



MICHIGAN STATE POLICE
LEGAL UPDATE
FEBRUARY 2007

This update is published by the Michigan State Police Executive Division. Questions and comments may be directed to the Executive Resource Section at MSPLegal@Michigan.gov.

IN THIS ISSUE...

Criminal Procedure	
Challenging subpoenas	1
Subpoenas and HIPAA	1
Did You Know?	
Effect of opinions	2
Back to Basics	
Interim bond and searches	3

CRIMINAL PROCEDURE

Full citations have been omitted.

A defendant cannot challenge an investigative subpoena directed to a third party; failure to comply with the investigative subpoena statute does not require exclusion of evidence

In *People v. Gadomski*, the defendant was investigated for home invasion and safe breaking. Investigative subpoenas were used to obtain information from pawn shops and a credit reporting service. The defendant challenged admission of the evidence obtained. The Michigan Court of Appeals held that no reasonable expectation of privacy exists in information knowingly shared with third parties, and therefore the defendant could not challenge the evidence.

The subpoenas used did not comply with the investigative subpoena statutes, [MCL 767A.1 - 767A.9](#), and the defendant challenged the use of the deficient subpoenas. The Court held that the person receiving such a subpoena (a third party), not the defendant, is proper person to challenge the validity of a subpoena. The Court further held that exclusion of evidence if not the proper remedy for a deficient subpoena.

HIPAA does not preclude disclosure pursuant to an investigative subpoena, nor does dentist-patient privilege

In *Attorney General v. Morin*, the Attorney General issued an investigative subpoena in support of a Michigan Department of Community Health (MDCH) investigation of insurance fraud. The defendant is a dentist and the subpoena sought patient records. The defendant asked the court to quash the subpoena because the requested records were protected by the Health Insurance Portability and Accountability Act (HIPAA) and Michigan's dentist-patient privilege statute.

HIPAA governs the release of patient information to third parties. The Michigan Court of Appeals held that HIPAA does not preclude the use of subpoenas for patient information because the statute allows for release pursuant to criminal or administrative proceedings or actions necessary for the oversight of a health care provider.

The defendant also claimed that the information should not be released because it was protected by the dentist-patient privilege contained in [MCL 333.16648](#). The Court disagreed with the defendant because the statute allows release when permitted by law, and HIPAA permits release.

EDITOR'S NOTE...

Current and past editions of the Legal Update can be found on the Internet.

1. Go to www.michigan.gov/msp
2. Click on 'Legal Resources for Police Officers' (in the light blue box on the right side of the page)
3. Click on 'MSP Legal Updates' (middle of the page)

DID YOU KNOW?

The following is intended to describe the effect of various types of opinions and the relationships between them. These are general rules provided only as an introductory primer. The most important thing to take from this section is: Officers should always consult with their prosecutor before acting pursuant to any issued opinion.

Attorney General Opinions

AG Opinions are formal opinions concerning the state of the law regarding a particular topic. They are only binding on the agency asking for the opinion. Although courts do not have to follow AG Opinions, they generally treat them with great deference. Because of this deference it is generally advisable to follow formal AG Opinions.

AG Opinions are only controlling, even for the requesting agency, on the facts presented in the opinion. This differs from court opinions where the same rule can be applied to analogous facts.

It should be noted that there's a difference between a formal AG Opinion and an informal opinion or memorandum of law. Formal opinions can be found on the AG's [Opinions Website](#). Informal opinions and memorandums are written to provide guidance only and are binding on no one.

Unpublished Opinions

Pursuant to Michigan's court rules, unpublished opinions of the Court of Appeals do not set precedent. That is, future courts, including lower courts, do not have to follow them. If fully developed they can be persuasive and a future court might adopt them as binding (through publication). But that is an argument for a prosecutor to make, and police should never rely solely on an unpublished opinion.

U.S. Courts of Appeals

United States Courts of Appeals hear cases involving federal questions – those involving federal statutes and the U.S. Constitution. They also hear state law cases under certain circumstances.

States are generally only bound (or controlled) by the Circuit covering that state. Michigan falls under the jurisdiction of the 6th Circuit Court of Appeals, and therefore, only 6th Circuit decisions are controlling here. This can present a problem when law enforcement learns of a decision from another circuit and decides to follow it. For example, a recent 5th Circuit decision allowed the warrantless searches of cellular phone data. News of this case was widely circulated because of its obvious benefit to law enforcement. The problem: It is not the law in Michigan.

It is not uncommon for circuits to disagree and have different rules. The 5th Circuit's opinion might be persuasive; a prosecutor could use its reasoning to ask the 6th Circuit to adopt the same rule. However, until the 6th Circuit adopts the rule of another circuit, it's not the law in Michigan.

Federal-State Relationship

Many believe that federal court have some supervisory powers over state courts. In actuality, state courts follow the rulings of federal courts only on federal questions. Federal courts follow state courts on state questions. In most cases, it is the state Supreme Court that determines the law in Michigan, and state law often differs from federal law.

For example, the U.S. Supreme Court approved the use of OWI check lanes, but we don't use them in Michigan because the Michigan Supreme Court has held them to be unconstitutional. This becomes important in cases such as the 5th Circuit decision noted above – even if the 6th Circuit adopts that rule, the Michigan Supreme Court might disapprove.

SUBSCRIPTIONS

Officers from any agency are welcome to subscribe to receive the Update via e-mail, and may do so by sending an e-mail to MSPLegal@Michigan.gov. The body of the e-mail must include:

1. Name (first & last)
2. Rank
3. Department
4. Work phone
5. E-mail address

BACK TO BASICS

Note: The following material does not represent new law. Instead, it is intended to reinforce basic rules of law that police officers frequently apply.

The right to interim bond does not invalidate a search incident to arrest

Under Michigan law, police may lawfully conduct a search incident to an arrest prior to offering the suspect the opportunity to post bond. In *People v. Chapman*, police arrested the defendant on an outstanding warrant. A subsequent search yielded drugs. The Michigan Supreme Court upheld the search even though the suspect had not been given the opportunity to post bond on the warrant.
