

MICHIGAN SUPREME COURT

PUBLIC HEARING

May 23, 2018

CHIEF JUSTICE MARKMAN: Well, good morning and thank you to all of you who are participating in our administrative processes by both your written and your oral submissions. Today's administrative hearing is an essential part of that process and affords us the opportunity to hear from members of the public, concerning matters that are before the Court for our consideration. Our agenda for these periodic hearings is always available on our Michigan Supreme Court website as soon as they have been settled.

While many participants speak on behalf of groups and organizations interested in particular matters, this process is, as always, open to any member of the public whether he or she is speaking on behalf of an organization, or simply to communicate their individual views.

So once again, thank you all for being here this morning to offer your thoughts and to respond to questions the Court might have. Whatever actions we end up taking on these and other matters, your thoughts will always be given serious and respectful consideration by the Court. Each of you will have three minutes to speak and now let us begin. Item 1, pertaining to erroneous judgments of sentence, we have a prosecutor from Livingston County, Bill Vaillencourt.

ITEM 1 (ADM File No. 2015-04)

Proposed amendment of MCR 6.429 to provide trial courts with broader authority to sua sponte address erroneous judgments of sentence.

MR. VAILLIENCOURT: Good morning. May it please the Court, William Vaillencourt, Livingston County prosecuting attorney and also Vice President of the Prosecuting Attorneys Association of Michigan—appreciate the opportunity to address the Court on this matter. We agree that there needs to be a modification to the rule. PAAM has filed a written comment which defines specifically what constitutes an illegal sentence; we think that—that would be an appropriate addition to the proposed rule.

But, I would also join in the comments submitted by the State Bar of Michigan, supporting the amendments proposed by Tim Baughman. Mr. Baughman's approach delineates specifically between an illegal and an invalid sentence and we think that—that's the best approach and would encourage the Court to adopt it.

I'd briefly like to address SADO's comment which says there should be some kind of a time limit or a good cause requirement for a party to file a motion to correct an illegal sentence, like there is for 6500 [sic] motions. But, the reality is that the way the 6500 rules work, is that there is no practical limitation on a defendant seeking to correct a judgment that's illegal. If there's an illegal sentence imposed that prejudices the defendant, good cause is always going to exist for a 6500 motion by virtue of an ineffective assistance of counsel claim, because no competent defense attorney would fail to object to an illegal sentence that prejudices their client. The current rule works only one way; the defendant can seek to file a 6500 motion to correct an illegal or an invalid sentence, but the prosecutor has no ability to do so.

JUSTICE VIVIANO: Mr. Vaillencourt, I read Mr. Baughman's letter as well. And he asserts that—you know, when there—when we arrive at an illegal sentence that's enforced by the court or by the appellate court, he says that's something of an embarrassment and I would tend to agree with him. But, I'm not sure I agree with his remedy. The—you know, for us to get to an illegal sentence, the court has to make a mistake, but also the parties have to not be paying attention to that mistake. So—and I don't mean to pick on you, but since you're here, does your office have a protocol for reviewing judgments of sentence to make sure that there—there aren't any mistakes or errors?

The—what we tend to see in the appellate system is apparently everybody has off-loaded these responsibilities to the Michigan Department of Corrections and they are—they're not a party to a case, but they have this amazing power to come in at the end of a case after it's done, in an ex parte fashion, and change the opp—the result of the case and change the judgment of sentence. And now you're saying they should be able to do it at any time they feel like it. The defendant could be released; he could be—have served his sentence; he could be at home on his back deck having a lemonade and—and under your remedy, we would pick him up again and say, nope, you've got an illegal sentence and there's a mandatory minimum and you're going back to jail.

MR. VAILLIENCOURT: Well, I think that at sentencing, first of all, what prosecutors in my office and around the State try to do is to make sure there is not an error at the sentencing proceeding. That the prosecutor advises that there's some

defect; defense counsel has the same obligation and the court does as well. So the best scenario is for it to be identified at sentencing, so we don't get to this situation.

I recognize the circumstance that you've identified and perhaps something that would be appropriate to add is that—and I think it was something that the State Bar Criminal Jurisprudence Committee looked at as well, is a limitation stating well, you can't correct it after the defendant has already completed the terms of their sentence, and been discharged from probation—

JUSTICE VIVIANO: Well, let me—

MR. VAILLIENCOURT: —or parole.

JUSTICE VIVIANO: —let me put a finer point on the question. Why isn't six months enough for the prosecutors' offices around the State of Michigan, the Attorney General Office, to review a judgment of sentence to determine whether there's a mistake?

MR. VAILLIENCOURT: Well—

JUSTICE VIVIANO: And whether it's illegal? I mean, you—you say it's illegal. I mean somebody should figure that out at some point in time, shouldn't they?

MR. VAILLIENCOURT: Well, the six-month time frame, though, really applies only to prosecutors; defense attor—defendants can always come in and correct an—

JUSTICE VIVIANO: I don't mean that—

MR. VAILLIENCOURT: —illegal sentence.

JUSTICE VIVIANO: —the def—I under—our system is set up to give defendants a lot of rights that prosecutors don't have, right?

MR. VAILLIENCOURT: Right. But they're—I'd agree with Mr. Baughman's observation that it really is embarrassing that a valid and lawful sentence was—

JUSTICE VIVIANO: Who should be—who should be embarrassed by this?

MR. VAILLIENCOURT: Well, I think the system as a whole. I think every, you know, Judges obviously they should know the law, prosecutors should know the law,

defense attorneys should know the law. And if something is omitted at sentencing, it should be pointed out at the time of sentencing.

