

**MICHIGAN SUPREME COURT**

**PUBLIC HEARING**

**September 20, 2018**

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**CHIEF JUSTICE MARKMAN:** Good morning and thank you all for being here. This is our administrative hearing at which we give any member of the bench or bar, or indeed any member of the public, the opportunity to share their perspectives with the Court concerning our administrative agenda. We take your thoughts seriously. We take your writings seriously and they are all a part of our consideration when we weigh in and decide where to go on our administrative agenda. So we very much appreciate those who've contributed to these proceedings. I must say, though, that we do have quite a number of people who are testifying this morning and we do have a three minute limit. I wish we had a little bit longer opportunity, but we have a three minute limit and we're going to attempt to be fairly rigorous in upholding that limit. So I hope you'll understand that and we will now proceed.

The first item we have is ADM File Number 2002-37 and 2018-20, which pertain to proposed amendments of our court rules regarding fee waivers for indigent individuals. We have three speakers and the first one will be Judge Julie Reincke, representing, I believe, the Michigan District Judges Association.

**JUDGE JULIE REINCKE:** Thank you for allowing MDJA to be here today. I do think this court rule and the history of its development is a good example of how things work well when a lot of different voices and minds are contributing. So we've been a part of this development for many months and we really like Alternative C. So we encourage you to adopt all the difficult parts of Alternative C but there are two things that I'm here, primarily, representing our clerks because we think there are two things in this that do little or no good to justice but do make extra work for them. One of them is we'd ask that you take out the sentence "The information contained on the form shall be non-public." I anticipate the form requesting this to be very similar to the form that we always see in our public files in civil cases asking for installment payments. Asks for income, debts, and assets. No social security numbers or anything very personal. So right now our civil clerks don't have to make anything non-public. This would be an extra step that they would have to set up procedures for and we don't see a [sic] necessity of it. The criminal clerks do have to set—make things, some non-public but those are forensic analysis, substance abuse disorder analysis, finger prints, victim

information. Things that logically should be non-public. But we don't think this very basic income, asset, debt information needs to be non-public. Also the criminal clerks—the criminal files have a form, and they're very frequently asking for appointed counsel. That is a public form and it asks for basically the same information. And if our decision is challenged, it's going to go on the record and all of this is going to be public anyway.

The second thing we would request is that the phrase "within three business days" be deleted from the first sentence. I understand that the filing date of these papers, of the original suit, would not be delayed if someone filed a request to waive fees. But having it signed by the judge within three days is going to put a burden on the clerks to get the mail handled, the files set up, the things to our—to us with a deadline we don't think is significant in the way the case is going to go forward. Many times it would be signed in three days. We have piles like this appearing every day or two in our offices. If we didn't keep up with them we would be deluged in orders to sign from civil, criminal, probation, letters from the jail, and so forth.

**JUSTICE VIVIANO:** What's a reasonable—what's a reasonable amount of time?

**JUDGE REINCKE:** I don't see why there should be deadline because there isn't a deadline for anything else. We—I haven't heard anyone complaining that district judges don't stay on top of their files because if we don't the whole system is going to slow down. We need to keep those things moving but I think that a three-day or a ten-day deadline really has no meaning if you're a responsible judge like almost all of us are and we want justice to be efficient. A lot of these are probation violation notices that have to get out quickly. We don't usually pick and choose; we just sit down with our piles and wade through them. So it's going to take extra attention from the clerk and they're going to have to catch us in the office within those three days, not on vacation, or have another judge sign it but I think most of us prefer to be involved in our own cases.

**CHIEF JUSTICE MARKMAN:** But, Judge Reincke, to follow up on what Justice Viviano just said. We have many deadlines in law. Not because judges are irresponsible or not attending their duties, but simply to move the process along in as an expedited manner as we can reasonably can. Do you not think there should be some alternative deadline to the one you disfavor here?

**JUDGE REINCKE:** I personally don't see a reason for it because I don't leave files sitting in my office. But if it were increased to ten days or so I think that would catch everybody who's—almost everybody with no problem, and the clerks would not have to come seek us out for a signature.

**CHIEF JUSTICE MARKMAN:** Okay. Well thank you very much, Judge. We appreciate you testifying on behalf of the district judges.

**JUDGE REINCKE:** Thank you.

**CHIEF JUSTICE MARKMAN:** Let me also please point out the obvious if I might, which is that our colleague Justice Bernstein is not here. He won't be here this morning. He has a, he has a conflict and he, of course, will have full access to the video and audio recordings of this, as well as the transcript, and he will certainly bring him up—bring himself up to a full understanding of what's taken place this morning. Let's move to our next witness who will be Robert Gillette, representing the State Bar.

**MR. ROBERT GILLETTE:** Thank you, Mr. Chief Justice. May it please the Court. My name is Bob Gillette. I'm the director of the Michigan Advocacy Program. I was the chair of the State Bar workgroup that developed Alternative B and then Alternative C, and I'm testifying today on behalf of the State Bar.

The Bar workgroup was formed in response to multiple ongoing concerns raised by legal services advocates and others who've observed or assisted pro se litigants as they struggle with the current system. I thought I'd just kind of explain how we got from B to C. There were really two committees working on the fee waiver problem in tandem, the Bar committee and an SCAO committee. We had an SCAO staff person on the Bar committee, and really appreciated her input on that committee, but we understood that the SCAO work was primarily focused on the e-filing process. We shared our drafts with SCAO throughout but hadn't seen the SCAO draft until it was published for comment by the Court. I—our reaction to the SCAO draft was very positive. We don't see a conflict between Alternatives A and B, and published by the Court. We see them as complementary. We see the SCAO draft as focusing on how fee waivers are handled administratively and in the to-be-implemented e-filing process. The Bar draft focuses on substantive guidance: What are the standards? What are the rules for determining whether a given application should be approved or denied? Alternative C is meant to adopt all the procedural changes that were contained in the SCAO draft in Alternative A and also retain the clearer substantive standards that the Bar proposed in its original Alternative B. And in the materials there's the August 20<sup>th</sup> letter from Janet Welch that includes a side-by-side, and you can kind of see how all the procedural things were just kind of adopted by the Bar in Alternative C.

Our main goals throughout the process, but especially in developing Alternative C, were to encourage consistent practices across the courts, to improve the administrative efficiency for judges, for court staff, and for litigants, and to increase

access to the court system for very low income persons, especially those who appear in pro se. Each provision of the rule is meant to respond to a troubling practice that's occurring in one or more of our courts. And we think that the Court and SCAO share the goals that were really the Bar goals in developing this proposal.

**JUSTICE MCCORMACK:** Mr. Gillette, can I interrupt you for a second?

**MR. GILLETTE:** Sure.

**JUSTICE MCCORMACK:** We got a late-breaking comment from MJA yesterday letting us know that they unanimously oppose A, B, and C. Not—not—maybe they've told us why, I'm not sure I know why yet because I—when we get a comment at 3:00 o'clock the day before we are prepared to have a hearing most of us have already done our reading and our work so I haven't been able to fully incorporate that. Was your group in touch with MJA? Do you have any sense of why they oppose everything?

