

**MIDC/MCBA SKILLS TRAINING
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MT. CLEMENS, MICHIGAN**

PRELIMINARY EXAMINATIONS: LAW AND PRACTICE

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I. Statutes and Rules governing the PE process

A. *PEs are creatures of statute* (MCL 766.1)

[been around forever, but NOT required by state or federal constitutions]

B. *Probable Cause Conferences* (MCL 766.4/MCR 6.108)

1. A form of PE “pretrial” hearing

- 2. Subjects for PCC include:**
- plea discussions
 - bond modification
 - stipulations
 - other “relevant” matters

3. May be waived by agreement of the parties. If PCC waived, parties must advise court whether PE will be held/waived, or plea.

4. Unless PCC waived, held 7-14 days from arraignment on complaint.

a) Nothing in statute/rules about adjournments; local practices?

C. *Prosecutor may elect to present “victim” testimony at PCC*

1. DANGER: per statute, if district judge believes “victim” testimony is sufficient, may bind over on that alone at that point

NOTE THOUGH: court rule says otherwise—PE proceeds on assigned date later. MCR 6.110(B)(2).

2. Even absent bindover, statute provides that “victim” cannot be recalled at PE absent “good cause.”

D. If PE is held, judge must find PC to believe a felony was committed and PC to believe D committed it

1. Per statute, PE shall be scheduled w/i 5-7 days from PCC unless court grants later date “for good cause.” (MCL 766.4)

2. Rules of evidence apply BUT: (MCR 6.110(C))

- a) *Statute permits some documents hearsay* (MCL 766.11b)

e.g. results of “properly performed” lab tests, certified copies of public records, business records, reports by law enforcement “or other public agency” except “police investigation report,” to include arson, ME, and lab reports.

- b) *Court rules also have exceptions*

--MRE 1101(b)(8): “... hearsay is admissible to prove, with regard to property, the ownership, authority to use, value, possession and entry.”

- c) *Applies to both sides--defense may introduce as well*

- d) *If a party seeks to introduce such documents, other side may subpoena and present the author of the document “on a satisfactory showing ... that live testimony will be relevant” to the bindover decision.*

3. Video/audio testimony permitted (MCL 766.11a)

- a) *Exceptions: complaining witness, eyewitness, cop taking D statement*

- b) *Only videorecorded testimony may be used later at trial*

E. District Court may accept felony plea, conduct AOI

1. If plea tendered at PCC or PE, sentencing is by assigned circuit court judge whose identity is disclosed prior to D tendering plea

II. Hold or Waive? Purposes of Preliminary Examination

- A. Purposes:** --learn more about evidence than in discovery;
--test that evidence;
--familiarize self with witnesses;
--lock in testimony for trial;
--demonstrate prosecution weakness (for plea negots.);
- B. Minuses?** --lock in testimony of reluctant witness;
--added charges;
--may hurt plea negotiations;
- C. Prosecutor has right to PE;** --DV cases?
--CSC with minor cases?
- D. BOTTOM LINE—we probably waive too much:**
1. If case is going to trial, hold unless you **REALLY** fear locked-in and dispositive testimony by a reluctant witness
 2. If case is going to be negotiated, consider waiving unless you think you can materially improve negotiating position by record evidence
 3. If case is a “tweener,” lean towards holding unless there’s a very good case not to do so (typically involving a concession by the other side)

III. Mechanics of Defense Practice

- A. Prior to the PCC, counsel must get up to speed quickly**
- Obtain/review discovery
 - Meet the client ahead of time
 - Determine plea negotiation strategy, if any
 - If a PE needs to be held, identify time needed to prepare for same
 - Contact APA to determine if “victim” will testify at PCC (where this is done)
- B. At the PCC, be prepared to discuss:**
- Negotiated outcomes, prosecutor theories, etc. This is an opportunity to learn more about the prosecutor’s case, and faster.
 - Missing discovery.

--Proposed witnesses to testify remotely; BE PREPARED TO OBJECT WHERE APPROPRIATE, AND TO DISCUSS issues related to how the recording system works, use of exhibits, impeachment problems, etc.

--Documents hearsay proposed to be offered; CONSIDER OBJECTING WHERE APPROPRIATE, e.g. where you think the document is not in fact a “business record,” or the lab test was not “properly performed,” or the document contains hearsay-within-hearsay. CONSIDER ALSO whether to discuss your intention to have the witness testify live and why.

--If the prosecutor proposes to take testimony from the “victim” at the PCC, BE PREPARED TO OBJECT if you have not had adequate time to prepare, e.g. you will be ineffective if forced to cross-examine the “victim” while unprepared; ask at least for a continuance (on Sixth Amendment grounds) to cross the vic later.

C. Conducting the PE itself

1. Purposes of cross-examination may be different than at trial

- a) *If cross may demonstrate an essential element for bindover isn't met, by all means go for it.*
- b) *If cross may reveal information or sources of information for potential defenses, go for that too.*
- c) *Regardless, seek to discover and lock in testimony on critical facts/circumstances so you aren't surprised at trial.*
- d) *SPECIAL WITNESS: if you think witness won't appear at trial, you must cross as if you were at trial.*

2. Know the rules about what witnesses may testify by remote; USE TO YOUR ADVANTAGE WHERE YOU CAN.

3. Ditto the documents hearsay rules....

4. BE JUDICIOUS in asking to call a “hearsay” witness live

--E.g. in a “D/D causing death case,” you may need to call the accident reconstruction cop if causation is at issue, but not the ME; or, if you think the accident was unavoidable b/c of some profound impairment of the decedent, vice versa; exercise appropriate discretion if you expect the judge to listen.

D. Response to motion to add charges:

First, anticipate this in advance and score guidelines.

***Second, try and limit exposure via cross-exam if you can
Third, make the best legal argument you can***

BUT: absent a significant material increase in D's exposure, don't cave to the threat. Gauge the reasons to hold (see above) vs how realistic is the potential of added charges ultimately to impact resolution.

IV. Post-PE: Making the Appellate Record

A. Motion to quash: issue of fact (abuse of discretion) v law (de novo)

B. Impairment of right to present a defense:

1. Discovery: object if you don't get all that you have coming

2. Hearsay witnesses: make the clear record why necessary

3. Hearsay documents: object if the document doesn't qualify

C. Confrontation

--No constitutional right to a PE, so, strictly speaking, there's no Constitutional right to cross-examine witnesses, but you still have to press if only to preserve the right to object to introduction of PE testimony at trial. (As noted above, this is esp. important if the APA seeks to put on a "victim" following the PCC.)

--Be creative: even if no 6A confrontation at PE, think about general public policy underlying effective PEs, and even grounds in the state constitution if applicable.

D. Effective assistance of counsel

1. Adequate time to prepare for the PCC and the PE itself

2. Adequate resources for appointed counsel given the speed with which counsel must prepare and the additional analyses counsel must make

3. Adequate opportunity to engage witnesses testifying remotely, esp. for impeachment

E. Use interlocutory appeals where necessary, including to COA