JUSTICE VIVIANO: Is it too much to ask the prosecutors to figure that out within six months after the judgement of sentence is entered?

MR. VAILLIENCOURT: Well, it's a duty that is imposed on everyone. The court should know the law as well as defense counsel. Everybody—

JUSTICE VIVIANO: Well, I mean—

MR. VAILLIENCOURT: —should.

JUSTICE VIVIANO: —you know, everybody has incentives, right? We have an adversarial process. The defense has an incentive to find out if there's a mistake that prejudices the defense, right?

MR. VAILLIENCOURT: Yes.

JUSTICE VIVIANO: The prosecutors' office has an incentive to—to find out if there's a mistake that prejudices the People of the State of Michigan and the crime victims who are affected by these crimes, right? So my point is in that specific—you know, you're here, I think, because you're—you're making sure that defendants are being sentenced appropriately according to the law. And serving the full extent of the sentences they should be serving; I assume you're not here to—because you are trying to make sure they serve less time.

MR. VAILLIENCOURT: Well, if the court imposes an illegal sentence that is longer than is mandated by law, yes, we point that out. And there have been circumstances where we've identified errors that prejudice the defendant; defense counsel or the court hasn't, but we come to the court and say, you need to fix this.

JUSTICE VIVIANO: I understand, but I mean your point is well-taken that the defendant has lots of remedies for when that happens, when the sentence is illegal and—

MR. VAILLIENCOURT: Right.

JUSTICE VIVIANO: —it prejudices the defendant. We're really here talking about just sentences that are illegal and prejudice the People. And my question is, the People

are involved in the case; they start—they initiate the case; they—on the Information state what the sentence is; they are there at sentencing and presumably could even have a set—a process after sentencing like the MDOC does. Why isn't six months enough time—

MR. VAILLIENCOURT: Well—

JUSTICE VIVIANO: —for all that to happen?

MR. VAILLIENCOURT: —well, if you look also—I mean, the *Comer* case is kind of interesting because it involved—there was an underlying legal question as to whether or not lifetime electronic monitoring applied. And it required this Court to make the decision under some—some competing Court of Appeals decisions. So the judgment may or may not actually have been invalid; it's after this Court made its decision in *Comer* that we all know, okay, the law is not lifetime electronic monitoring in every CSC One case.

Well—so then, there are judgments out there that are contrary to law and there's no interest that really says, well defendant gets a windfall. They get a benefit of an illegal sentence after the law has been decided by—by this Court as to what applies. Yes, in a perfect world, all these errors would be identified at sentencing. But, the fact that errors occur—

JUSTICE VIVIANO: I mean in—

MR. VAILLIENCOURT: —that's—

JUSTICE VIVIANO: —the federal system they give—what, only 14 days and somehow they abide by that very strict limitation. I just—by my mind and you know, I obviously was involved in proposing the rule six months is an appropriate period in our system, which is larger and has a higher volume, and more of a higher error rate--

MR. VAILLIENCOURT: Mm-hmm.

JUSTICE VIVIANO: —probably than the federal system to find these mistakes. And I'm just not, as you can tell, not persuaded that—that more time than that is needed. I do think it's reasonable to give the participants in the system a reasonable opportunity to do this. I—my sense of it is we're not getting a lot of effort from the prosecutors' side to identify these errors. Instead, we rely on the MDOC. And once they point it out, then you're here saying, okay, someone else pointed out a mistake; now we

should be able to fix it. That seems like it's not a—really the way to run a railroad, to me.

MR. VAILLIENCOURT: Well, like I said—you know, in a perfect world everything would be identified at sentencing. And the only issue you would then have would be clerical errors. But, the reality is—is that there are things that are missed by—you know, the Judge has the obligation to impose a legal sentence regardless of what the parties say. And if the court misses something, you know, that's something that should be corrected regardless if the parties point it out.

CHIEF JUSTICE MARKMAN: Any further questions?

JUSTICE VIVIANO: Sorry to monopolize your time.

MR. VAILLIENCOURT: That's why I came here.

CHIEF JUSTICE MARKMAN: Well, thank you Mr. Vaillencourt.

MR. VAILLIENCOURT: Thank you, very much.

CHIEF JUSTICE MARKMAN: We'll see you later this morning when we—

MR. VAILLIENCOURT: Yes, thank you.

CHIEF JUSTICE MARKMAN: Okay. Is there anybody on item number two? Item number three? Item number four, Alan Gershel, the Administrator of the Attorney Grievance Commission.

ITEM NO. 4 (ADM File No. 2016-27)

Proposed alternative amendments of MRPC 7.2 regarding certain lawyer advertisements.

MR. GERSHEL: Good morning. May it please the Court again, Alan Gershel on behalf of the Grievance Commission. My comments are really brief as to this agenda item. I—the Commission is requesting that the Court delay adoption of either Alternative A or Alternative B and wait until the ABA has completed its review of all of the advertisement rules, including 7.1, I think, through 7.4. At which time it would be our position that we would be submitting a proposal that would embrace Proposal 7.2 as well.

However, if the Court's inclined to move forward on this, it's our view that the Court adopt Alternative B; it appears to be more expansive than Alternative A. It seems to encompass a more sophisticated kind of advertising. And the only other change we would suggest is that excluding the phrase "law firm" in the rule. I think by just keeping the name of the lawyer, it gives better protection for the public.

So again, to—to repeat, it's our position that we would request that the Court delay an adoption of either alternative until the ABA has completed its work on the advertising rules.