**MR. GILLETTE:** Well, I would—you know there were comments by three courts, Wayne Probate, Wayne Circuit, and the Oakland Court—Oakland Circuit Court, and the Oakland Court especially kind of spells out the objections to both A and B. And—

**JUSTICE MCCORMACK:** But how about C? They also apparently oppose C.

**MR. GILLETTE:** Well I think that the Oakland—the earlier comments that they hadn't seen C yet. I'm sure they would have opposed it had they seen it.

**JUSTICE MCCORMACK:** What do we think of that? I mean, I understand that MDJA is probably slightly more relevant in terms of how these things processed. But what do you make of MJA's opposition to—

**MR. GILLETTE:** Well I think that it's somewhat just resistance to change. It's hard to see MJA as committed to a process because the problem is there's not a consistent process of course—across the courts and so, you know, to the extent it is going to things about how court clerks and courts process these, and every change is a challenge, and is an administrative adjustment, that's just kind of my read of the Wayne and Oakland comments.

**JUSTICE MCCORMACK:** Okay.

**MR. GILLETTE:** And e-filing is going to be a big change—

**JUSTICE MCCORMACK:** Yea.

**MR. GILLETTE:** —some of us accept that.

**CHIEF JUSTICE MARKMAN:** Mr. Gillette—

**JUSTICE WILDER:** I haven't read the comments either but in the district courts the clerks tend to work more cooperatively with the judges as opposed to—sometimes there's conflicts in the larger communities between the judges, the court and the clerk, which is a separate entity, and I wonder if that has anything to do with their opposition.

**MR. GILLETTE:** It could. I mean it's really—very—I'm really reluctant to kind of speculate on what MJA is thinking since I haven't spoken with them personally or seen their comments but definitely that's a dynamic in the court system.

**JUSTICE WILDER:** I mean the clerks have a constitutional role and they try to protect that role, and sometimes there's conflict between the circuit court and the clerk on how that works out.

**MR. GILLETTE:** Right. But luckily the court rules really direct how procedures happen in our courts and so this Court through this rule has the opportunity—again, I encourage you to listen to everyone—but has the opportunity to address that.

**CHIEF JUSTICE MARKMAN:** Well thank you, Mr. Gillette. We appreciate your thought. Maybe you could put together very quickly an Alternative D before they oppose it.

**MR. GILLETTE:** Thank you very much.

**CHIEF JUSTICE MARKMAN:** Thank you very much. Our last witness on this same matter will be Rebecca Shiemke, representing the Michigan Poverty Law Program.

**MS. REBECCA SHIEMKE:** Good morning. Thank you very much. I'm here also on behalf of the Legal Services Association of Michigan, which is the group of the thirteen largest civil legal aid programs in the State of Michigan. My role with Michigan Poverty Law Program is as a family law specialist where I have had an opportunity to talk with a number of other family law legal services attorneys over the years and particularly about the current process with the fee waivers, which is—frankly in my experience in representing clients has been an affidavit that I've filed in every single case—a family law case. And essentially what I'm here to say is to ask the Court to also support Alternative

C because I think it better addresses the underlying concern, which is why this proposal—the proposed amendment is before this Court, which is to increase and improve access to justice for indigent clients. And I want to just take my time to talk a little bit about some of—what I’ve heard about some of the practice that have been going on across the court [sic] and some of the ways in which legal services attorneys have responded. In—so many of the practices do indicate what the previous speakers have talked about, which is an inconsistent practice from court to court. So some of the things I’ve heard about is courts requiring additional documentation besides just the affidavit, including current photo ID where an address matches the address on the pleadings. Current proof of public assistance, an award letter from DHHS, which isn’t always easy to get. Pay stubs or tax returns to indicate proof of income. And there’s always a question about whether this documentation becomes part of the record or not. It’s difficult for attorneys sometimes to get this information. It’s even harder for self-represented litigants to meet these standards. In one large jurisdiction, attorneys take all fee waivers to the chief judge where they wait until the chief judge is available to review the fee waiver. Depending on the docket, sometimes that’s a long time. In that same jurisdiction, the fee waiver is valid only for the day on which it’s signed so if the attorney or the self-represented party doesn’t always—also have pleadings ready to go they have to start all over on another day.

The other concerns I’ve heard from legal aid attorneys are some of the reasons why fee waivers have been denied which are contrary to the statute, and which I believe Alternative C will help address by setting clearer guidelines. So fee waivers have been denied because parties have cable, because they have a cellphone, regardless of the fact that may be the way in which the party keeps contact with family and jobs and other things. Some judges will suspend the fee waiver with the requirement that it be paid at the end of the case but then refuse to enter the final judgment until the fee waiver’s been—until the fees have been paid.

So in response to some of those concerns that we’ve heard over the years that are continuing in [inaudible] we’ve done a couple things. We’ve had to appeal a number of fee waiver denials to the Court of Appeals, most recently in 2018 in *Hendrickson v Campbell*, which was a child custody and support case. The court—the Court of Appeals order the fee waiver to be granted, finding that the trial judge’s refusal to grant it upon learning the client received public assistance was an abuse of process. In another case where the same process was going on, there was an appeal filed; the Court of Appeals reached the same decision, and because the process continued we also sought administrative review by the State Court Administrator. So it’s a process that’s continuing. I believe Alternative C really address those concerns.

**CHIEF JUSTICE MARKMAN:** Okay. We very much appreciate your thoughts, Ms. Shiemke. Thank you very much for being here.

**MS. SHIEMKE:** Thank you.

**CHIEF JUSTICE MARKMAN:** Okay. Let's move to Item 2 on our agenda, which has to do with Administrative File 2013-05 and 2014-46, pertaining to amendments of our court rules regarding post-judgment relief from judgment motions. This is a very broad package of changes and we'll look forward to the testimony. First will be Alan Gershel, Michigan's Grievance—Attorney Grievance Administrator.

**MR. ALAN GERSHEL:** Good morning, Mr. Chief Justice. May it please the Court. Alan Gershel, Grievance Administrator on behalf of the Grievance Commission. We have sent in a letter supporting the changes. Interestingly enough, the Commission consists of nine people, three of whom are prosecutors. And we did discuss this at length and the Commission unanimously was in support of the change. We get—probably the biggest complaint we get every year comes from defendants. Out of the maybe 2000 complaints a year, a substantial percentage are from defendants. Now it typically involves the performance of their lawyer. But occasionally it involves the conduct of the prosecutor and, by and large, we're really not in a position to evaluate that. Typically we'll send it back and say you got to pursue your judicial remedies. So I believe a procedure in place that would allow the prosecutor to evaluate these cases, specifically direct how it's supposed to be done, when it's supposed to be done, the burdens of proof, is really consistent with the mission of the Commission, which is to protect the public, and I think this would go a long way towards doing that. We simply don't have the wherewithal to conduct that kind of investigation, and also I would add, that this roadmap that's being proposed really wouldn't put any burden on us. In fact, frankly, it would be helpful to the process to know that this is out there and prosecutors are evaluating this case and if necessary, reporting what has to be reported.

