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Lesson 6: Criminal Law Summary

Lesson Summary

This lesson provides an overview of criminal court basics in Michigan. It also covers procedural and strategic considerations regarding discovery and investigation, motions and hearings, plea negotiations, trial, and posttrial issues in criminal cases.

Michigan Criminal Court Basics

Essentials

Arrests and Charging Documents

A person may be arrested with or without an arrest warrant. An arrest warrant is a court order to arrest a defendant and bring them before the court. *See* MCL 764.1b. Both district court judges and district court magistrates may issue arrest warrants. MCL 600.8511(e), 764.1.

An arrest warrant is required to arrest a person for a misdemeanor committed outside the presence of an officer. However, this requirement has some exceptions. *See, e.g.,* MCL 764.15(1)(d), (h)–(i), .15a. An arrest warrant is not needed for a felony committed in the officer's presence or when the officer has reasonable cause to believe a felony was committed and reasonable cause to believe that the defendant committed the offense. MCL 764.15(1).

A complaint is the charging document that, once accepted by the court, formally states the charges against the defendant and establishes the basis for all further action to be taken by the court in the case. MCL 764.1d; MCR 6.102. In felony cases, after a case is bound over to circuit court, the prosecutor must file an information as the charging document. MCR 6.112.

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Jurisdiction and Venue

The circuit court is the court of general jurisdiction in felony cases and "high court" misdemeanors (misdemeanors with a punishment up to two years' incarceration). MCR 6.008. The district court handles traffic infractions and all misdemeanors where punishments do not exceed one year. MCL 600.8311. It also retains jurisdiction of preliminary examinations for all felonies and "high court" misdemeanors. *Id.*

In general, the proper venue for trial of a criminal case is the county where the offense charged was committed. *See People v McBurrows*, 504 Mich 308; 934 NW2d 748 (2019); *People v Lee*, 334 Mich 217; 54 NW2d 305 (1952).

Federal courts in Michigan may also have jurisdiction over a person who commits a federal crime within the state. 18 USC 3231.

Elements of the Offense

Most criminal offenses are outlined in the Michigan Penal Code, MCL 750.1 et seq., and the Uniform Traffic Code, MCL 257.951 et seq. Michigan also retains some common-law offenses that do not have a statute outlining the elements. The prosecution must prove each element of an offense beyond a reasonable doubt. *See People v Beck*, 504 Mich 605; 939 NW2d 213 (2019).

Criminal Liability, Defenses, and Deferrals

Juveniles are generally not subject to criminal prosecution and are not convicted of a crime. MCL 712A.1(2). Instead, they are adjudicated delinquent. Delinquency proceedings involve juveniles under age 18, but some juveniles may be tried as adults for serious felonies such as murder. MCL 712A.2.

Young adults may also avoid a conviction for certain crimes through the Holmes Youthful Trainee Act. Adults who committed an eligible offense on or after their 18th birthday but before their 26th birthday may be eligible but only if they plead guilty. If the

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offense was committed on or after their 21st birthday, the consent of the prosecutor is also required. It allows a defendant to avoid a conviction if they successfully complete court requirements, such as probation. MCL 762.11.

Defendants may raise affirmative defenses, including accident, alibi, claim of right, duress, identification, self-defense, insanity, mental illness, and abandonment. *See* MCL 768.20a, .21a, .36, 780.951 et seq., .971 et seq.; *see also Michigan Model Criminal Jury Instructions with ICLE Commentary* ch 7. If a judge or jury accepts these defenses, with the exception of mental illness, it must find the defendant not guilty. MCL 768.36.

Adults charged with certain drug offenses may also avoid a criminal conviction through a deferral. MCL 333.7411.

Specialty courts, such as drug courts and mental health courts, are other deferral (and potential dismissal) options for defendants who meet minimal statutory requirements for admission. *See* MCL 600.1060 et seq. However, the requirements for individual courts may vary.

For more information, see *Michigan Basic Practice Handbook* ch 20 (ICLE 6th ed), *Michigan Criminal Procedure* ch 4 (Hon. Travis M. Reeds & Paulette Michel Loftin eds, ICLE 2d ed), and *Michigan Model Criminal Jury Instructions with ICLE Commentary*.