JUSTICE MCCORMACK: Are there—

JUSTICE VIVIANO: What do you think of the hybrid—

JUSTICE MCCORMACK: Oh.

JUSTICE VIVIANO: I'm sorry. The rule proposed by Mr. Mogill—

JUSTICE MCCORMACK: You talked a lot on the last rule. I'm just saying, go ahead.

JUSTICE VIVIANO: All right, go ahead. I defer.

JUSTICE MCCORMACK: I—

JUSTICE VIVIANO: Just curi—

JUSTICE MCCORMACK: Well I was going to ask the same question. What do you think of the hybrid proposal that's on the table? And why wouldn't we do something now and then we could revisit it in six months when the ABA does something else. I mean, why put off providing more protection to the public in the meantime?

MR. GERSHEL: As I said, I think Alternative B is a better—a better version. That would be our recommendation. I think in terms of efficiency, we would—I think it's more efficient to do this as a one-step process and not a two-step process. But, if the Court is so inclined, I—we believe that the B version is a better version; it's broader and will encompass more of the kinds of advertising that we are seeing.

CHIEF JUSTICE MARKMAN: Is it your expectation that there are likely to be changes in the current proposal at the next convention?

MR. GERSHEL: I think there have. It certainly will be a—I mean a small example, but if you look at 7.3—I think it's 7.3, it talks about solicitation, solicitation by telegraph. Now, we don't see many of those cases anymore so that rule is pretty antiquated and could use revisions. And so that's—that's our view.

CHIEF JUSTICE MARKMAN: Any further questions?

JUSTICE BERNSTEIN: Why—why is the—why is this such a concern?

MR. GERSHEL: I'm sorry, Justice.

JUSTICE BERNSTEIN: Yeah—oh, good morning. Why is this such a concern? Why is this something that the Bar is so concerned about?

MR. GERSHEL: Advertising?

JUSTICE BERNSTEIN: Yeah. Why is this—this seems to be kind of a focus and I'm just curious. If you could help us to understand why this is such a concern?

MR. GERSHEL: Well, we get a lot of requests for an investigation in advertising cases.

JUSTICE BERNSTEIN: Okay.

MR. GERSHEL: And—find those cases difficult cases, because you're balancing, as the Supreme Court has said, the ability under the First Amendment to advertise. And unless that advertising is patently false, there's really not much for us to be able to do. I mean, we sort of chip around the edges on some of these advertising cases where we can establish some degree of falsity. Solicitation is a different matter.

JUSTICE BERNSTEIN: Right.

MR. GERSHEL: Obviously, very different and we'll pursue those cases. But, we struggle with the advertising cases. And perhaps when we see what the new ABA Model Rules look like, it may help us in terms of our enforcement responsibilities.

JUSTICE BERNSTEIN: And I guess what my question is—like if you have in the medical community, you see the—the ads for 1-800-DENTIST. I mean why—why, you know, I mean I see that Ad constantly. So I guess my question is, if you’re looking at this 1-800-DENTIST, and I guess you have, you know—I’m not really familiar with—with a lot of the Ads that we’re like dealing with here, but I guess your concern is where you have an Ad that’s just like a number or something that doesn’t identify the firm, correct?

MR. GERSHEL: Yes. I think it should. Again, if the—Alternative B is adopted, we would just recommend that law firm be taken out. I think the consuming public is better protected when we know who the lawyer is who is handling the matter.

JUSTICE BERNSTEIN: Right. But if you were to call—I’m just trying to get an example. So give me —give me an example of what you’re concerned about?

MR. GERSHEL: Well, I’ll give you a couple of examples where we have taken some action in advertising cases, if that would be helpful. We’ve had situations where a lawyer will place on his or her webpage John Doe and Associates—no known associates.

JUSTICE BERNSTEIN: Ah—

MR. GERSHEL: That’s a patently false advertisement.

JUSTICE BERNSTEIN: —I see. Okay.

MR. GERSHEL: Or another example was, the attorney advertises offices all over Michigan. There’s one office; that’s false.

JUSTICE BERNSTEIN: Right. Okay.

MR. GERSHEL: It misleads the public.

JUSTICE BERNSTEIN: Okay.

MR. GERSHEL: So, you know, those are kind of easy cases and frankly, once we identify those cases to the lawyer, they’ve been very quick to make the change. We’ve not had to—

JUSTICE BERNSTEIN: Right.

MR. GERSHEL: —file formal complaints; we say this is false. You need to change your advertising and it gets done quickly because they know what the alternative is going to be.

JUSTICE BERNSTEIN: Right.

MR. GERSHEL: So those are the easy cases.

JUSTICE BERNSTEIN: Right.

MR. GERSHEL: When—when it's clearly false, it's the other stuff that makes it more difficult.

JUSTICE BERNSTEIN: But give me an—I just want—I'm just trying to understand this better, myself; give me an example.

MR. GERSHEL: Of?

JUSTICE BERNSTEIN: Of something that's more complicated that you're looking for guidance on?

MR. GERSHEL: "Best Plaintiff's Lawyer in Michigan." I mean, how do I prove that's false? I mean, I don't know if that person is or is not. Or, they advertise as an expert in criminal defense; I don't know if that's, you know, that—that's true or not.

JUSTICE BERNSTEIN: So what would you like us—I guess my question is—and this is helpful, this conversation that we're having, so thank you for engaging me in this.

MR. GERSHEL: Yes.

JUSTICE BERNSTEIN: But I guess my question is—is that what were the alternatives? So someone says they're the best attorney in Michigan, right; that's your concern, right? Like a lawyer—because you're not supposed to compare yourself to other lawyers, correct? Is that the idea?