**CHIEF JUSTICE MARKMAN:** Mr. Gershel, you have a lengthy history both with addressing ethical problems and I believe you were a prosecutor for many years—

**MR. GERSHEL:** Thirty, your Honor.

**CHIEF JUSTICE MARKMAN:** Is there anything in this package—in this package of proposals that you see incompatible with any ethical obligations that prosecutors owe?

**MR. GERSHEL:** No, there may be some procedural issues that prosecutors may have in disclosing information, I understand that. But overall, the package is a good one. I think that to require prosecutors, when they become aware of information that may demonstrate actual innocence, have to go through the following steps. I think it's good for the system, promotes confidence in the system, and I don't see again—I don't—I know there are comments regarding the process and procedures, but overall I think it's a good process and probably would have recommended it to you, Chief Justice, when I worked for you as your criminal chief many years ago.

**CHIEF JUSTICE MARKMAN:** Are there any further questions? Well thank you very much, Mr. Gershel. Next witness is Andrew Goetz, who's the appellate chief of the United States Attorney's Office. Thank you.

**MR. ANDREW GOETZ:** Thank you, and may it please the Court. Andrew Goetz for the United States Attorney's Office for the Eastern District of Michigan. The United States Attorney's Office and the Department of Justice more generally has a long-standing commitment to rectifying wrongful convictions wherever and whenever they occur. And we certainly embrace the motivation for the proposed revisions to Michigan Rule of Professional Conduct 3.8. The main problem we have with these proposed revisions is that they mandate a type of one-size-fits-all approach that just does not provide us with the flexibility we need to address these issues when they come up in our cases, particularly in some of the complex cases we prosecute. The—we've identified several of these problems in our letter. We haven't even gotten into some of the problems that might result, say in national security cases when dealing with classified information. And these aren't hypothetical problems we're raising, either. They're based on our own cases, our own investigations. Our office has a long-standing experience in this arena in dealing with sensitive information that comes to light that we have to disclose to make sure justice is done but can't do it in the way the rule mandates here.

**JUSTICE VIVIANO:** What would happen if there's a conflict between a federal law and the disclosure requirements of the proposed rule? How would someone in your office—how would they proceed?

**MR. GOETZ:** The short answer is that we'd do everything we could to avoid that conflict and try and find an avenue to disclose it as quickly as we could.

**JUSTICE VIVIANO:** But ultimately if they're opposed, isn't the federal law supreme and you have to follow your obligations under federal law first?

**MR. GOETZ:** The answer is probably yes. And if that question were litigated, that would certainly be our position. It's a bit tricky here because the Rules of Professional Conduct are incorporated into federal law in 28 USC 530B so it's as, I think, Mr. Green points out it's federal law versus federal law so we'd be trying to reconcile two pieces of federal law that appear to be inconsistent. I think, in a lot of circumstances, we would be able to comply with this rule. It's the ones we mentioned where the rule does not really take into account some of these countervailing interests we have. And I will say, just to respond to one of the comment letters, we're quite confident these problems are happening in U.S. Attorneys' Offices in jurisdictions where this rule has been passed. They're not airing them publicly but given the experiences we've had I think it'd be safe to say these problems are happening and especially given some of the conflicting obligations we face.

**CHIEF JUSTICE MARKMAN:** Aren't all federal prosecutors obligated to abide by the ethical and professional laws of their jurisdiction? Wherein arises the conflict in your judgment? Where are you most vulnerable to a tension that might arise in this context?

**MR. GOETZ:** I see my red light is on. May I answer?

**CHIEF JUSTICE MARKMAN:** I'm sorry?

**MR. GOETZ:** My red light is on.

**CHIEF JUSTICE MARKMAN:** Yea, please, if you would.

**MR. GOETZ:** So the answer to your question is yes. Prosecutors are required to abide by the Mich—the rules of professional conduct in the jurisdiction where they practice. That's section 530B that I just mentioned, 28 USC 530B. The conflict arises I think mostly, and where we're most concerned about it, is in the grand jury context where we're going to learn about—well, the national security context as well—but in the grand jury context where we're going to learn about information where we're actually prohibited from disclosing it. There are criminal penalties to disclosing grand jury information. The only avenue would be a court order. We can only get that court order if we can show that the need for secrecy would be vindicated by the court order. So if the witnesses wouldn't be put at risk, if targets wouldn't be tipped off we're investigating somebody. So meeting that standard would be tricky. It also, I mean, by mandating the procedure that it does, the—it prevents I'd say what we call more creative solutions to addressing these issues. And we have one example from our office, I think it's about a decade ago, maybe a little bit longer, where we learned of this type of information and we couldn't disclose the evidence itself but we went to a local

prosecutor and said, “hey, we can’t tell you how we know this but you have the wrong guy.” And they did what you’d hope they would do, and it was either pre-trial or post-trial, and they used what we told them to make sure justice is done. That wouldn’t comply with the letter of this rule. It’s a more creative solution. It’s not disclosure of the evidence but it’s a more creative solution. And our concern is that, by mandating this strict approach, it prevents us from doing things like that to account for countervailing interests.

**CHIEF JUSTICE MARKMAN:** Well, these are all very legitimate concerns you’re raising and we appreciate you sharing the federal perspective here. We certainly are possibly in a situation where we’re not as aware of some of the kinds of conflicts that you might identify that we would see coming out of state prosecutor’s offices. But we do have a safety valve provision in the rules, of course, that allow a judge to authorize you not to disclose certain kinds of information, don’t we? And it there was—and in the end, if there was a conflict, an insuperable conflict, between your federal obligations and the obligations under state court rules, wouldn’t the supremacy clause of the constitution effectively resolve that as well?

**MR. GOETZ:** The answer to your first question is no and the answer to your second question is yes. And I’ll start with the first one. The answer is no because the rule as written is not, you can get a court order to disclose, it’s you have to get—you have to disclose unless you get a court order authorizing you not to. So it’s flipped from the situation I’m talking about. And as far as conflicts between the Rules of Professional Conduct and other obligations under federal law, you’re probably right, Chief Justice Markman, that’s what our litigating position would be and we may very well prevail. Our concern is that you usually don’t draft legislation or rules that invite that type of conflict. Usually the better course of action is to reconsider the language of the rule to avoid that from ever coming about. So we just ask the Court to take these considerations into approach in looking at the language.

**CHIEF JUSTICE MARKMAN:** Yea, I’m—I can’t reasonably ask you to rewrite the proposal, you know cold, standing here, but what do you have in mind in terms of how we should effectively respond to the concerns that you’re raising? Should we put in a provision having to do with federal grand juries in particular or what exactly should we consider doing in response to the concerns that you’ve raised?

**MR. GOETZ:** Well, our—I guess our first suggestion, and this might not satisfy the court, but our first suggestion would be to at least issue this as guidance to prosecutors. I think one of the main problems prosecutors have when, say, they don’t have the resources we have within the Department of Justice is that they don’t have a

timeline or a roadmap for how to address this type of information when it comes to light. So it—even if this Court did not adopt this in the Rules of Professional Conduct, we would urge the Court to promulgate this in the State Bar Journal as guidance for prosecutors. So that would be step one. Step two, PAAM has put forward a proposed alternative on the 3.8 language. It does not address all of our concerns, and I'll emphasize that. It addresses many of them, but not all of them so I urge the Court to look at that carefully. Unless there are any further questions, I—

**CHIEF JUSTICE MARKMAN:** Appears there's not. So thank you very much for coming here and sharing your perspectives, we appreciate it.

