and English grammar.

(7) A child is abandoned when the child's [parent(s)/guardian/custodian] leave(s) the child for any length of time, no matter how short, with the intention of never returning for the child. The intent of the [parent(s)/

guardian/custodian] to abandon the child may be inferred from the [parent's/parents'/guardian's/custodian's] words and/or actions surrounding the act of leaving the child.

Standard of Proof—M Civ JI 97.37

The standard of proof in this case is proof by a preponderance of the evidence. Proof by a preponderance of the evidence means that the evidence that a statutory ground alleged in the petition is true outweighs the evidence that that statutory ground is not true.

No Duty to Present Evidence—M Civ JI 97.38

[Mother's, Father's, Guardian's, Nonparent Adult's or Custodian's names] [has/have] no duty to present evidence that the statutory grounds alleged in the petition are not true. It is your duty to decide from the evidence that you have heard whether one or more of the statutory grounds alleged in the petition are true.

Treatment of One Child as Evidence of Treatment of Another Child—M Civ JI 97.39

You have heard testimony about [another child/other children] of [Mother's/Father's names], namely, [Children's names]. [That child/Those children] [is/are] not the subject(s) of the petition(s) before you now. How a parent treats one child is evidence of how that parent may treat another child. Therefore, if you choose to believe the evidence, presented by any party, relating to how [Mother's/Father's names] treated [that other child/those other children], you may consider it in making your decision in relation to [this child/any or all of these children].

Improvement in Circumstances Not Controlling—M Civ JI 97.40

If you find that one or more of the statutory grounds alleged in the petition have been proven, the fact that circumstances may have improved since [date petition filed or another more appropriate date, where applicable] does not negate your finding.

Not Necessary to Prove Each Fact Alleged—M Civ JI 97.41

It is not necessary that each and every fact alleged in the petition be proven before you can find that one or more of the statutory grounds alleged in the petition have been proven. It is necessary, however, that sufficient facts be proven so that, in your judgment, you can find by a preponderance of the evidence that one or more of the statutory grounds alleged in the petition have been proven.

Unfit Home by Reason of Neglect or Cruelty —Res Ipsa Loquitur—M Civ JI 97.42

You may, but are not required to, find that the child's home or environment was an unfit place for the child to live in by reason of neglect or cruelty on the part of his or her parent, guardian, nonparent adult or custodian if you find all the following:

1) The child has suffered an injury or injuries.

2) The child was not capable of inflicting the injury or injuries on himself or herself.

3) The injury or injuries are such that would not ordinarily occur unless they were caused by another person inflicting them on the child or another person not providing proper care and supervision for the child in order to prevent the injury or injuries.

4) The child was in the exclusive control of his or her parent, guardian, nonparent adult or custodian at the time the injury or injuries occurred. The term "custodian" includes any other person to whom the parent or guardian entrusted the care of the child if the parent or guardian knew, or should have known, that that person might injure the child or permit the child to be injured through lack of proper care and supervision.

5) The true explanation of what happened to the child is more likely to be within the knowledge of the parent, guardian, nonparent adult or custodian than the petitioner.

Findings Re: Statutory Grounds—M Civ JI 97.43

(1)(a) If you find by a preponderance of the evidence that [Children's names], mother, or father, or both, when able to do so, neglected or refused to provide

proper or necessary support, medical, surgical or other care necessary for [his/her/their] health or morals, or

(b) If you find by a preponderance of the evidence that [Children's names] [was/were] subject to a substantial risk of harm to [his/her/their] mental well-being, or

(c) If you find by a preponderance of the evidence that [Children's names] [was/were] abandoned by [his/her/their] [mother/father/parents/guardian/custodian], or

(d) If you find by a preponderance of the evidence that [Children's names] [was/were] without proper custody or guardianship, or

(e) If you find by a preponderance of the evidence that the home or environment of [Children's names] was an unfit place for [him/her/them] to live in by reason of neglect, cruelty, drunkenness, criminality or depravity on the part of [his/her/their] [mother, father, or both/guardian/nonparent adult/custodian], or

(f) If you find by a preponderance of the evidence that [Children's names] mother, or father, or both, [has/have] substantially failed, without good cause, to comply with a limited guardianship placement plan regarding the [child/children, or