MR. GERSHEL: Yes, sir.

JUSTICE BERNSTEIN: Like you can't—so if someone says, we're the best in—in this area, right? So that—I guess you're saying that's kind of a concern. So what—you would want the Court to regulate that, to basically say you can't say you're the best?

MR. GERSHEL: No, I'm not—I'm not advocating that. I'm not advocating that at all. I think that would be problematic.

JUSTICE BERNSTEIN: Okay.

MR. GERSHEL: We would have huge enforcement issues, we would have proof problems and frankly, I could devote the whole office to investigating cases like that and not do the more serious stuff. So, Justice Bernstein, I'm not advocating that. And if I suggested that, I apologize. That was not my intent. I just find those cases very difficult and lawyers have a first amendment right to advertise.

JUSTICE BERNSTEIN: Right.

MR. GERSHEL: So unless it's false, I don't know what, at this point in time, what we can really do. I am curious to see what the ABA comes up with; they've been evaluating this and I think it might be helpful to the process. So I guess I'll end where I started with a recommendation to hold off. But if not, again, we would recommend B as being more expansive.

JUSTICE BERNSTEIN: Okay, but your issue is that basically—you know, that this perspective is you would just—you just want the Court to be more concerned if it's a patently false statement, right? So going back to the issue of, you know, we have offices all over the State and you have one office; if it's a patently false circumstance situation, you want to be able to reign that in. But in terms of the other first amendment issues that come with advertising, you don't want the Court to get engaged in that conversation.

MR. GERSHEL: I just think it's a much more complicated issue and has to be done case-by-case. I don't want to paint with too broad a brush here.

JUSTICE BERNSTEIN: Right.

MR. GERSHEL: But I think that by-and-large, that has been our touchstone in the Grievance Commission, before we take on those cases, because I'd have to convince a panel of lawyers judging this lawyer.

JUSTICE BERNSTEIN: Right.

MR. GERSHEL: That this advertising was—was false.

JUSTICE BERNSTEIN: And that's the standard. The standard now is your concern is this falsity, not any of the other—

MR. GERSHEL: That's our focus at this point in time who—again, separating solicitation from advertising—

JUSTICE BERNSTEIN: No, I underst—falsity is a whole different thing.

MR. GERSHEL: Exactly.

JUSTICE BERNSTEIN: We're talking about—

MR. GERSHEL: Advertising.

JUSTICE BERNSTEIN: —TV, radio—that kind of thing. So your focus or the current focus right now is—is that basically, lawyers have a first amendment right to advertise, to express themselves. And, ultimately, unless they say something that is patently false—

MR. GERSHEL: Or false.

JUSTICE BERNSTEIN: I'm sorry?

MR. GERSHEL: False.

JUSTICE BERNSTEIN: False.

MR. GERSHEL: Yeah.

JUSTICE BERNSTEIN: That they say something that is false, then ultimately the first amendment would trump any other concerns that people might have as it regards that.

MR. GERSHEL: Speaking from my perspective as the enforcement arm, I think to bring those cases would be very—very difficult as we stand here right now.

JUSTICE BERNSTEIN: Okay. Thank you, very much.

CHIEF JUSTICE MARKMAN: Thank you, Mr. Gershel. Our next witness will be Attorney Jules Olsman.

MR. OLSMAN: Good morning, may it please the Court. I am here on my—in my individual capacity to support the Alternative A to 7.2. I do sit as a member of the State Bar Board of Commissioners. And I am not here to speak on behalf of the State Bar. I saw that our executive director sent you a comprehensive letter which lays out the position of the Bar.

My concern, and this has been almost four years now in the making, to get these 53 words into 7.2 is, I want to—this should be entitled the Who Are You—Amendment 7.2; it's all it asks—who are you? Who are you? If you're going to run an Ad, you're going to run a website, you're going to have a billboard, it should say who you are—

JUSTICE BERNSTEIN: Counsel—

MR. OLSMAN: —you don't—

JUSTICE BERNSTEIN: —I have a question. Counsel, why is the public not able to figure that—if I—what is your concern here? If I call you up, who answers the phone? If I'm calling a phone number, what is—what is the concern that you have—

MR. OLSMAN: I don't—

JUSTICE BERNSTEIN: —I call—

MR. OLSMAN:—I don't know that in all circumstances, Justice Bernstein, but I do know that there are websites out there. And I'm not—in the written comments that went to the Court by myself and others, I'm not looking to single anyone out. But if you look up Gold—if you Google Goldstar Wages, or Goldstar Law, there's no names. Who are you? Who are you?

JUSTICE BERNSTEIN: What happens when you call them?

MR. OLSMAN: I don't know. I've never tried.

JUSTICE BERNSTEIN: But let's—

JUSTICE MCCORMACK: What's the number?

JUSTICE BERNSTEIN: —right, let's call now.

MR. OLSMAN: You want to give them a call right now?

JUSTICE BERNSTEIN: All right, let's give—

JUSTICE MCCORMACK: You know I'm going to as soon as we—

MR. OLSMAN: I—I assume that. But my—the purpose of the rule is transparency and providing information to the public; we don't sell hardware. We're selling legal services to people who need help. And I believe it's only reasonable that if people are going to do that, they're going to put their names on billboards, they're going to put their names in Ads, or an icon name.