**MR. GOETZ:** Thank you.

**CHIEF JUSTICE MARKMAN:** Our next witness will be Imran Syed of the Michigan Innocence Clinic.

**MR. IMRAN SYED:** Thank you, Mr. Chief Justice. I strongly support both the proposed amendments to 3.8 and MCR 6502. I encourage the Court to adopt them exactly as they've been proposed. I'll limit my comments just to 6502 and specifically one narrow point, which is the scope and role of that rule. And I encourage the Court to keep that in mind as it addresses these proposed amendments because I think some of the letters in opposition seem to be forgetting that specific role of 6502. 6502 is the first of many requirements that a criminal defendant must satisfy to succeed on a post-conviction motion. It's simply the first gateway rule. No one can be released from prison simply by satisfying 6502. They must also satisfy the underlying substantive legal standard, most likely *People versus Cress*. So those who oppose the change because they say this would mean 6502 opens the door without entailing any materiality or diligence requirements, those contentions are off the mark. 6502 has never entailed any materiality or diligence requirements. This Court clarified part of that in its *Swain* opinion a couple of years ago. Diligence/materiality remain important requirements; they simply come in at the next step when the substantive *Cress* standard is being evaluated. More specifically, I'll address two things. First, the prosecuting attorneys of Michigan have suggested alternative language for the actual innocence exception and noted that this is more in line with the federal standard. That's a problematic suggestion and it's actually incorrect that it's more in line with the federal standard, and I'll explain that. The standard that they've proposed, the language comes from a federal test known as the *Sawyer versus Whitley* test, which the U.S. Supreme Court explicitly rejected for gateway evaluations of actual innocence claims. The citation for that is a case called *Schlup versus Delo*, 513 US 324, where the U.S. Supreme Court rejects the *Sawyer v Whitley* test and, for gateway actual innocence claims, adopts a different test,

*Murray versus Carrier*, which is much more in line with the standard that's currently stated in 6508. All we're asking is the 6508 standard, for the reasons explained in our letter, also be replicated in 6502. The gateway standard should remain what it's always been in 6508. The standard that PAAM has proposed is what federal courts use to evaluate substantive claims of actual innocence where actual innocence itself is a grounds for relief. No such claim has ever been recognized by this Court in—under our state law, and I think that standard is entirely irrelevant to the discussion here. And finally, to the subject of forensic science, I have a lot to say on that provision but again I'll limit myself to one important point here. Again, 6502 is only a gateway. So new scientific evidence that enables someone simply to file a motion and satisfy the new evidence requirement of 6502 should absolutely be a very broad standard. Some letters opposing the change—

**JUSTICE MCCORMACK:** Mr. Syed, are you worried that it's squishy as it's published? I mean, does any time there's a new paper published on pub med [ph], do we have to entertain substantively a bunch of new 6500 motions?

**MR. SYED:** Your Honor, I think the answer to that is 6502 recognizes simply one requirement, that the evidence is new. 6502 is not created to vet the new evidence. We have subsequent rules that would do that. So to answer the concerns that were raised in some of the letters, we'd never be under a situation where a single new theory by a single person would get someone out of prison unless it was also material. Materiality would later be evaluated under the *Cress* standard. However, there are famous examples in forensic science where an emerging theory that for a small period of time is only propagated by one or a small group of individuals is so undeniable that it eventually and very quickly comes to be accepted. If such a theory emerges, 6502 shouldn't ban a defendant—we shouldn't stand in the way of a defendant litigating that theory and the courts will have ample opportunity to consider the materiality of such emerging theories under the *Cress* standard. So in the vast majority of cases, of course, a single new theory that no one else in the scientific profession supports will not warrant relief from judgment so I think some of the floodgates arguments that have been made are unwarranted. I'll be happy to address any other questions but—

**CHIEF JUSTICE MARKMAN:** I do have a question here. In your informal remarks here you've used the term "actual innocence" to describe the scope of the changes that we're reviewing here. And I look to the changes in court rule 6.502, it uses the term "innocent." It doesn't use the term "actual," just uses—

**MR. SYED:** Right—

**CHIEF JUSTICE MARKMAN:** “—whether—if the defendant is innocent of the crime.” And I’m looking at the Rules of Professional Conduct applicable to the prosecutor and there it talks about “a defendant who did not commit an offense of which he was convicted.” Is there any potential for confusion in using these different phrases? Do you understand them all to be applying to the same general universe of individuals?

**MR. SYED:** Yes, Chief Justice, I do. And I think in 6508, which is language you were quoting where it simply says there’s a likelihood that someone is innocent, or a reasonable likelihood. I think that, by context, is going to actual innocence and not toward legal innocence. If the Court felt the need to clarify in adding the language to 6502 that it is speaking only to claims of actual innocence based on fact and not legal innocence, it would be free to do that, of course.

**CHIEF JUSTICE MARKMAN:** Okay. Thank you. Any further questions? Okay, thank you very much, Mr. Syed. Our next witness will be Mr. Bruce Green of the Fordham University School of Law.

**MR. BRUCE GREEN:** Good morning, Mr. Chief Justice, may it please the Court. My name is Bruce Green. I teach at Fordham. I’ve also been active in the ABA Criminal Justice Section and had a front row seat and was also a participant in the drafting, and ABA’s adoption, of rules—model rules G—3.8(g) and (h), which are what the proposed Michigan rules 3.8(f) and (g) are based on. This has been opposed by some prosecutors but not all in various states. It’s very different from issues on which prosecutors have been—ethics issues on which prosecutors have been opposed in recent years because, as you’ve heard, prosecutors basically accept the underlying premise and the principle that prosecutors should investigate new evidence of innocence and if they become convinced there was a wrongful conviction seek to remedy it. But prosecutors in some jurisdictions have some difficulty with the wording. The ABA process was an inclusive one. It included federal prosecutors, state prosecutors, judges, and defense lawyers. In my state, New York, where a version of the rule was adopted likewise it was a highly inclusive process. The rules now have been adopted in 18 states which cover about 40% of the population of the country and—

**JUSTICE MCCORMACK:** Can I ask you right there, Mr. Green? I’m sorry. Among those 18 states, how many have adopted or included this safe harbor provision that the prosecutors are recommend—some of the prosecutors are recommending here? And do you have any views on whether there is any harm in adopting a safe harbor provision?