(g) If you find by a preponderance of the evidence that [Children's names] mother, or father, or both, [has/have] substantially failed, without good cause, to comply with a court-structured plan regarding the [child/children], or

(h) If you find by a preponderance of the evidence that [Children's names] [has/have] a guardian appointed for [him/her/them] under the Michigan Estates and Protected Individuals Code, and

(*i*) that [Children's names] mother, or father, or both, having the ability to support or assist in supporting the [child/children], [has/have] failed or neglected, without good cause, to provide regular and substantial support for the [child/children] for a period of two years or more before the filing of the petition, or if a support order has been entered, [has/have] failed to substantially comply with the order for a period of two years or more before the filing of the petition, and

(*ii*) that [Children's names] mother, or father, or both, having the ability to visit, contact or communicate with the [child/children], [has/have] regularly and substantially failed or neglected, without good cause, to do so for a period of two years or more before the filing of the petition, then you must find that one or more of the statutory grounds alleged in the petition have been proven. (Read

only those paragraphs below that have the same letter caption as the paragraphs you read from the first half of this instruction.)

(2)(a) If you do not find by a preponderance of the evidence that [Children's names] mother, or father, or both, when able to do so, neglected or refused to provide proper or necessary support, medical, surgical or other care necessary for [his/her/their] health or morals, and

(b) If you do not find by a preponderance of the evidence that [Children's names] [was/were] subject to a substantial risk of harm to [his/her/their] mental well-being, and

(c) If you do not find by a preponderance of the evidence that [Children's names] [was/were] abandoned by [his/her/their] [mother/father/parents/ guardian/custodian], and

(d) If you do not find by a preponderance of the evidence that [Children's names] [was/were] without proper custody or guardianship, and

(e) If you do not find by a preponderance of the evidence that the home or environment of [Children's names] was an unfit place for [him/her/them] to live in by reason of neglect, cruelty, drunkenness, criminality or depravity on the part of [his/her/their] [mother, father, or both/guardian/nonparent adult/ custodian], and

(f) If you do not find by a preponderance of the evidence that [Children's names] mother, or father, or both, [has/have] substantially failed, without good cause, to comply with a limited guardianship placement plan regarding the [child/children], and

(g) If you do not find by a preponderance of the evidence that [Children's names] mother, or father, or both, [has/have] substantially failed, without good cause, to comply with a court-structured plan regarding the [child/ children], and

(h) If you do not find by a preponderance of the evidence that [Children's names] [has/have] a guardian appointed for [him/her/them] under the Michigan Estates and Protected Individuals Code, and

(*i*) that [Children's names] mother, or father, or both, having the ability to support or assist in supporting the [child/children], [has/ have] failed or neglected, without good cause, to provide regular and substantial support for the [child/children] for a period of two years or more before the filing of the petition, or if a support order has been entered, [has/have] failed to substantially comply with the order for a period of two years or more before the filing of the petition, and

(*ii*) that [Children's names] mother, or father, or both, having the ability to visit, contact or communicate with the [child/children], [has/have] regularly and substantially failed or neglected, without good cause, to do so for a period of two years or more before the filing of the petition, then you must find that none of the statutory grounds alleged in the petition have been proven.

Court to Determine Disposition—M Civ JI 97.44

You are not to concern yourselves with what will happen to [Children's names] if you should find that one or more of the statutory grounds alleged in the petition have been proven. If the Court has jurisdiction of [this child/these children], that does not necessarily mean that [he/she/they] will be removed from their home or made [a ward/wards] of the court either temporarily or permanently. If the Court has jurisdiction of [this child/these children], the Court will then decide at a later time what to do about [this child/these children] and [his/her/their] family. There are many options available to the Court.

Not a Criminal Proceeding—M Civ JI 97.45

I instruct you that this is a child protection proceeding. It is not a criminal case. Therefore, the issue before you is not that of guilt or innocence, but whether one or more of the statutory grounds alleged in the petition have been proven. You should not consider this proceeding to be in any way involved with the criminal law so far as your deliberations are concerned.

Deliberations and Verdict—M Civ JI 97.46

(1) When you go to the jury room, you should first choose a foreperson. [He/she] should see to it that your discussions are carried on in a businesslike way and that everyone has a fair chance to be heard.

(2) When at least five of you agree upon a verdict, it will be received as the jury's verdict. In the jury room you will discuss the case among yourselves, but ultimately each of you will have to make up your own mind. Any verdict must represent the individual, considered judgment of at least five of you.