We're not talking—when this originally started, the people that came out strongly against it, at the Representative Assembly—I think it was either three or four years ago, were the large firms like Dickinson and Dykema and Honigman; they said, well we advertise under a trade name so we don't think it's necessary if we put an Ad in a magazine that says Honigman or Dykema that we need to put anything else underneath it, because if you Google Dykema—boom, there's the website, there is everybody's names, there is everything they do.

The same is true—Justice McCormack in her questions, which all of the people who responded seemed to focus on, correctly, raised the question about 1-800-LAWFIRM. That's absolutely fine. If you Google 1-800-LAWFIRM, you will get their whole website with all the lawyers who work in the firm and exactly what they do.

JUSTICE BERNSTEIN: So counsel, your concern is—is that this is like a mystery? Like people call these numbers and there's no—I guess what I'm trying to understand is that if you—you call these numbers and then someone answers the phone and they say this is—doesn't—isn't the follow-up question usually, who are you? What I'm trying to understand is how does this all work? If I were to call that number that—and say, I don't under—how do they answer the phone? They say, this is—

MR. OLSMAN: Well, that depends on what they are, Justice Bernstein. So for example, a few years ago you may recall that there was a series of billboards on busses all over the city called Motor City Accident Attorneys?

JUSTICE BERNSTEIN: Yes.

MR. OLSMAN: And I kept asking people who—who are Motor City Accident Attorneys?

JUSTICE BERNSTEIN: Okay.

MR. OLSMAN: Nobody seemed to know. Now, that's, you know, that's a whole other issue that other states are looking at now, including Illinois. And that's these case brokering services like for pain and things like that, which are national outfits that are out advertising. They have huge budgets and then they are diverting legal service—they are diverting cases to lawyers who are willing to either pay—I don't—I don't know what they do; I hope to God after 40 years in the profession, I'm not going to find out what they do and how that works. But that's an—that may be another issue and that may be another issue for another day. It may not even be an issue for this Court, if they're not law firms. Or, how are you going to regulate—

JUSTICE BERNSTEIN: But is this—

MR. OLSMAN: —that kind of service?

JUSTICE BERNSTEIN:—is this analogous to the 1-800-DENTIST, where I call 1-800-DENTIST and then 1-800-DENTIST then sends me to someone, or they—

MR. OLSMAN: That may—

JUSTICE BERNSTEIN: —refer you to—

MR. OLSMAN: —that may be—

JUSTICE BERNSTEIN: —like a dentist in your area; is that how they would work?

MR. OLSMAN: That may be the case, but the idea is simply to identify who the entity is that is running the Ad. I mean, we're not here—I'm not here to talk about whether a lawyer advertising is good or bad, because it doesn't matter; it's here to stay and it's a multi-billion dollar industry across the United States. I'm not here to talk about that. I don't really care what the ABA is going to do, with all due deference to my colleague—to Mr. Gershel.

I'm interested in the State Bar of Michigan. I'm interested in the consuming public, the people who will go to a lawyer because they need help. And I think before you even dial 1-800 for whatever, you should have some idea who that is. So if you see

a name—let's say just see an icon—nothing but an icon. There's a huge billboard up on Greenfield and Ten Mile, in northwest Detroit, with just a picture of an attorney on it, nothing else. And it says, WINS—that's all. Who is this? I mean, what is this—what's the harm in that person, or that law firm, putting their name on that board?

CHIEF JUSTICE MARKMAN: Mr. Olsman?

MR. OLSMAN: So you know who you're calling?

CHIEF JUSTICE MARKMAN: Mr. Olsman?

MR. OLSMAN: Yes.

CHIEF JUSTICE MARKMAN: I've heard you this morning and I guess I wonder what's inadequate in your view about the current ABA Model Rule?

MR. OLSMAN: I don't believe that—that there is adequate protection for the public, by what's out there today at least in terms of what we've had in Michigan. I'm not prepared, necessarily to distress [sic]—to discuss all the nuances of the ABA; I'm interested in the Michigan Rule. And in putting this thing forward, there were many people involved including Professor Sedler at Wayne State, to deal specifically with the issue of first amendment considerations. And his—his position is the more—when you give people more information, it's hard to argue it's constricting their first amendment rights.

We're not asking people to take information out, we're just saying just tell us who you are. It's a simple matter of transparency and it's a simple matter of just telling people who is paying for the Ad.

CHIEF JUSTICE MARKMAN: Okay. I think your time is up—

JUSTICE BERNSTEIN: Well actually, counsel, I guess my question is—just to be very clear, this is your only concern, this issue in terms of the fact that you—you want for these different entities when you call them, you just simply want to know who the person is that's running [sic]—running this specific entity.

MR. OLSMAN: If you're—that's correct. I want to know who it is, that's exactly right; who are you? That's exactly correct. To assure that—to assure that the entity purporting to be a law firm or purporting to be a lawyer, is in fact a lawyer, is in fact licensed in Michigan and is an identified entity, not an icon, a symbol, or somebody

masquerading as a lawyer, or masquerading in that capacity in order to get the case to give it to someone else—

CHIEF JUSTICE MARKMAN: But, is—isn't that—

MR. OLSMAN:—that's correct.

CHIEF JUSTICE MARKMAN: —fully accomplished under the—isn't that fully accomplished under the Model Rule?

MR. OLSMAN: I'm not—

CHIEF JUSTICE MARKMAN: That even when there's no icon or symbol, it's—it requires that there be a public communication of who is responsible for the advertising.

MR. OLSMAN: I do—I believe with all due deference, Justice Markman, I believe that the—the small number of words that are involved here would take care of—would take care of, you know —No. If you say to me, well can I point to a specific example? Of course not. How would—how would—but I see the potential for harm. I see grave potential and that's why I'm here to try to seek prevention of.