**MR. GREEN:** So the ABA model rule includes, in the comments, a good faith provision. My state adopted it into the rule. My basic view and that of the folks in the ABA who drafted the model rule is states should be free to adopt the rule to fit their own state's procedures. To make prosecutors comfortable, we have no qualms about incorporating the good faith provision into the rule. In general, we're not—I'm not advocating for exactly the wording of the ABA rule but something along the lines of the rule if it doesn't fit exactly with your state process. I guess I want to just jump to the federal—Mr. Goetz's comments. There are quite a number of rules of professional conduct that have disclosure provisions, and that in theory the same kind of concerns could have been raised about: 3.8(d) requires pretrial disclosure of exculpatory evidence; rule 3.3 requires disclosure of ex parte proceedings of evidence contrary to the position of the lawyer; rule 3.3 also requires disclosure to rectify perjury. There are obligations of candor to the court. These all have to be reconciled with grand jury secrecy, with CEPA [ph], classified information, with other obligations. My experience is that, in general, prosecutors figure out how to reconcile these obligations. They're not—I don't think anybody would oppose having ethics rules that require prosecutorial disclosure because of concerns about secrecy obligations. I think in this case as well, to the extent that the McDade amendment doesn't trump whatever federal secrecy obligation there is, prosecutors can figure out how to disclosure—I do have to say, to my recollection, this is the first time that I've heard this objection from federal prosecutors. It wasn't raised in the ABA. It wasn't raised in New York and I don't recall, although I could be misremembering, it being raised in general. So I'd be surprised if prosecutors acting in good faith couldn't figure out how to reconcile their obligation to rectify wrongful convictions with whatever grand jury secrecy obligations they have. As the Court recognizes, there are provisions where you could seek a court order not to make disclosure if disclosure would interfere with an investigation or other obligations. I—you know the basic argument of the prosecutors is, I don't think they'd disagree with the value of the underlying principle, but that there'd be more harm than good. The ABA's view is to the contrary. Eighteen states have the rule. The world hasn't come to an end in those states and, you know, I think the anticipated problems are overstated. And unless the Court has other questions—

**CHIEF JUSTICE MARKMAN:** I do have a question, professor. And I like to impose upon or invoke your experience here if I can do that in looking at the similar rules in other states. I think well of this measure and I think it has the potential for bringing a lot of good to our state in terms of identifying the kinds of persons who simply shouldn't be incarcerated. It's that simple. But I do expect that this new rule will be creating a flood of motions for relief from many individuals who are not even remotely factually innocent. I mean it provides an entirely new avenue for potential relief and I do expect that we're going to be inundated by these after this rule becomes

effective if it's adopted by the Court. I mean, my question is, is that simply the cost we pay for the benefits we think are attained by these new rules or is there some greater, more limiting threshold that's possible to protect the system from being overrun by these kinds of claims?

**MR. GREEN:** So I take it that the claims will go to the grievance committee. And I heard this morning that they get 2,000 complaints from criminal defendants to begin with. I'm not sure that the experience in the states that have this has—I haven't heard complaints from disciplinary authorities, certainly not in my state. So I don't know that this will make a significant difference but I don't think it would add to the burden of the grievance process because I think they know how to weed through complaints and deal with the ones that are legitimate. So I guess I don't think that the underlying premise is necessarily correct, that there'll be a flood of by—and because the rule is about prosecutors' obligations to disclose new evidence, it's hard to imagine that there'll be many legitimate complaints that prosecutors knew of new evidence they didn't disclose to me as a defendant. You know, it could be that there are, but I just don't anticipate it. And I do think that disciplinary authorities around the country are pretty efficient.

**CHIEF JUSTICE MARKMAN:** I mean I'm surprised to hear a little bit what you're saying here. I mean right now in order to secure relief you have to show that there's been a change in the law or there's some significant new evidence. That's no longer going to be the case. Why wouldn't there be a great number of incarcerated individuals attempting to avail themselves of this new opportunity, this new avenue for relief?

**MR. GREEN:** I may be confused. Are you talking about rule 3.8 or the other rule that's in front of you? Because 3.8 is just a disciplinary rule. It doesn't create an opportunity for relief.

**CHIEF JUSTICE MARKMAN:** I'm talking about the more funda—I'm talking about the motion for relief from judgment itself.

**MR. GREEN:** Okay. I—with apologies, I'm only here to talk about rule 3.8, which is the ABA—which is based on the ABA model rule. I'm not familiar with the other provision.

**CHIEF JUSTICE MARKMAN:** So you're focusing on the pros—obviously you're focused on the prosecutors so far. I thought your written submission had focused on the larger rule.

**MR. GREEN:** I hope I only focused on rule 3.8(f) and (g).

**CHIEF JUSTICE MARKMAN:** Okay. Thank you very much.

**MR. GREEN:** Thank you, your Honor.

**CHIEF JUSTICE MARKMAN:** Thank you, professor. Our next witness will be Brett DeGroff of the State Appellate Defender Office. And I might ask you the same question if I could.

**MR. BRETT DEGROFF:** Sure, Chief Justice Markman. So I think that—I don't anticipate that there'd be a flood of new motions. It very well may be that someone who is already going to file a motion for relief from judgment and who already could file—could claim new evidence and files a subsequent motion under that provision might now also add in this claim and say I also—there's also a significant possibility I'm innocent. But I don't know that there are people who weren't going to file a motion that will now file a motion because of this and that there would be a flood of them. That's from—based on my experience and my appellate practice at SADO. That's my estimation of what would happen. Of course, we're all just guessing about that. I think. I can't of course predict the future.

The State Appellate Defender Office does recommend that this Court adopt all of the changes in this package. And with respect to 6.502(G)(2), I want to touch on just a couple of points that were made in opposition in the public comments. One that I wanted to address was the question you've already asked me, Chief Justice Markman, and as—also as to that, if—even if there were a flood of new issues, certainly in those claims would be some people where there is a significant possibility that they're innocent. And I don't think that we solve the problem, the underlying problem that there are legitimate folks that need—that have issues that need to be addressed by denying review—not denying relief, but denying review—to all of those people. Also there was a point made by—in opposition that this would re-open litigation of issues already decided, and that's not right. 6.508(D)(2) prohibits relief on grounds that have already been decided and this rule wouldn't change or make any exception to that. Also I wanted to address the suggestion that the significant possibility of actual innocence be replaced by the clear and convincing standard, and we would encourage the Court not to consider that. I think it's important as Mr. Syed pointed out that this is a gateway provision. This is not a substantive determination that someone's going to get a new trial. And if you look at how 6500 motions develop once the motion is filed at that point hopefully from an actual innocent defendant's perspective an evidentiary hearing can be granted where, you know, an additional investigation can take place. A pro se defendant might be appointed counsel at that point. At the point when they're filing

this motion pro se, they might not have access to an attorney at all or an investigator at all. And so to expect them to meet a clear and convincing standard at the gateway before they have access to any of those resources is most certainly going to deny review even in some places where it should take place. And I have one additional point I'd like to make but I see my light's on.