(3) It is your duty as jurors to talk to each other and make every reasonable effort to reach agreement. Express your opinions and the reasons for them, but keep an open mind as you listen to your fellow jurors. Rethink your opinions

and do not hesitate to change your mind if you decide you were wrong. Try your best to work out your differences.

(4) However, although you should try to reach agreement, none of you should give up your honest opinion about the case just because other jurors disagree with you or just for the sake of reaching a verdict. In the end, your vote must be your own, and you must vote honestly and in good conscience.

Communications with the Court—M Civ JI 97.47

(1) If you want to communicate with me while you are deliberating, please have your foreperson write a note and deliver it to the bailiff. It is not proper for you to talk directly with the judge, lawyers, court officers, or other people involved in the case.

(2) As you discuss the case, you must not let anyone, even me, know how your voting stands. Therefore, until you reach a verdict, do not reveal this to anyone outside the jury room.

Exhibits—M Civ JI 97.48

(Option 1) If you want to look at any or all of the exhibits that have been admitted into evidence, just ask for them.

(Option 2) You may take the exhibits which have been admitted into evidence into the jury room with you.

Verdict—M Civ JI 97.49

There are only two possible verdicts in this case:

(1) One or more of the statutory grounds alleged in the petition have been proven.

(2) None of the statutory grounds alleged in the petition have been proven.

These possible verdicts are set forth in the verdict form(s) which you will receive. Only one of the possible verdicts may be returned by you [as to each child]. When at least five of you have agreed upon one verdict [as to each child], your foreperson should mark that verdict.

Dismissal of Extra Juror—M Civ JI 97.50

Ladies and gentlemen of the jury: You will recall that at the beginning of the trial, I told you that while seven jurors were seated to hear this case, only six would deliberate and decide the case. Seven jurors were selected in the event one of you become ill or otherwise could not complete the case. Fortunately, all of you remained healthy, so we must now excuse one of you from further participation in this trial. If you are excused, you may either leave or may remain in the courtroom to see what the verdict will be. If you are excused, please don't feel your time has been wasted. You may have been needed and your participation was important to the administration of justice. The [bailiff/ clerk] will now draw the name of one juror by lot. [Bailiff draws name]. Thank you [name of juror]. You may step down.

Bailiff's Oath—M Civ JI 97.51

Do you solemnly swear that you will, to the best of your ability, keep the persons sworn as jurors in this trial from separating from each other, that you will not permit any communication to be made to them, or to any of them, orally or otherwise, that you will not communicate with them, or with any of them, orally or otherwise, except upon the order of this Court, or to ask them if they have agreed upon a verdict, until they shall be discharged, and that you will not, before they render their verdict, communicate to any person the state of their deliberations or the verdict they have agreed upon?

Begin Deliberations—M Civ JI 97.52

Ladies and gentlemen of the jury: Throughout this trial I have told you not to discuss the case among yourselves or with anyone else. Now is the time for you to discuss it among yourselves. Please follow the bailiff to the jury room to begin your deliberations.

IV. VERDICT FORMS

[Multiple statutory grounds alleged]

We, the jury, find that:

[ ] One or more of the statutory grounds alleged in the petition concerning (child's name) have been proven.

[ ] None of the statutory grounds alleged in the petition concerning (child's name) has been proven.

[One statutory ground alleged]

We, the jury, find that:

[ ] The statutory ground alleged in the petition concerning (child's name) has been proven.

[ ] The statutory ground alleged in the petition concerning (child's name) has not been proven.

CHAPTER 14

Paying the Costs of Child Protective Proceedings

14.1 Federal, State, and County Sources of Funding

On page 334, after the second full paragraph insert the following text:

The 50% FIA reimbursement of annual expenses does not include reimbursement for counties' capital expenditures. *Ottawa County v Family Independence Agency*, ___ Mich App ___, ___ (2005). In *Ottawa County,* eleven Michigan counties filed suit seeking reimbursement from the FIA for capital expenditures that included building, equipping, or improving juvenile detention facilities. The Court of Appeals concluded that reimbursement of a county's expenditure is conditioned upon meeting several requirements, including compliance with FIA's administrative rules and enabling statute and FIA's policies. Moreover, the Court noted that FIA is required to develop a system of reporting expenditures that only allows reimbursement "based on care given to a specific, individual child." MCL 400.117a(8). Relevant administrative rules and policies allow reimbursement of expenses necessary to provide direct services to children but severely limit reimbursement of capital expenditures because such expenditures are not attributable to the care of individual children. The Court of Appeals also concluded that FIA's failure to reimburse the counties for their capital expenditures did not violate the Headlee Amendment, Const 1963, art 9, §29. *Ottawa County, supra* at ___.