CHIEF JUSTICE MARKMAN: Well, thank you very much, Mr. Olsman.

MR. OLSMAN: Thank you, very much.

JUSTICE VIVIANO: Wait, before you go. Your submission says you support either Alternative A or Alternative B. And I guess my—

MR. OLSMAN: In—

JUSTICE VIVIANO: —next question is, in that order?

MR. OLSMAN: Well, in my—in my written submission, I just said either one will be fine. But in reading—in reading the comments of Mr. Tucker and Ken Mogill and the other people that responded, and in hearing the debate with the Board of Commissioners, I think the best—best alternative is Alternative A.

JUSTICE VIVIANO: And what do you think of the Hybrid alternative proposed by Mr. Mogill?

MR. OLSMAN: I think that my preference would be A. I think that there's—there's ways to nuance this thing all the way around. I think you could—somebody might say well, what if we put in this, or what if we—I just think we need to put in who is providing the legal services. And the problem—and Norm Tucker points out correctly, in his letter to you, that the more you leave the door open, the more somebody is going to figure out a way to go through it. So if you just say okay, just the name of the lawyer putting—paying for the Ad, that may not necessarily be who is providing the legal services. So the—I think the broader, more-encompassing approach is the better way to go.

JUSTICE BERNSTEIN: Why is this such a problem now? Has this been going on for a while?

MR. OLSMAN: Well, I mean attorney advertising has reached warp speed proportion now, especially with the Internet now. I attended a conference in Chicago last week where one of the sponsors was—is a company that like—does the metrics of attorney advertising; how much it costs, literally, to get a call. How much does it—and I mean, it's becoming a refined science to the likes of which I have never seen.

But Justice Bernstein, there are ads out there that don't have names of lawyers in them, of people purporting to be law firms. And if there's one person that's misled, it's too many. And like I said, it's—I can't point to an empirical study that would tell the Court there have been X-number of complaints or anything like that. I have no way to know that. I'm here as the—to try to prevent that from hap—if it prevents it from happening to one person, it's been worth the last four years of effort, talking and being involved in this.

JUSTICE BERNSTEIN: I guess the one concern is, is it that—is there going to be other things to come? Like, what I'm trying to do is bifurcate your issue from the overall general issues of freedom of speech and the other things we've been discussing this morning. Is your issue specific to this discussion, or will we be—

MR. OLSMAN: Specific.

JUSTICE BERNSTEIN: —seeing—are we going to see more issues to come or is this it?

MR. OLSMAN: No, I am—I am here to be specific unlike what I usually am. I am here—we are not here to talk about all the nuances of attorney—I'm not. Attorney advertising, whether it's good, whether it's—who knows? I mean, like I said, it's here to

stay. It's here to stay and it's—it's, you know, it's omnipresent. The question is, this just deals with one thing and one thing only. Just tell us who you are.

JUSTICE BERNSTEIN: And I'm not taking a position, I'm just trying to understand—

MR. OLSMAN: I know.

JUSTICE BERNSTEIN: —all the angles.

MR. OLSMAN: Well—

JUSTICE BERNSTEIN: What I'm trying to understand is, what is the distinction between what happens in the medical field when—I don't know who's behind 1-800-DENTIST, but that's who people are calling to find out who they can go to in their area. So, how do you distinguish, you know, dental work or medical work from legal work, and why should one be—I'm just asking this in a general sense, why is it that one should be more regulated over the other?

MR. OLSMAN: Well that's a good point. But, I don't know what the Dental Association requires of its members and I don't know what the Medical Association requires of its members with—

JUSTICE BERNSTEIN: But they're both—but the same issues are relevant, because you're basically talking about your issue and concern. And you're doing a great job and we're grateful that you're here with us today, because I think you're helping to explain the issue quite well. But both issues deal with the safeguarding of the public, so—

JUSTICE MCCORMACK: But it—I just looked up 1-800-DENTIST, Rich—I'm just telling you.

JUSTICE BERNSTEIN: Yeah.

JUSTICE MCCORMACK: I didn't know, but I just looked it up and it—it's actually a referral service; it's not an advertising. It's—you look—you go to 1-800-DENTIST and you put in where you live. And then it finds you a board certified Dentist with a name in your area.

JUSTICE BERNSTEIN: In your area.

JUSTICE MCCORMACK: So it's not—I don't—I'm not sure these are analogous.

JUSTICE BERNSTEIN: So let me ask you a question then. Let's see—but let's use that as a model. Let's say you called up this number, its 1-800-whatever.

JUSTICE MCCORMACK: 1-800-LAWYERS—help me.

JUSTICE BERNSTEIN: Lawyers help me. And then they were to refer you to a lawyer in your area, would now that be okay or is that—

JUSTICE MCCORMACK: The Bar Association does that. Jules—

MR. OLSMAN: If they're not a law—if they're not a law firm, and they're a case—

JUSTICE MCCORMACK: Right.

JUSTICE BERNSTEIN: I understand.

MR. OLSMAN: I don't mean to say case—

JUSTICE BERNSTEIN: I get it. I understand.

MR. OLSMAN: —in a pejorative way.

JUSTICE BERNSTEIN: So just to be—so just—

JUSTICE MCCORMACK: If they're advertising secretly—

MR. OLSMAN: May be no other way to say it, though.

JUSTICE BERNSTEIN: I understand, counsel. So basically what you're saying, counsel, is that your issue is just what Bridget was saying, is—is that—it—

JUSTICE MCCORMACK: They're different, apples and oranges.