Progression of a Criminal Case

Criminal cases are governed by the Code of Criminal Procedure, MCL 760.1 et seq., and MCR 6.001 et seq. In general, a criminal prosecution will begin with an arrest and arraignment. In felony cases, the district court will conduct a preliminary examination. MCL 766.4. If the court finds probable cause that the defendant committed a felony, the case will be “bound over” to circuit court. Before trial, the parties will conduct discovery, conduct a pretrial conference, file and argue pretrial motions, and

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conduct plea bargaining. If the defendant is found guilty, the case will proceed to sentencing and potentially an appeal to higher courts.

Discovery and Investigation

Essentials

MCR 6.201 et seq. outlines the rules of discovery for criminal cases. Civil forms of discovery, such as depositions, are not permitted. MCR 6.001(D).

Michigan is a reciprocal discovery state, meaning that both the prosecution and the defense have some duties to provide discovery. MCR 6.201 details the obligations of both parties. On request, a party must

- provide the other party with the names and addresses of all witnesses whom the party may call at trial or allow the other party to interview a witness, MCR 6.201(A)(1);
- produce all written or recorded statements pertaining to the case by a lay witness whom the party may call at trial, except a defendant is not required to turn over their own statement, MCR 6.201(A)(2);
- disclose the curriculum vitae of any expert witness and either the expert's report or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion, MCR 6.201(A)(3); and
- provide a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial, MCR 6.201(A)(6).

Each party must also disclose any criminal record that it may use at trial to impeach a witness and a description of or list of criminal convictions of its own witnesses. MCR 6.201(A)(4), (5).

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MCR 6.201(C) lists the prosecution's obligations to disclose information, such as police reports, interrogation records, and any plea agreement connected to the case. The prosecution also has a duty to produce all exculpatory information or evidence known to it. This is commonly referred to as its *Brady* obligation. *Brady v Maryland,* 373 US 83, 87 (1963); *People v Carter*, 415 Mich 558, 593; 330 NW2d 314 (1982). *Brady* information includes material evidence favorable to the accused not only on the issue of guilt but also on the issue of punishment, including information in the possession of the police. Exculpatory evidence includes impeachment evidence. *United States v Bagley,* 473 US 667, 676 (1985).

If a party fails to comply with discovery requests voluntarily, the court may grant a continuance, order the offending party to comply with the rule, prohibit the offending party from introducing the material, or enter any other order that it deems appropriate, including sanctions. MCR 6.201(K).

For more information, see *Michigan Basic Practice Handbook* ch 20 (ICLE 6th ed), *Michigan Criminal Procedure* ch 6 (Hon. Travis M. Reeds & Paulette Michel Loftin eds, ICLE 2d ed), and *Michigan Model Criminal Jury Instructions with ICLE Commentary*.

Key Investigation Methods

Defense counsel should conduct a thorough client interview to understand the client's history, relationships with witnesses, and circumstances surrounding their statements to police. Defense counsel or their investigator should promptly interview witnesses while memories are fresh.

A prosecutor must go beyond the police report to obtain a complete understanding of the case, including whether there is any exculpatory evidence not in the report. Prosecutors should meet with witnesses to ensure the police report is accurate and to evaluate their truthfulness and ability to testify in court.

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Both the prosecution and defense should use online searches and social media to discover information that could be used to impeach witnesses. The Michigan Freedom of Information Act, MCL 15.231 et seq., may also be useful to defendants.

Forensic and Expert Evidence

Courts conduct *Daubert* hearings to determine whether expert opinion testimony meets evidentiary and statutory standards of reliability. *See Daubert v Merrell Dow Pharms,* 509 US 579 (1993). In Michigan, those standards are set forth in MRE 702 and MCL 600.2955.