**CHIEF JUSTICE MARKMAN:** Please make the point.

**MR. DEGROFF:** So in regards to 6502(G)(3), there was one argument—point made in opposition specifically about subparagraph (b), which I like to address. And this is the point that talks about a test—a change in opinion of a testifying expert. And this is not as broad as it might seem. Yes, it's talking about the change in opinion of one expert but not any expert in the field, a testifying expert. And I think that the context is important here. MRE 702 and *Daubert* are really broad standards and they encompass more—they allow in more expert testimony than just, you know, areas where there's a large scientific debate and lots of published work, and these discussions are being had in the public. Those provisions also allow experiential testimony, experiential expertise, and so you can very well have a case where some—an expert testifies and it very well may be that the conviction really relies on their opinion alone. And if that changes, that's something that should be—should get through the gateway at least. Should at least get through the gateway and that judges and prosecutors and jurors who had a part in that, you know, can be secure that that can be reviewed if it changes in the future.

**CHIEF JUSTICE MARKMAN:** Okay. Well thank you, Mr. DeGroff. Are there any questions? Appreciate your time.

**MR. DEGROFF:** Thank you very much.

**CHIEF JUSTICE MARKMAN:** The next witness will be Bill Vaillencourt, the Livingston County Prosecutor.

**MR. WILLIAM VAILLIENCOURT:** Good morning. May it please the Court. William Vaillencourt, Livingston County Prosecutor and President-elect of the Prosecuting Attorneys Association of Michigan. I thank the Court for the opportunity to appear and speak about these proposed changes. Michigan's prosecutors are dedicated to ensuring that justice is done and that instances of wrongful conviction are corrected. When there is information suggesting that a defendant might be innocent, prosecutors follow up and have that investigated. And when we determine that an innocent has been convicted, we work to rectify it. So we fully embrace the principles that motivate

these proposals. PAAM has filed a lengthy comment as to both the 6500 proposal and the ethics rule proposal. We've identified some issues and we've proposed some alternative language that we think accomplishes what the Court wants to but avoids some of the procedural issues that we've identified. Even Mr. Geshel [sic] acknowledged some procedural issues that might arise. One key issue is presenting information ex parte to a judge about potential evidence that might need to be investigated. Michigan's courts—or the court rules don't really accommodate how do you pre—how does a prosecutor present ex parte information to the judge presiding over the case so that they can then make a determination, well disclosure should be delayed. So we've proposed some language in both—for both the ethics rule and the 6500 rule that we believe helps address those. We're con—one of our primary concerns is having a grievance panel making determinations of complex factual and scientific issues that involve the weighing of evidence. We fully expect that there's going to be a two-track effort where a defendant requests a review along with the contemporaneous filing of a grievance or at least the threat of filing one. That raises the risk of creating unnecessary potential conflicts of interest for reviewing prosecutors and the real risk of inconsistent results. What if a court finds the evidence inconsistent but a grievance panel doesn't? To the extent there are disputes about whether new evidence raises a real question of innocence, those issues are best resolved in court, not through the grievance process. So we've suggested putting the disclosure rule—the disclosure requirements in the court rule. That would allow courts to make those determinations. It would also have the added benefit, quite frankly, of addressing the federal concerns because they're not bound by MCR 6.502. The proposed ethics rule is also problematic because it does not contain an explicit protection for good faith determinations that, with the benefit of 20-20 hindsight, turn out to be wrong. While the comment suggests that, well, there would never be discipline on that basis, the rules are explicit that the comments don't expand or narrow the scope of the rule. So if the Court is going to adopt the rule, we think it's critical that the good faith protection be included.

As to the proposed changes to MCR 6.502, we agree that there should be an actual innocence exception. We think the standard should be a little more objective one than the proposed "significant possibility." One easy change would be to allow prosecutors to file a motion for relief from judgment. The current rule doesn't allow [sic] prosecutor to do that so there have been instances where essentially prosecutors have been drafting motions for defendants to file so it can be brought in front of the court. We join the concerns raised by the State Bar and Mr. Baughman in their comments criticizing the broad scope of the definition of "new evidence" and I join Justice McCormack's observation that it does seem a little bit squishy. To the extent the Court believes that a specific definition of "new evidence" is required, we think that the

proposal by the State Bar is more appropriate. So I thank you for your consideration. I'll invite and take your questions, although I see my time is up.

**CHIEF JUSTICE MARKMAN:** Are there any questions? Okay. Well you've been—

**MR. VAILLIENCOURT:** Thank you very much.

**CHIEF JUSTICE MARKMAN:** Thank you. Next, we have John Smietanka, the former United States Attorney in Michigan. I don't see Mr. Smietanka here. Okay. Our next witness will be Amanda Tringl, who's with the Western Michigan Cooley Innocence Project.

**MS. AMANDA TRINGL:** Good morning, Mr. Chief Justice and fellow Justices of the Supreme Court. My name is Amanda Tringl. I'm a staff attorney at the Western Michigan Cooley Innocence Project. I'm here today with the director of the project, Ms. Marla Mitchell-Cichon, to express our whole-hearted support for the proposed amendments to MCR 6.502 and to 3.8. First, I'd like to thank you guys very much for the opportunity to be here today and for your time and consideration on this very important matter. I—many—I prepared some comments, and we've also submitted a written comment as well, and many of the comments that I've prepared today have already been addressed by Imran and Brett as well. So in the interests of time I'll just kind of make a coup—a few summary points to remind us what we're all actually here—

**CHIEF JUSTICE MARKMAN:** Can you please talk into the microphone, if you would?

**MS. TRINGL:** Sorry. Can you hear me know better?

**CHIEF JUSTICE MARKMAN:** That's better.

**MS. TRINGL:** Thank you. First, again as everyone—people in support of this has pointed out numerous times, all the proposed amendment to 6.52 [sic], in terms of the innocence exception, does is allows an innocent individual, when there's a significant or possibility of innocence, overcome that procedural threshold. And I just would like to really reiterate to the Court that the justice system has failed whenever an innocent person is wrongly convicted and serving time in prison. Finality is very important in many instances. However, the interest of the victim is not served, the interest of the defendant—the wrongfully convicted defendant is not served, the safety of the public is not served when the wrong person is convicted and serving time in prison. So thereby

allowing—and prohibiting defendants from bringing evidence of innocence, merely because of procedural bars, stands in the way of fulfilling the true purpose of justice. Next, I just would like to talk real quickly about the new changes in scientific evidence. Scientific evidence—science is ever evolving and change [sic] really rapidly. The—as you all know, the court system, the legal system does not move that quickly. I believe the language is very appropriate as proposed and that it will allow for—and I think most importantly one thing I'd like to point, while the language is broad, again this is merely a threshold requirement. There'll be a much more in depth evaluation done by the trial court even prior to allowing or requiring the prosecutor to submit a response. So I don't think the actual proposed language—it's not about allowing a defendant to present questionable evidence to bring an endless motion for relief. Rather, it's really about allowing the defendant to have a court review the—their claims on the merits about the questionable evidence presented at their trial and used to secure their conviction, in light of the new advances in science and changes. I see that my light is up so thank you very much for your time and be happy to address any questions you might have.

**CHIEF JUSTICE MARKMAN:** Well thank you very much, Ms. Tringl. We appreciate you being here.

**MS. TRINGL:** Thank you.

**CHIEF JUSTICE MARKMAN:** We now have the director of the Western Michigan Cooley Innocence Project, Marla Mitchell-Cichon. Did I fail to give a sufficient French emphasis to your last name?