JUSTICE BERNSTEIN: They're different and you just want to know who it is that's behind the Ad.

MR. OLSMAN: Right.

JUSTICE BERNSTEIN: To be very clear as to who's making the ad, so when people call they know exactly who they are speaking to and who is—what representation they'd be getting.

MR. OLSMAN: That is exactly—

JUSTICE BERNSTEIN: Okay.

MR. OLSMAN: —all. It just seems like a small thing, so.

JUSTICE BERNSTEIN: Okay.

MR. OLSMAN: All right.

CHIEF JUSTICE MARKMAN: Thank you, Mr. Olsman.

MR. OLSMAN: Thank you, very much—appreciate it.

JUSTICE MCCORMACK: Sorry, I had to look up 1-800—

ITEM NO. 5 (ADM File No. 2016-30)

Proposed amendments of MCR 9.112 and 9.131 to provide that spouses of the Attorney Grievance Commission or Attorney Discipline Board members or employees be subject to the same procedure for review of allegations of misconduct as the Board or Commission member or employee.

CHIEF JUSTICE MARKMAN: Item number 5, Mr. Gershel; you are also interested in testifying on this?

MR. GERSHEL: As to this matter, Agenda Item 5, we would support the change that we include spouses in the—in the list of individuals that we would have to recuse ourselves from hearing the case on. So I have no objection to that at all.

CHIEF JUSTICE MARKMAN: What would be your view about expanding the list of relationships that would fit within the modified rule?

MR. GERSHEL: I don't think it's necessary.

CHIEF JUSTICE MARKMAN: Hmm?

MR. GERSHEL: I don't think it's necessary. I think that, at least speaking from my own experience at the Grievance Commission the last four years, we've had one case that involved a complaint against the spouse of an employee. And we've had two cases where the complaint involved the spouse of an ex-commissioner. And it was my decision that, although it wasn't required, that we recuse the office from handling this case. So I don't think it happens very often. I think when it does happen, we use good judgment and err on the side of recusing ourselves. And so I think adding a list of relationships that would be covered by the rule I think is a solution; but it's not a problem, frankly.

CHIEF JUSTICE MARKMAN: Any further questions?

MR. GERSHEL: Thank you.

CHIEF JUSTICE MARKMAN: Why don't you stay here? We also have you on number six.

ITEM 6 (ADM File No. 2016-31)

Proposed alternative amendments of MRPC 1.16 to require criminal defense attorneys to inform clients that the counsel cannot withdraw without the court's permission under circumstances where counsel intends to withdraw if the defendant does not accept a plea or for any reason under MRPC 1.16(B)(3).

MR. GERSHEL: All right, as to number six, it's the position of the Grievance Commission that this change is—is not necessary. I understand that the proposal is an outgrowth of the *Townsend* [ph] decision. But I think there are sufficient number of protections in place already. For example, 1.4(B) requires that a lawyer explain the matter to a client; 1.16 also deals with—with this issue. So—I'm also stepping away from my current position. Before this, I was a prosecutor for 30 years and I don't recall a single situation where this issue came up. So again, I don't—I could be wrong, but at least in my experience and as well with other prosecutors, I don't think it's a systemic problem and I think that the rules we already have address this issue. The attorney would have to go to the court and get the court's permission; the attorney has to otherwise speak to the client, discuss the problem with the client. So frankly, I think it's an unnecessary rule.

CHIEF JUSTICE MARKMAN: Okay. Thank you, Mr. Gershel. We also have scheduled on Item number six, attorney Joshua Blanchard.

MR. BLANCHARD: Good morning. May it please the Court? So I am a criminal defense practitioner. I am also the incoming Chair of the Criminal Law Section and a Director of CDAM, so I think I'm pretty well immersed in the day-to-day practice of criminal law. And my primary objection to the current rule and why I encourage the Court to adopt the Model Rule, is that it gives the lawyer—the criminal defense lawyer too much control; it gives them a trump card in the attorney/client relationship. Because anytime a client says I don't want to take this deal, the lawyer can threaten to withdraw to coerce a plea.

It's my view when you get into a criminal case, you're in for the duration. I don't—well, the Court recently adopted limited skill representation rules, and specifically excluded criminal from that. This—if we adopt the rule that says, well you've just got to tell your client that you have to seek permission from the court before you can withdraw, I think that tacitly endorses the practice of threatening withdrawal to get out—to get your client to plead. And it sort of moves us toward this limited scope where a lawyer can say, well I'm only going to get in for plea negotiations. And if that doesn't work, I'll tell my client well, if you don't plead, I'm getting out.

I don't think that's the way our criminal justice system is set up or should be set up. And so I think the solution here is to adopt the Model Rule that gets rid of the imprudent standard, doesn't let a lawyer out of the case because he thinks the client is making an imprudent decision. I mean, the client is the one who has to suffer the penalty, if he's wrong, and so I think it's his right to make that decision.

If the Court adopts my proposal and adopts the Model Rule, I would encourage the Court to also provide clarity to the Bar that threatening to withdraw over rejecting a plea offer isn't appropriate. I don't think that's a practice we should be encouraging. So I'd ask the Court to make that clear if it adopts the Model Rule. Thank you.

CHIEF JUSTICE MARKMAN: Thank you, counsel. Item number eight, Alan Gershel.

ITEM 8 (ADM FILE No. 2016-45)

Proposed amendment of MCR 9.122 to establish a 56-day time period in which a grievant may file a complaint in the Supreme Court after the Attorney Grievance Commission has dismissed a request for investigation.