Hearings and Pretrial Motions

Essentials

Probable Cause Conference and Preliminary Examination

The probable cause conference is the first hearing after the defendant is arraigned. It includes discussions about plea agreements, bail and bond modification, stipulations, and other matters relevant to the case. MCL 766.4(1); MCR 6.108(C). The prosecution and defendant are entitled to a probable cause conference unless both waive it.

A preliminary examination is held in the district court to determine whether sufficient evidence exists to continue proceedings in circuit court. The prosecuting attorney has the burden to establish probable cause that the defendant has committed a felony. MCL 766.1 et seq.; MCR 6.110(E). The burden of proof at the preliminary examination is lower than the burden of proof at trial. *People v Yost*, 468 Mich 122; 659 NW2d 604 (2003). If the court finds probable cause does not exist, it must discharge the defendant without prejudice or reduce the charge to an offense that is not a felony. MCR 6.110(F).

See MCL 766.4(1) and MCR 6.104(E)(4) for timing requirements for the preliminary examination and probable cause conference.

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Motions

One of the most important pretrial motions in a criminal case is the motion to suppress. A defendant uses a motion to suppress to prevent the prosecution from using evidence obtained in violation of the Michigan or U.S. Constitutions, such as a search or seizure that violates the Fourth Amendment or a confession that violates the Fifth or Sixth Amendments. A motion to suppress evidence generally requires an evidentiary hearing. *But see People v Kaufman*, 457 Mich 266; 577 NW2d 466 (1998).

Other common pretrial motions include the following:

- motion for change of venue
- motion for joint trial
- motion to quash
- motion for severance of charges (or separate trials)
- motion to dismiss
- motion in limine

Interlocutory Appeals

If a party loses a pretrial motion, it may seek an interlocutory appeal in some instances. MCL 600.308(2)(c), 770.3(2); MCR 7.205. A timely interlocutory application for leave to appeal may be filed within 21 days of the entry of the order being appealed. MCR 7.205(A)(1). An order must be in writing, signed by the court, and dated with the date it is signed. MCR 2.602(A)(1). Without a written order, there is nothing to appeal.

For more information, see *Michigan Basic Practice Handbook* ch 20 (ICLE 6th ed) and *Michigan Criminal Procedure* chs 5, 7 (Hon. Travis M. Reeds & Paulette Michel Loftin eds, ICLE 2d ed).

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Hearings

Two Michigan-specific hearings that may occur in criminal cases are the preliminary examination and *Walker* hearings.

A *Walker* hearing is an evidentiary hearing for a court to determine the voluntariness of a defendant's statement or confession. *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965). These hearings must be held outside the presence of the jury. MRE 104. The prosecutor bears the burden of proving the confession was voluntary by a preponderance of the evidence.

Strategic Motion Practice

Cases can be won or lost through pretrial motion practice. Both the prosecution and defense can use pretrial motions to limit evidence and issues to help reach a plea agreement or even a dismissal of the charges. Motions are particularly critical to address character issues arising under MRE 404(b) and MCL 768.27–.27c before trial. On the defense side, a *Stanaway* motion may be necessary to obtain certain information protected by the social worker–client or doctor-patient privilege. *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994), *cert denied sub nom Michigan v Caruso*, 513 US 1121 (1995).

Plea Negotiations

Essentials

Generally, the pleas available in the circuit court are available in district court. MCR 6.301 et seq. sets forth the procedure for pleas in circuit court and is more specific and comprehensive than MCR 6.610(F), which governs pleas in district court.

In what is often referred to as charge bargaining, a prosecutor has complete discretion in deciding what, if any, plea to offer the defendant to reduce or dismiss charges. *See Genesee Cty Prosecutor v Genesee Circuit Judge*, 391 Mich 115; 215

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NW2d 145 (1974). A judge cannot accept a plea to an offense other than the one charged by the prosecutor. MCR 6.301(D). The consent of the court is required for pleas of nolo contendere (no contest), guilty but mentally ill, not guilty by reason of insanity, and conditional pleas. MCR 6.301(B), (C). A judge may refuse to accept a plea if the defendant does not provide an adequate factual basis. MCL 768.35; MCR 6.302(D).