**MS. MARLA MITCHELL-CICHON:** That was excellent, your Honor.

**CHIEF JUSTICE MARKMAN:** Okay. Thank you.

**MS. MITCHELL-CICHON:** Good morning, Mr. Chief Justice and members of the Court. Thank you for taking testimony on these two important issues today. I must confess we did, a little, take advantage of the time this morning as we brought two folks from the Cooley Innocence Project. But I thought it was really important as the director of this project to answer any questions that the Court has and maybe start out with a quote from Oscar Wilde, who said, "The truth is rarely pure, and never simple." And I think that is what the Court is trying to undertake here, balancing the issue of finality under 6.500 and the interests of Michigan citizens who are imprisoned wrongfully. And we have learned a lot over the last thirty years, since DNA testing, about how the justice system can go extremely wrong. And I think maybe it's best to end with a real person because what this Court does and what we all do as lawyers affects individuals. And one

of our last exonerations was LeDura Watkins. And Mr. Watkins was convicted in 1975 of a crime he did not commit. And the evidence against him included hair comparison, which as this Court is now aware, is not a scientific modality. Mr. Watkins actually had a decent lawyer at his trial. His lawyer, under the expert admission rules, objected to the admission of the hair comparison testimony but the judge—circuit court judge admitted the testimony. And that testimony, along with an informant, convicted Mr. Watkins. Again in the Court of Appeals, in 1976, Mr. Watkins challenged the hair comparison and lost. He filed another delayed appeal. He filed three post-conviction motions. And it was not until this Court reversed his pro se petition to order the Wayne County Circuit Court to look at whether or not he had met the threshold requirement, based on *People v Swain*, that Mr. Watkins had his day in court and the truth came out. Our office entered an appearance in that case and we were concerned about the procedural issues. But substantively Mr. Watkins was bringing the new scientific evidence to the court and, to the credit of Prosecutor Worthy, that office reached out to us and did the right thing and moved to join in our motion and dismiss the charges against Mr. LeDura Watkins. And in that dismissal order, your Honors, Wayne County acknowledged that our affidavit from an expert and the new FBI findings were newly discovered evidence. And for that reason, and for all the reasons that have been stated in support of these motions [sic] and changes in the rules, it's critical that this Court recognize that—recognize and we move forward to learn the lessons of wrongful conviction. And I'd just like to end, Justice Markman, with addressing your cost question because I know, as judges, that's important at every level. And there is a cost. There will be additional time spent but the benefit will far outweigh it because, as the other speakers have indicated, this is not about coming into court and saying, "I am actually innocent or I am innocent," and then there will be a court hearing. It just provides those individuals who are actually innocent the opportunity to get beyond the threshold questions. And similarly, under the ethical rules, it's not requiring prosecutors to do anything that a real honest and decent prosecutor would [sic] already do. It's giving all lawyers in the State of Michigan guidance on how to best to do that. So thank you so much for proposing these rules and listening to our comments this morning.

**CHIEF JUSTICE MARKMAN:** Thank you for your perspectives. Thank you very much. We move now to Item 4 on our agenda, Administrative File No. 2017-14 that concerns proposed administrative effort by this Court to require circuit court judges and county clerks to enter into certain agreements on the assignment and performance of certain ministerial duties. First witness will be the Livingston County Clerk, Elizabeth Hundley.

**MS. ELIZABETH HUNDLEY:** Mr. Chief Justice, may it please the Court. Elizabeth Hundley, speaking on behalf of myself and many of the other county clerks in Michigan.

We object to the proposed administrative order and request that it not be adopted. Reasons include: many of the matters that must be included in the agreement are not ministerial duties. We have been elected to our office by the voters of our communities; we have campaigned, debated opponents, and the voters have decided we're the candidates best suited to meet the—make the decisions required in this office. We've been elected with the expectation that we will use our professional skills, experience, and judgment to make those decisions. We are held accountable at each and every election for the decisions that we make. Second, many of the items that must be included in the agreement directly pertain to employment and discipline of employees. We're concerned that this may be exposing both the county clerks and the courts to additional liability that we currently do not face. Clerks and courts are co-employers with their funding units. If we start with an agreement that blends that, we are opening ourselves to liability we do not currently face. Clerks must also adhere—or many clerks must adhere to terms of bargaining agreements, as well as we're faced with limited funding. If an agreement can't be reached and requires funding we can't attain then the agreements will not be beneficial. We're also afraid that requiring this agreement may cause conflict where no conflict currently exists. Many of my county clerks, we don't have conflicts with our chief judges and we don't want to have that arise. Lastly, we are also concerned with the harm that may result to the public. One of the important principles underlying our government is the separation of powers. By separating governmental powers, we better avoid corruption. It's the county clerk that keeps open their ever-watchful eye to ensure that tregity—integrity of the court rule is preserved. We adhere to following the court's rules and guidelines that are presented by this Court. If judges have a voice in how we staff and who we staff our offices with, county clerk employees cannot perform with the autonomy necessary to report problems to the clerk without fear of appraisal [sic]. Some issues county clerk staff have brought to the clerk's attention include a judge or their staff back dating orders, a judge or their staff removing items from files, final proofs being taken on a case where the summons had expired and no service had been effectuated. This is just a small sampling of where clerks step in and insist—assist the court in correcting itself. If the separation of powers becomes too blurred, an abuse of discretion is allowed to take place and harm to the public is what may result. We strongly believe county clerks and chief circuit court judges, as well as court administrators, must strive for the efficient administration of our courts. However, mandating this behavior in many jurisdictions will not reach that goal. We want to prevent harm to the public. Therefore, we're requesting this Court not adopt the proposed administrative order.

**CHIEF JUSTICE MARKMAN:** Ms. Hundley, over the years it's been my observation that in the overwhelming number of Michigan counties, the relationship between the judiciary and the clerk's office has been a very good one, an amicable one,

a productive one. Can an argument be made nonetheless that in those very few counties in which that isn't true, and there are a few, that this might be a meritorious approach to try and rectify matters.

**MS. HUNDLEY:** I believe that there are certain counties where an agreement would be beneficial. I'm not sure what drove the timing of this matter. I do realize that there are counties that have a problem with that relationship, possibly requiring an agreement in individual counties but not requiring it in all would be a resolution to that matter.

**CHIEF JUSTICE MARKMAN:** Okay. Any further questions? Thank you very much. We appreciate you sharing your perspective.

**MS. HUNDLEY:** Thank you.

**CHIEF JUSTICE MARKMAN:** Our next witness will be former jurist of this state, now an attorney with Warner Norcross and Judd, Jonathan Lauderbach.