MR. GERSHEL: Thank you. As to this item, we—we support the concept. My only recommendation, on behalf of the Commission, is that we expand the time period—I think its 56 days, currently, in the rule and the recommendation is to go to 180 days.

And my reason for this is—is as follows: In a number of cases when we have decided to decline or reject a request for investigation, we set up a process in the office where the complainant can ask for reconsideration of that—of that denial. And the way the system is set up, is that—that request will be reviewed by the Deputy [indiscernible @ 39:27] Administrator; it's a de novo review. It means we open—maybe we open the whole case, make some additional investigation and in some cases the initial decision to close the case is in fact rejected and we open the case.

Even if we still close the case, at the end of the period, and it does take some time to do this, at the end of the day it still may be helpful to the court that we did this. Because if the person does seek review by this Court, our reconsideration review may help to clarify some of the issues that you'll be asked to review on the reconsideration. So again, we support this. We'd just like a little more time to facilitate our internal review process.

CHIEF JUSTICE MARKMAN: We like to divide things by seven without remainders, so you'd be okay with 182 days, wouldn't you?

MR. GERSHEL: Yes.

CHIEF JUSTICE MARKMAN: Okay.

MR. GERSHEL: Yeah, exactly.

CHIEF JUSTICE MARKMAN: Don't leave again—

MR. GERSHEL: Okay.

CHIEF JUSTICE MARKMAN: —please. We have you on number 10 as well.

MR. GERSHEL: Okay.

CHIEF JUSTICE MARKMAN: Would you like to introduce yourself again?

MR. GERSHEL: Yes, again, your Honor.

JUSTICE BERNSTEIN: I think it's a good idea, because they want to know who the lawyers are.

MR. GERSHEL: I also think some of my colleagues behind me then will address this agenda item as well.

ITEM 10 (ADM File No. 2016-49)

Proposed amendment of MRPC 7.3 and proposed addition of MRPC 1.18 to clarify the ethical duties that lawyers owe to prospective clients and create consistency in the use of the term "prospective client."

MR. GERSHEL: As we have indicated in our letter, we support this rule in its entirety. It makes very good sense that we clearly delineate situations where there's a perspective client talking to a lawyer. This better protects the client. It also better protects the lawyer. He or she knows what their responsibilities are as it concerns potential conflicts and frankly, this is a rule that we have no problem with. And I think it's needed and will give additional protection to the public, so we support the rule. Thank you.

CHIEF JUSTICE MARKMAN: Thank you, Mr. Gershel. Thanks for all of your testimony this morning. The next witness on the same subject is Stephanie LaRose of the State Bar Professional Ethics Committee.

MS. LAROSE: Good morning, may it please the Court. I'm the current Chair of the Michigan State Bar Standing Committee on Professional Ethics. And I'm here representing the State Bar support for the adoption of proposed Rule 1.18 on prospective clients.

The reason that we support this rule, and that also the Attorney Grievance does as well, is that we are the people on the ground and with the ability to ascertain whether lawyers are struggling to understand and comply with their duties toward prospective clients. And a review of—of issues, complaints and former ethics opinions, would indicate that attorneys are in need of greater guidance on that issue.

We have at least four prior ethics opinions addressing prospective clients or attempting to address prospective clients, under current rules which largely do not address the pre-engagement period. Those opinions are quite lengthy. A lot of analysis is needed to come to answers that are very simply stated, within the proposed rule and the comments to that rule. And so it is for that reason that we support the rule.

Additionally, the rule is verbatim ABA's Model Rule 1.18 and the comments to it. The ABA adopted that rule in 2002. And in the 16 years interceding, approximately 30 other jurisdictions have adopted the rule; either the same rule or substantially similar. And in that period of time a review of the literature, ethics opinions in cases that have arisen under those rules, does not indicate any substantial concern, controversy over the rule, or difficulty in applying it. And for that reason, we support the proposal which is word-for-word, Model Rule 1.18 and its comment.

CHIEF JUSTICE MARKMAN: Thank you, very much, Ms. LaRose.

MS. LAROSE: Thank you.

CHIEF JUSTICE MARKMAN: Our final witness of the day will be Mr. Vaillencourt, again, on Issue number 11.

ITEM 11 (ADM File No. 2017-10)

Proposed addition of MCR 6.417 to require trial courts to provide parties with an opportunity to comment on a proposed order of mistrial, state their consent or objection, or suggest alternatives.

MR. VAILLIENCOURT: Thank you. May it please the Court again, William Vaillencourt, Livingston County Prosecutor and Vice President of the Prosecuting Attorneys Association of Michigan—appreciate the opportunity to be here.

We support the proposed rule with two amendments, as outlined in PAAM's letter; first is stylistic change, the second is the substantive requirement that the discussion about mis—mistrials occur on the record. Frequently, there's a lot that goes on, off the record, or in Chambers and areas other than mistrials. But I think it's especially critical in this area involving a mistrial that a record be made of the parties' positions on whether a mistrial is appropriate. It facilitates, I think, better decision-making in the trial courts. But also creates a record to be reviewed on appeal. So we would support the rule with those amendments. And I'll invite any questions.

CHIEF JUSTICE MARKMAN: Okay. Well, thank you.

MR. VAILLIENCOURT: Thank you.

CHIEF JUSTICE MARKMAN: Thank you to all our participants today who have commented orally and in writing. And as I said at the outset, we will take your comments into very respectful consideration as we decide what to do on these matters. Thank you again. We stand adjourned.