April 2005

Update: Crime Victim Rights Manual

CHAPTER 10

Restitution

10.5 Persons or Entities Entitled to Restitution

B. Individuals or Entities That Have Compensated the Victim

Replace the last sentence on the bottom of page 239 with the following text:

See *People v Washpun,* 175 Mich App 420, 423 (1989) (prior to the statutory amendment that added the section quoted above, the Legislature intended insurance companies to receive restitution under the CVRA to the extent that they compensated victims for losses arising from crimes), and *People v Byard*, ___ Mich App ___, ___ (2005) (the Michigan Catastrophic Claims Association, a private association funded by Michigan drivers that compensates insurance companies for no-fault medical claims exceeding $250,000.00, may be subrogated to an insurance company). An individual or entity that has compensated a victim need not file a claim to receive restitution under MCL 780.766(8), MCL 780.794(8), or MCL 780.826(8). *Byard, supra.*

CHAPTER 10

Restitution

10.9 Calculating Restitution Where the Offense Results in Physical or Psychological Injury, Serious Bodily Impairment, or Death

C. Triple Restitution for Serious Bodily Impairment or Death of a Victim

Insert the following text after the August 2004 update to this subsection:

A court may order up to triple the amount of any other restitution allowed under the CVRA, including restitution payable to insurance companies that have compensated the direct victim for losses incurred as a result of the offense. *People v Byard,* ___ Mich App ___ (2005). In *Byard,* the defendant was convicted of operating a motor vehicle while visibly impaied causing serious injury. It was undisputed that the victim suffered a serious impairment of body function. Defendant was ordered to pay $659,128.09 to an insurance company and $280,000.00 to the direct victim of the offense, $250,000.00 of which was for "pain and suffering under MCL 780.766(5)." The Court of Appeals upheld the restitution order, stating:

> "Defendant says that, because the victim did not suffer any out-of-pocket expenses, no restitution was 'otherwise allowed under this section.' MCL 780.766(5). However, the trial court ordered defendant to pay $659,128.09 to Allstate Insurance Company for medical expenses and lost wages paid for the victim. MCL 780.766(4)(a) & (c) allows a court to award restitution for medical bills and lost wages. MCL 780.766(8) allows courts to award restitution to any person, government entity, or business or legal entity which compensates the victim for losses arising out of a defendant's criminal conduct. Therefore, the award of restitution to Allstate was restitution 'otherwise allowed under this section,' and the $659,128.09 award could potentially be tripled under MCL 780.766(5). Thus, the trial court did not err when it awarded $250,000 to the victim under MCL 780.766(5)." *Byard, supra.*

April 2005

Update: Domestic Violence Benchbook (3rd ed)

CHAPTER 3

Common "Domestic Violence Crimes"

3.1 Chapter Overview

On page 63, add the following text to the end of the first paragraph:

In *People v Wilson*, ___ Mich App ___ (2005), the Court of Appeals addressed the issue of what constitutes a "domestic violence case." The Court stated:

> "Domestic violence includes any of the assaults. Indeed, even murder may be characterized as domestic violence. Domestic violence is not a specific crime, but a description of circumstances surrounding a violent crime in which the perpetrator and victim have a pre-existing relationship that may be categorized as a 'domestic' relationship."