The three types of sentence bargaining are sentence agreements, sentence recommendations, and "preliminary evaluations of sentence length"—commonly referred to as *Cobbs* evaluations. *See People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

A sentence agreement is commonly, though not always, part of a plea. A judge is not required to accept the parties' agreed-on sentence. *See People v Killebrew*, 416 Mich 189; 330 NW2d 834 (1982). If the judge does not agree to the sentence agreement with the prosecutor, the defendant may withdraw the guilty plea.

A *Cobbs* evaluation is a form of sentence bargaining in which a judge can place on the record a preliminary evaluation of what sentence would be appropriate if the defendant pleads guilty. A *Cobbs* evaluation must be at a party's request. If a judge gives a *Cobbs* evaluation and the defendant pleads in reliance on the judge's statement regarding sentencing, the defendant is entitled to withdraw their plea if the judge determines at sentencing that a more severe sentence is appropriate. MCR 6.310(B)(2)(b).

Both defense attorneys and prosecutors should review Michigan's sentencing guidelines and calculate the appropriate sentencing based on the guidelines before entering into plea negotiations or asking for a *Cobbs* evaluation as a judge will often ask for "guidelines" when making their decision. Note that Michigan is a "truth in sentencing"

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state, meaning that an offender is required to serve the entire minimum sentence before being considered for parole. *See* MCL 769.34, 791.234.

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Strategic Considerations

Defense counsel needs to be aware of the direct sentencing consequences, any potential diversion or deferral statutes or programs, and any collateral consequences of the charged offense when negotiating a potential charge bargain or sentence bargain. For example, certain offenses might have immigration consequences, *see* 8 USC 1101(a)(48)(A), or require the defendant to register under Michigan's Sex Offenders Registration Act, MCL 28.721 et seq.

A prosecutor will often seek input from the police officers, the witnesses, and the victim of the case before agreeing to a plea. The William Van Regenmorter Crime Victim's Rights Act, MCL 780.751 et seq., requires prosecutors to seek input (and, in some cases, concurrence) from victims before making offers for reductions or deferrals.

A plea agreement must be stated on the record or reduced to writing and signed by the parties. This agreement must be made part of the case file. MCR 6.302(C)(1); *see People v Winters*, 501 Mich 321; 967 NW2d 827 (2018).

If the court states during the plea hearing that it will sentence the defendant to a specified term or range, the court must (1) state that any sentencing guidelines range mentioned at the plea hearing is only a preliminary estimate and the final range determined at sentencing may differ, (2) inform the defendant whether any sentencing guidelines range discussed at the plea hearing is part of the plea and that the defendant has a right to withdraw the plea should the sentencing guidelines range at sentencing

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differ, and (3) provide a numerically quantifiable sentence term or range when providing the preliminary estimate. MCR 6.302(C)(2)(a)–(c).

Unique Issues

The Holmes Youthful Trainee Act (HYTA), MCL 762.11, is a deferral statute that is often used in plea bargaining. This statute has specific age restrictions, and deferral is not allowed for a number of offenses, including all offenses for which the penalty is life, all traffic offenses, and most criminal sexual conduct offenses. MCL 762.11(3), (4). To receive consideration under HYTA, a defendant must have committed the crime charged on or after their 18th birthday but before their 26th birthday. MCL 762.11(1), (2).

Michigan's Sex Offenders Registration Act, MCL 28.721 et seq., must also be kept in mind when plea bargaining. A defense attorney renders ineffective assistance of counsel by failing to inform the defendant that a guilty plea will require registration as a sex offender. *People v Fonville*, 291 Mich App 363; 804 NW2d 878 (2011).

There are many other possible consequences of a plea that should be discussed with a defendant before entry of the plea, including driver's license sanctions, employment consequences, the loss of occupational licenses, and immigration consequences, among others.

For more information, see *Collateral Consequences of a Criminal Conviction* (Tracey W. Brame ed, ICLE).

