**MICHIGAN’S PROPOSED COURT RULE ON CONFRONTATION**

**Just Because You CAN do Something – Does that Mean that You Should?**

 The next time you are in a courtroom – look around you. Look at the video screen if there is one. Look at the table for the plaintiff. Then look at the witness stand. Close your eyes and imagine the most effective way for the accused citizen to fully confront a witness? Is it via a 2-way conference that allows the witness to appear via the tv screen? Is it via a sworn affidavit? Or is it live to be subject to scrutiny from the jury of every non-verbal cue and responsiveness to answers on direct and cross? It may seem simple but what may seem simple may also be inconvenient for the party with the burden of production, the burden of proof beyond a reasonable doubt and the one way obligation to call live every witness who has evidence to offer against the accused. The right to have witnesses sworn under oath and appear live to testify before the fact-finder is the heart of the right of confrontation in the 6th Amendment as revitalized by the Supreme Court in the 2004 *Crawford* v *Washington* opinion.

 Of course the answer to the question as to what is most effective is easy: live testimony from the witness stand. Wait: does that even mean a somewhat detached witness like a laboratory analyst who merely performs a scientific test of some alleged chemical compound in the accused’s system like ethanol, marijuana or cocaine? This may be where the lawyer wrestles with the answer. The answer becomes easier to understand when one realizes one of the basic tenants of metrology.

Metrology is the science of measuring things. This science is applicable in forensics when it comes to the attempt by a human-operated instrument to identify something that was sampled from the human body and then to measure it. Uncertainty is rampant in forensic metrology. In this context, uncertainty means sources of variability (or error) that lead the value reported by the instrument to be other than the true value. The sources of uncertainty include human error and differences from the way one technician performs compared to another. Therefore, it may be important to have the analyst who conducted the measurement appear in court live to testify. An analyst who lacks competence in how the system functions may need to be cross examined and exposed for the possible degree of variance of the reported value from the true value, just as much as the fraudulent analyst.

The United States Supreme Court ruled that confrontation means that the government bears the burden of producing the analyst for live testimony in *Melendez-Diaz v Massachusetts*, 129 SCt 2527 (2009). The Court then extended the confrontation protection to prohibit the use of a supervisor or surrogate witness for the actual analyst in *Bullcoming v New Mexico \_\_*SCt \_\_(2011).

The Michigan Supreme Court responded by proposing MCR 6.202. The proposed rule creates a notice and demand system for testimony from a laboratory analyst. The proposed rule creates a “shall be admitted” system if a forensic analyst fills out a certificate stating that he or she is “qualified by education, training or experience,” and “that the tests were performed under industry-approved standards and procedures” among other things.[[1]](#footnote-1)

The rule also requires the prosecutor to produce a report of the analysts’ “methods and findings” no later than 28 days before trial. If neither the defense attorney nor the defendant if unrepresented respond or object within 14 days, then the report of the analysis shall be admitted at trial as if the analyst was called to testify.

The Supreme Court of the United States expressly recognized that states do not offend the constitution with a notice and demand system for introducing lab reports without live testimony absent an objection from the accused. However, the opinion did not set forth what details in a notice and demand system would suffice to protect the confrontation rights of the accused.

The system under the proposed MCR 6.202 does not give the accused or his lawyer much time to effectively analyze the proper strategy. This problem will be magnified if the prosecution and/or lab do not produce meaningful information about the “methods” of the analysis as required by MCR 6.202. I can speak from personal experience when I say that it is not uncommon to disagree with the lab on what its analysts or supervisors believe to be important or relevant or even allowable documentation of the “methods” for me to review on behalf of my client.

If the accused is asked to choose to waive the right to confront the lab analyst and his attorney is worried about annoying the judge or the prosecutor, the dynamic is created for a lack of a completely fair, public trial that is carried in the full basket of rights created by the founders.

The Michigan Court of Appeals issued an opinion in January, 2011 that interpreted a slightly different court rule. In *People v Buie* \_\_ NW2d \_\_ (2011)(on remand), the court held that the court rule that allowed for testimony of witnesses via video conference violated the confrontation clause absent a state interest or public policy that justifies the use of 2-way video conference testimony even though it subverts the accused’s confrontation rights.[[2]](#footnote-2) The *Buie* court held that cost savings, efficiency and convenience were not justifiable state interests or public policy grounds as the prosecutor conceded that point on appeal. The court held that the accused himself did not consent to the procedure either even though his lawyer did.

This column is not to suggest that there are no provisions of a notice and demand rule that could protect the confrontation right and allow for a waiver of live testimony of certain witnesses. The question is exactly how to best protect confrontation and ensure the accused agrees with the decision of the lawyers and knowingly waives live testimony. Should the rule be re-written to specify “party” as the only person who can waive the appearance of the witness?

Further, some judges require accused citizens to put such decisions on the record. Do you open the courthouse doors in Ithaca just so that the court can satisfy a court rule and engage in a colloquy with the accused about the decision to waive the appearance of a lab analyst in Lansing? Time spent sooner is time saved later in many cases.

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1. The full text of the rule and a proposed SCAO-approved form “certificate of analysis” can be viewed in their entirety at Supreme Court’s website at <http://www.courts.mich.gov> [↑](#footnote-ref-1)
2. The court rule at issue is MCR 6.006. [↑](#footnote-ref-2)