CHAPTER 5

Evidence in Criminal Domestic Violence Cases

5.3 Audiotaped Evidence

B. Hearsay Objections to Audiotaped Evidence

2. Excited Utterance Exception Under MRE 803(2)

On page 168 before the last paragraph, insert the following text:

In *People v Walker,* ___ Mich App ___, ___ (2005), the defendant beat his live-in girlfriend with a stick and threatened to "blow her back out" with a handgun. Two hours after the beatings had stopped, the victim jumped from a second-story balcony, ran to a neighbor's house, and asked the neighbor to call the police. The victim made statements to the neighbor, who wrote out the statements and gave them to the police. The victim did not appear for trial, and her statements were admitted under the excited utterance exception to the hearsay rule. The defendant argued that the statements should not have been admitted because of the two-hour delay between the assault and the victim's escape, during which time the victim fell asleep and had time to "compose herself enough to jump from a second story window." The defendant also argued that this delay provided the victim with time to fabricate the assault. The Court of Appeals rejected the defendant's argument and upheld the admission of the statements as "excited utterances." The Court of Appeals reiterated the Michigan Supreme Court's holding in *People v Smith*, 456 Mich 543, 551 (1998), that there is no express time limit for excited utterances: the focus is on whether the declarant was still under the stress of the event at the time the statement was made. The Court found that the facts of this case, including the testimony of the neighbor and police officer that the victim was upset, crying, shaking, and hysterical, supported the trial court's determination that the statements were properly admitted. *Walker, supra* at ___.

The Court of Appeals also found that the crime victim's statements made to the neighbor and police officer did not constitute "testimonial statements" for the purposes of the Confrontation Clause. The defendant argued that pursuant to *Crawford v Washington,* 541 US 36 (2005), admission of the victim's statements violated the Confrontation Clause because they were "testimonial statements." The Court rejected the defendant's argument and stated:

> "We discern no holding or analysis in *Crawford* that would lead us to conclude that the victim's statements to her neighbor, and the repetition of her statements to responding police officers, were testimonial hearsay violative of the Confrontation Clause."

April 2005

Update: Juvenile Justice Benchbook (Revised Edition)

CHAPTER 10

Juvenile Dispositions

10.13* Restitution

*Renumbered by January 2005 update to page 231.

E. Persons or Entities Entitled to Restitution

Insert the following text before the paragraph beginning "**Individuals or entities that have provided services** . . ." on page 239:

In *People v Byard*, ___ Mich App ___, ___ (2005), the trial court ordered the defendant to pay full restitution to the victim's insurance company, Allstate Insurance, in the amount of $659,128.09. On appeal, the defendant argued that because Allstate was reimbursed by the Michigan Catastrophic Claims Association (MCCA) for all of its losses over $250,000.00, Allstate was only entitled to $250,000.00. Although the MCCA did not file a claim to receive restitution, the Court amended the restitution order to provide $250,000.00 to Allstate, and the remaining $409,128.09 directly to the MCCA.

*Renumbered by January 2005 update to page 231.

10.13* Restitution

I. Calculating Restitution Where the Offense Results in Physical or Psychological Injury, Serious Bodily Impairment, or Death

Triple restitution for serious bodily impairment or death of a victim.

Insert the following text after the August 2004 update to this subsection:

A court may order up to triple the amount of any other restitution allowed under the CVRA, including restitution payable to insurance companies that have compensated the direct victim for losses incurred as a result of the offense. *People v Byard*, ___ Mich App ___ (2005). In *Byard*, the defendant was convicted of operating a motor vehicle while visibly impaired causing serious injury. It was undisputed that the victim suffered a serious impairment of body function. Defendant was ordered to pay $659,128.09 to an insurance company and $280,000.00 to the direct victim of the offense, $250,000.00 of which was for "pain and suffering under MCL 780.766(5)." The Court of Appeals upheld the restitution order, stating:

> "Defendant says that, because the victim did not suffer any out-of-pocket expenses, no restitution was 'otherwise allowed under this section.' MCL 780.766(5). However, the trial court ordered defendant to pay $659,128.09 to Allstate Insurance Company for medical expenses and lost wages paid for the victim. MCL 780.766(4)(a) & (c) allows a court to award restitution for medical bills and lost wages. MCL 780.766(8) allows courts to award restitution to any person, government entity, or business or legal entity which compensates the victim for losses arising out of a defendant's criminal conduct. Therefore, the award of restitution to Allstate was restitution 'otherwise allowed under this section,' and the $659,128.09 award could potentially be tripled under MCL 780.766(5). Thus, the trial court did not err when it awarded $250,000 to the victim under MCL 780.766(5)."