Trial

Essentials

Jury Selection

MCR 6.401 et seq. governs basic trial practice in criminal cases. Parties can waive a jury trial and opt for a bench trial. MCL 763.3; MCR 6.402. Every jury trial begins with

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some form of juror selection, known as voir dire. *See* MCR 2.510, .511, 6.412, .620. Felony juries must have 12 jurors, while district court juries for misdemeanors only have 6 jurors. MCR 6.410, .620.

Voir dire can be conducted by the attorneys, by the court, or by a combination of both depending on the particular judge's style. If the court examines prospective jurors, it must permit the attorneys for the parties to (1) ask further questions that the court considers proper or (2) submit further questions that the court may ask if the court considers them proper. MCR 2.511(C). Challenges to prospective jurors are divided into two categories: challenges for cause and peremptory challenges. MCR 2.511 and 6.412 provide the jury selection procedure, bases for challenges for cause, and numbers of available peremptory challenges.

After the jury is selected, the jury must be sworn. MCR 6.412(F). The juror oath is a very significant part of the process because the swearing of the jury is the trigger for application of constitutional double jeopardy provisions. *People v Hicks*, 447 Mich 819; 528 NW2d 136 (1994).

Evidence

The Michigan Rules of Evidence that are critical to criminal cases include the following:

- MRE 404 (character evidence)
- MRE 608 (opinion or reputation evidence)
- MRE 609 (impeachment by evidence of previous conviction)
- MRE 801–807 (hearsay rules and exceptions)

Knowing when these rules apply is vital to introducing evidence that will be considered by the jury or objecting to evidence improperly admitted. This is particularly

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important not only in the present moment of the case but also to preserve issues on appeal, if necessary.

The hearsay rules are frequently misunderstood. In *Crawford v Washington,* 541 US 36 (2004), the U.S. Supreme Court held that the right of confrontation precludes presenting some statements by unavailable witnesses for use against a criminal defendant even if those statements satisfy traditional hearsay exceptions. In other words, in criminal prosecutions, evidence that satisfies one of the exceptions in MRE 803 or 804, and perhaps some evidence that is defined by MRE 801 not to be hearsay, may be inadmissible nonetheless. *Crawford* applies only to "testimonial" statements. The distinctions between testimonial and nontestimonial statements are often factually subtle and can be hard to discern. *See Davis v Washington,* 547 US 813 (2006).

Jury Instructions

After completion of testimony and before closing arguments, the judge will discuss with the attorneys the proposed instructions to the jury and will consider any requests for instructions from the attorneys. MCR 2.513(N). Many judges may require attorneys to file their list of requested jury instructions before the beginning of the trial.

For more information, see *Michigan Basic Practice Handbook* ch 20 (ICLE 6th ed), *Michigan Criminal Procedure* ch 9 (Hon. Travis M. Reeds & Paulette Michel Loftin eds, ICLE 2d ed), and *Michigan Model Criminal Jury Instructions with ICLE Commentary*.

Jury Selection

MCR 6.412 governs voir dire. Many attorneys argue that a trial can be won or lost in voir dire, and attorneys have different methods for selecting a jury. One of the goals for this process is to find out what each prospective juror may bring to the deliberation table, including, potentially, their biases and prejudices.

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Posttrial

Essentials

Presentence Investigation Report

In felony cases and many misdemeanor cases, the local probation department interviews the defendant and prepares a presentence investigation report, known as a PSIR. MCL 771.14 lists PSIR requirements, which include an assessment of the person's prognosis for adjusting back into the community and the recommended sentence.

The defendant's attorney has a right to attend the presentence interview on request. MCR 6.425(A)(2). Both the prosecutor and defense counsel have a right to review, receive, and retain a copy of the presentence report at a reasonable time or at least two business days before sentencing. MCL 771.14(5); *see also* MCR 6.425(B). The court has a duty to correct an inaccurate report and to strike irrelevant information. MCL 771.14(6); MCR 6.425(B), (D)(2).

Sentencing

MCL 769.5 establishes a rebuttable presumption that the court must sentence an individual convicted of a misdemeanor, with some exceptions, "with a fine, community service, or other nonjail or nonprobation sentence." MCL 769.5(3). The court may depart from this presumption on the basis of reasonable grounds for departure that are stated on the record. MCL 769.5(4); ; *People v Mason,* No 367687, slip op at *5, ___ Mich App ___, ___ NW3d ___ (Aug 22, 2024) (requirements for court's explanation).