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CHAPTER 11

Paying the Costs of Juvenile Proceedings

11.1 County, State, and Federal Sources of Funding

On page 265, before the last paragraph, insert the following text:

The 50% FIA reimbursement of annual expenses does not include reimbursement for counties' capital expenditures. *Ottawa County v Family Independence Agency*, ___ Mich App ___, ___ (2005). In *Ottawa County,* eleven Michigan counties filed suit seeking reimbursement from the FIA for capital expenditures that included building, equipping, or improving juvenile detention facilities. The Court of Appeals concluded that reimbursement of a county's expenditure is conditioned upon meeting several requirements, including compliance with FIA's administrative rules and enabling statute and FIA's policies. Moreover, the Court noted that FIA is required to develop a system of reporting expenditures that only allows reimbursement "based on care given to a specific, individual child." MCL 400.117a(8). Relevant administrative rules and policies allow reimbursement of expenses necessary to provide direct services to children but severely limit reimbursement of capital expenditures because such expenditures are not attributable to the care of individual children. The Court of Appeals also concluded that FIA's failure to reimburse the counties for their capital expenditures did not violate the Headlee Amendment, Const 1963, art 9, §29. *Ottawa County, supra* at ___.

April 2005

Update: Managing a Trial Under The Controlled Substances Act

CHAPTER 15

Sentencing

15.2 Sentencing for Major Controlled Substance Offenses

C. Major Controlled Substance Offenses That Require Consecutive Sentences

4. Court of Appeals Cases Interpreting §7401(3)

Insert the following text as the third bulleted item on page 323:

- *People v Wyrick*, ___ Mich App ___, ___ (2005)

A defendant's second conviction for misdemeanor possession of marijuana, punishable by up to two years' imprisonment, qualifies as "another felony" for purposes of the consecutive sentencing mandate in MCL 333.7401(3).

April 2005

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part I—General Matters (MRE Articles I, II, III, V, and XI)

2.7 Presumptions

A. Civil Case—MRE 301

Insert the following text on page 32 immediately before subsection (B):

If evidence is introduced to rebut a presumption, "the presumption dissolves, but the underlying inferences remain to be considered by the jury[.]" *Ward v Consolidated Rail Corporation*, ___ Mich ___, ___ (2005). In *Ward*, the defendant introduced evidence that missing evidence was disposed of as part of a routine business practice, thereby rebutting the presumption that the missing evidence was intentionally made unavailable. Missing evidence only gives rise to an adverse presumption when the complaining party can establish intentional conduct showing fraud or a desire to suppress the truth. Thus, the Court held that "the trial court erred when it instructed the jury that it could draw an adverse inference, but failed to explain that no inference should be drawn if defendant had a reasonable excuse for its failure to produce the evidence."

CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.40 Hearsay Exceptions

I. Declarant Unavailable—MRE 804, MCL 768.26

Insert the following text before the last paragraph on page 112:

In *People v Walker,* ___ Mich App ___, ___ (2005), the Court of Appeals held that a crime victim's statements to a neighbor and a police officer do not constitute "testimonial statements" for purposes of the Confrontation Clause. In *Walker*, the defendant beat the victim and threatened to kill her. The victim jumped from a second-story balcony and ran to a neighbor's house, and the neighbor called the police. The victim made statements to the neighbor, who wrote out the statements and gave them to the police. The victim did not appear for trial, and her statements were admitted under the excited utterance exception to the hearsay rule. The defendant argued that pursuant to *Crawford v Washington,* 541 US 36 (2005), admission of the victim's statements violated the Confrontation Clause because they were "testimonial statements." The Court rejected the defendant's argument and stated:

> "We discern no holding or analysis in *Crawford* that would lead us to conclude that the victim's statements to her neighbor, and the repetition of her statements to responding police officers, were testimonial hearsay violative of the Confrontation Clause."

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CHAPTER 2
Evidence

Part IV—Hearsay (MRE Article VIII)

2.40 Hearsay Exceptions

I. Declarant Unavailable—MRE 804, MCL 768.26

Insert the following text after the March 2005 update to this subsection:

In *People v Ware*, ___ Mich App ___, ___ (2005), the Court of Appeals stated in dicta that *Crawford v Washington*, 541 US 36 (2004), does not prohibit the admission of a witness's statement under MRE 804(b)(6). MRE 804(b)(6) allows the admission of a statement against a party if that party has engaged in or encouraged wrongdoing that was intended to and did in fact make the declarant unavailable as a witness. In *Ware*, the defendant killed the victim and then stated to the witnesses "[i]f this shit go any further y'all next." A witness failed to appear at trial, and her statements were admitted under MRE 804(b)(6). In affirming the trial court's admission of the statements under MRE 804(b)(6), the Court of Appeals stated the following:

> "[T]he United States Supreme Court in *Crawford v Washington*, 541 US 36[] (2004) sought to reinforce the criminal defendant's Sixth Amendment right to confront a witness offered against him. *Crawford* is absent of language concerning the circumstances of a witness's unavailability, when such unavailability was caused by the defendant. From a practical standpoint, it would be grossly unfair to allow a defendant in a criminal matter to cause an adverse witness to be unavailable, and then assert a Sixth Amendment violation arguing a *Crawford*-type violation. To allow otherwise would facilitate threats or acts by a criminal defendant, against a potential witness, in order to prohibit statements or testimony, and thereby grant a criminal defendant a 'constitutional defense' against all statements made by a witness who was unavailable at the time of trial."

CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.41 Statement of Co-Defendant or Co-Conspirator

D. Cautionary Instruction—CJI 2d 5.6

On page 116, replace the first sentence in this subsection with the following text:

**People v McCoy*, 392 Mich 231 (1974).

Whether to give a cautionary accomplice instruction is within the trial court's discretion. *People v Young*, ___ Mich ___, ___ (2005). In *Young*, the Court overturned the *McCoy** rule, which required the trial court to give the jury a cautionary instruction about accomplice testimony whenever requested by the defendant. Under *McCoy*, a trial court's failure provide the jury instruction required reversal of the conviction. According to the *Young* Court, MCL 768.29 clearly provides that the jury instructions are within the trial court's discretion.

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CHAPTER 3

Civil Proceedings

Part VII—Rules Governing Particular Types of Actions (Including MCR Subchapters 3.300 – 3.600)

3.62 Contracts

On page 253, before subsection (A), insert the following text:

Effective March 12, 2005, the Committee on Model Civil Jury Instructions adopted new jury instructions for use in contracts cases, M Civ JI 142.01–142.55. The new jury instructions may be viewed online at www.courts.mi.gov/mcji/adopted-instructions/ch142.htm.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

B. Sentencing Guidelines

After the second paragraph of this subsection, add the following text:

"[A] sentence that exceeds the sentencing guidelines satisfies the requirements of MCL 769.34(3) when the record confirms that the sentence was imposed as part of a valid plea agreement. Under such circumstances, the statute does not require the specific articulation of additional 'substantial and compelling' reasons by the sentencing court." *People v Wiley,* ___ Mich ___, ___ (2005). "[A] defendant waives appellate review of a sentence that exceeds the guidelines by understandingly and voluntarily entering into a plea agreement to accept that specific sentence." *Id.*

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April 2005

Update: Sexual Assault Benchbook

CHAPTER 7

General Evidence

7.6 Former Testimony of Unavailable Witness

Insert the following text on page 364 after the April 2004 update:

In *People v Walker,* ___ Mich App ___, ___ (2005), the Court of Appeals held that a crime victim's statements to a neighbor and a police officer do not constitute "testimonial statements" for purposes of the Confrontation Clause. In *Walker*, the defendant beat the victim and threatened to kill her. The victim jumped from a second-story balcony and ran to a neighbor's house, and the neighbor called the police. The victim made statements to the neighbor, who wrote out the statements and gave them to the police. The victim did not appear for trial, and her statements were admitted under the excited utterance exception to the hearsay rule. The defendant argued that pursuant to *Crawford v Washington,* 541 US 36 (2005), admission of the victim's statements violated the Confrontation Clause because they were "testimonial statements." The Court rejected the defendant's argument and stated:

> "We discern no holding or analysis in *Crawford* that would lead us to conclude that the victim's statements to her neighbor, and the repetition of her statements to responding police officers, were testimonial hearsay violative of the Confrontation Clause."

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April 2005

Update: Traffic Benchbook—Revised Edition, Volume 2

CHAPTER 4

Section 904 Offenses

4.2 Driving While License Suspended or Revoked Causing Death — §904(4)

A. Elements of the Offense

3. By operation of the motor vehicle, the defendant caused the death of another person.

Insert the following case summary at the bottom of page 4-5:

Applying the analysis used in *People v Lardie*, 452 Mich 231, 259–260 (1996), for §625(4) offenses, the Michigan Court of Appeals held that MCL 257.904(4) requires a causal link between the victim's death and the defendant's suspended license. *People v Schut*, ___ Mich App ___, ___ (2005).