Although there are some statutory exceptions, Michigan is generally a system of indeterminate sentencing. Mich Const 1963 art 4, §45. Prison sentences have a minimum and maximum component, and the parole board has jurisdiction to release the person after the individual has served the minimum term. Michigan's statutory

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sentencing guidelines, MCL 777.11 et seq., establish the minimum and maximum term of a sentence for felony offenses. *See also* MCL 777.31 et seq., .50 et seq.; *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015) (guidelines are advisory only).

Multiple sentences are generally served concurrently. *People v Chambers*, 430 Mich 217; 421 NW2d 903 (1988). However, several statutes provide for consecutive sentencing. *See, e.g.,* MCL 333.7401(3) (major controlled substance violations), 750.227b(3) (felony with firearm); *see also People v Warren*, 505 Mich 196; 949 NW2d 125 (2020) (covering trial court duties regarding consecutive sentencing).

Sentencing guidelines apply to habitual offender convictions. MCL 777.21(3). Multiple convictions are to be scored for each offense. MCL 777.21(2); *see also* MCL 769.10–.13; MCR 6.425(F)(5).

Probation

A probationary term is available for all but the most serious crimes in Michigan. MCL 771.1(1) excludes probation for murder, treason, armed robbery, nearly all major controlled substance offenses, and first- and third-degree criminal sexual conduct. The terms vary depending on whether the felony is nonviolent, MCL 771.2(1), or violent, MCL 771.2a. *See also* MCL 791.236 (defining *violent felony*).

Alternative Sentencing

Certain offenses may be dismissed after the defendant completes probation, a program, or treatment. *See, e.g.,* MCL 333.7411 (drug possession or use), 436.1703 (minor in possession of alcohol), 750.350a (parental kidnapping), 762.11 (Holmes Youthful Trainee Act), 769.4a (domestic violence). Additional sentencing alternatives may be available to the defendant, including drug courts and sobriety courts. *See* MCL 600.1084.

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Expungements

Expungement has the effect of setting aside a criminal conviction, which permits the person to honestly tell potential employers and others that the individual has not been convicted of a crime. However, expungement "is a privilege and conditional and is not a right." MCL 780.621d(14).

Michigan limits expungement in three key ways:

1. Certain crimes are ineligible for expungement. *See* MCL 780.621c.
2. Expungement may be barred if the defendant has too many convictions. *See* MCL 780.621, .621a, .621b.
3. The defendant must satisfy waiting periods before applying. MCL 780.621d, .621e.

For more information, see *Michigan Basic Practice Handbook* ch 20 (ICLE 6th ed) and *Michigan Criminal Procedure* chs 11, 12 (Hon. Travis M. Reeds & Paulette Michel Loftin eds, ICLE 2d ed).

Sentencing

MCR 6.425(D)(1)(c)(i)–(iv) provides that before imposing sentence, the court must give the defendant's attorney an opportunity to speak on the defendant's behalf; permit the defendant to speak or present information that mitigates the defendant's sentence; provide the prosecutor an opportunity to speak equivalent to that of the defense attorney; and allow any victim of the crime, or a victim's designee, present at sentencing to speak or provide an impact statement. The parties and the victim speaking at sentencing is commonly referred to as allocution.

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Recommended Resources

1. *Michigan Model Criminal Jury Instructions with ICLE Commentary* (subscription required)
2. Sentencing Guidelines Manuals
3. *Michigan Criminal Procedure* (Hon. Travis M. Reeds & Paulette Michel Loftin eds, ICLE 2d ed) (subscription required)
4. Michigan Court Rules
5. Michigan Rules of Evidence
6. *Michigan Basic Practice Handbook* chs 20, 21 (ICLE 6th ed) (subscription required)
7. *Collateral Consequences of a Criminal Conviction* (Tracey W. Brame ed, ICLE) (subscription required)

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