In *Schut*, the victim was killed when she collided with the defendant's truck as she crossed the road in front of the defendant's vehicle on a snowmobile. The defendant argued that the statutory language of MCL 257.904(4) required more than his "mere involvement" in the victim's death. According to the defendant, the statute applied only if his operation of the truck without a valid license constituted the actual cause of the victim's death. Citing *Lardie*, *supra*, the *Schut* Court agreed with the defendant:

> "In *Lardie*, our Supreme Court ruled that identical language found in MCL 257.625(4), operation of a motor vehicle while intoxicated causing death, required proof of causation, i.e., the prosecutor must establish that the particular defendant's decision to drive while intoxicated produced a change in that driver's operation of the vehicle that caused the death. An unavoidable killing is insufficient to justify an invocation of the statute. . . .
>
> * * *

"Binding authority interprets MCL 257.625(4) as requiring a causal link between the intoxication and the death, thus, we interpret MCL 257.904(4) as requiring a causal link between the suspended license and the death. To find otherwise would mean the statute would impose a penalty on a driver even when his wrongful decision to drive with a suspended license had no bearing on the death that resulted." *Schut, supra* at ___.

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CHAPTER 7

Felony Offenses in the Michigan Vehicle Code

7.10 Felonious Driving

On page 7-22, add section 7.10 as indicated above and insert the following text:

A. Applicable Statute

MCL 257.626c provides:

> "A person who operates a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, carelessly and heedlessly in willful and wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner that endangers or is likely to endanger any person or property resulting in a serious impairment of a body function of a person, but does not cause death, is guilty of felonious driving punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both."

B. Elements of the Offense

1. The defendant operated a motor vehicle on a highway or other place open to the public or generally accessible to motor vehicles, including an area designated for parking.

2. The defendant operated the vehicle:

- carelessly and heedlessly in willful and wanton disregard of the rights or safety of others, or
- without due caution and circumspection and at a speed or in a manner that endangers or is likely to endanger any person or property.

3. The defendant's operation of the vehicle resulted in serious impairment of a body function, but not death.

C. Criminal Penalties

MCL 257.626c provides the following penalties:

- Imprisonment for not more than two years; or

- Fine of not more than $2,000.00; or
- Both.

D. Licensing Sanctions

1. Six points. The conviction is reported to the Secretary of State. MCL 257.320a(1)(e) and MCL 257.732(4)(b).

2. Mandatory one-year suspension of the defendant's license. MCL 257.319(2)(c).

E. Issues

A defendant was not operating a motor vehicle for purposes of MCL 257.626c when, while he was a front-seat passenger in another person's vehicle, the defendant grabbed the steering wheel and turned it without the driver's permission, causing the vehicle to leave the road and strike a jogger. *People v Yamat,* ___ Mich App ___, ___ (2005). In reaching its decision, the *Yamat* Court first acknowledged that the Legislature defined a critical term in the statute, "operate," as "being in actual physical control of a vehicle . . . ." MCL 257.35a. The Court further noted, however, that the Legislature did not define the term "control." In the absence of a statutory definition, the Court consulted a dictionary; according to Webster's New Collegiate Dictionary (1980), "control" means "power or authority to guide or manage."

Applying the hybrid definition outlined above to the facts of the *Yamat* case, the Court explained its conclusion:

> "Applying these definitions, we conclude that defendant was not in actual physical control of the vehicle. Rather, defendant was interfering with the actual physical control of the vehicle. The undisputed evidence shows that the driver, who had control of the gas and brake pedals, emergency brake, ignition, turn signals, and steering wheel, was appropriately driving the vehicle until defendant grabbed the steering wheel, causing the vehicle to veer off the road. Although defendant's act caused the vehicle to veer off the road, defendant did not have the actual physical control of the vehicle, i.e., the power or authority to guide or manage the vehicle. Defendant could not have stopped or started the vehicle, nor could he have caused it to increase or decrease in speed. Defendant could not use any of the vehicles [sic] other instruments; therefore he was not in actual physical control of the vehicle." *Yamat, supra* at ___.

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