**MR. JONATHAN LAUDERBACK:** Chief Justice Markman, Justices, good morning. May it please the Court. It is my pleasure to be here this morning on behalf of the Michigan Association of County Clerks to explain the association's opposition to the proposed administrative order. Many of my comments have already been—my planned comments have already been articulated by Clerk Hundley. But on behalf of the association, the message that I hope you take away from my remarks is that Michigan's county clerks are absolutely committed to cooperation with the judiciary in their dual role as clerk of the circuit court. The association simply believes that this particular proposed administrative order is not the appropriate vehicle to do that. The five numbered paragraphs, the bullet points, in the proposed administrative order squarely address discretionary matters that are reserved to the executive branch: The compensation of county clerk employees; the number of FTEs allocated by the clerk to judicial duties; the method for hiring, performance evaluation, and discipline of clerk's office employees; the assignment of staff—particular staff assigned by the county clerk to pull files. That's my personal favorite; I can't imagine a more discretionary function than determining which particular employee within an office is best suited to perform that type of a clerical task.

**JUSTICE VIVIANO:** Does it make sense for there to be a separation of powers between the court and the official responsible to be the custodian of the court files?

**MR. JONATHAN LAUDERBACK:** Whether it makes—

**JUSTICE VIVIANO:** It seems to me, as I think it through, and you and I have actually had a conversation about this—

**MR. JONATHAN LAUDERBACK:** We have.

**JUSTICE VIVIANO:** That at every level of our court system, except the circuit court, the clerk is appointed directly by the court.

**MR. JONATHAN LAUDERBACK:** Correct.

**JUSTICE VIVIANO:** At our level. Certainly the Court of Appeals level. But also the district court level. And the probate court. And so here we are just in the circuit court world, where we have this antiquated system, where the court—we have an independently elected clerk. And in many counties, it does—it works fine. But in some counties it doesn't. And obviously we're not here trying to develop a system for the counties where it works fine. We're very happy with those. We wish they all—it worked fine everywhere.

**MR. JONATHAN LAUDERBACK:** Let me address if I may your ques—your first question, does it make sense? That's up to you. Because—and here's why, because that is our current law. District court clerk staff are employees of the court. That's not the case in circuit court. That's a function of the law. There may be a legislative solution to that but an administrative order is not the way to fix that problem. And I want to—if I may, I want to address Chief [sic] Markman's question to Clerk Hundley. There are counties—there are certain counties in the state where there have been problems. There are 83 counties in Michigan and I think there may be handful where there have issues in the past. Those are situational issues that need to be addressed for what they are but I submit that in those particular circumstances that we've read about in the news and that many of us are aware of, no written agreement is going to fix that. Or instructing people to sit down and enter into an agreement where there is already a standoff between a clerk and a chief judge, having the other 78 counties throughout the state enter into a written agreement to try to fix a localized very situational problem just isn't an appropriate solution. Again, the association is committed to working with the judiciary to look for solutions to issues such as electronic filing and all of the things—all of the change that's associated with that. This is simply an inappropriate vehicle in which to affect discretionary powers. So I thank you for your time.

**CHIEF JUSTICE MARKMAN:** Thank you again, Judge. We move on to Item 5, Administrative File No. 2017-16, which concerns a proposed amendment of our court rules requiring a trial court judge to provide certain advice to a pleading defendant. Our—

**MEMBER OF THE AUDIENCE:** Mr. Chief Justice, I was here to speak on the last item. Would it be possible?

**CHIEF JUSTICE MARKMAN:** Okay, I'm sorry. I didn't see you—

**MEMBER OF THE AUDIENCE:** I didn't realize I had to register on the list so—

**CHIEF JUSTICE MARKMAN:** Okay, well I didn't see your name on the agenda so that's the only reason I overlooked you. But please come up here if you would. This is Judge Tom Powers from Grand Traverse County.

**JUDGE THOMAS POWER:** That's correct. I'm Tom Power. I'm a circuit judge. It's Leelanau, Grand Traverse and Antrim Counties. And I am here to speak for myself, my colleague Judge Elsenheimer, and also for the three county clerks of Leelanau, Grand Traverse, and Antrim Counties. We met several weeks ago and we are unanimous in our hope that you do not adopt this new rule. County clerks are independently elected constitutional officials and to exactly determine where their authority ends and where my authority begins is difficult. There's overlap, there's gray area, and if you look at it too carefully, there are going to be disputes as to what auth—who has what authority to do which things. This order is going to force us to negotiate over a whole host of abstract and hypothetical issues that have not, up until now, been a problem. They're out there. They could be a problem but they haven't been. And now we're forced to negotiate and contest those issues instead of allowing us to do as we have done. When an issue arises, sit down with the clerk, work out what's best in terms of the pub—work for the clerk's office, what works for the court, and that has been very successful. I'm not aware in our—and I'm 25 years now as a circuit judge—I'm not aware that we ever had—even had to have the SCO [sic] come in to mediate such an issue. If there were a problem, they're available. And if you can't work it out, that's what lawsuits are for. There's nothing inherently wrong with that. But almost all the time, these clerks and courts can work these things out successfully. Under this order, each side will have to insist upon their rights or risk losing them because if you give them up in a written order, which is now approved by the Supreme Court, all of a sudden you can't change it without agreement and maybe not at all. So each side will have to insist on their rights on each of these hypothetical issues that are going to come up in these negotiations. It's going to force us to have a contest with our clerks and possibly damage a good and

constructive relationship. An example: The statute requires the clerk to attend circuit court sessions, all of them. I don't need to have them there for all sessions. They have busy work, the things that they need to do and I can free their staff up. For instance, civil motion days, I don't need them there. I don't need them there for non-jury trials. So we have a working relationship and each of the three counties is a little different, in each of the three counties, and it works fine. But if I'm—if we have to write this down, if I don't insist that we have in the agreement that the clerk has to be present, I will lose the right to have them present. And the clerks have similar concerns. Of course, the regional administrators, if you adopt this proposal, are going to be running around the state having to mediate all these hypothetical, abstract questions that are going to have to—that are going to be argued out in hammering out this agreement. The Supreme Court has administrative supervision of the courts. I think exercising your authority with this particular order will in fact force those of us who work for you, the clerks and the judges, to have conflict between us and fight on abstract and hypothetical issues. We do not need that sort of conflict between us. This last thing I'm going to say is something I'm sure my three county clerks would not agree with. It would be best if the circuit court had the records function and the clerk's function completely under their control with court employees, just as the district court does and just as your Court does. But that's not the situation we have. It would require, at the very least, a change in statute and maybe very likely a change in the constitution. And that's not going to happen politically. So it is better that we have a relationship of respectful equals and, on those rare occasions, when there's a cantankerous county clerk that is uncooperative or a judge who is difficult and unreasonable, then those rare occasions, I would say that's when the State Court Administrator's Office, maybe with a judge or a county clerk or two, should go in and help them mediate their dispute. And if it doesn't work out, then they can take the political consequences of going to court and explaining to their public why they're spending tens of thousands of dollars fighting it out over what appears to be a small point. So I would urge you not to adopt this proposal and I appreciate your time. And I apologize for not being properly registered.

**CHIEF JUSTICE MARKMAN:** No need to apologize but thank you for coming all the way up from—down here from Grand Traverse. Back to Item Number 5, our lone witness will be Angeles Meneses of the State Appender—State Appellate Defender's Office.

**MS. ANGELES MENESES:** [Adjusting the podium.]

**CHIEF JUSTICE MARKMAN:** You're experienced with that, aren't you?

**MS. MENESES:** Good morning and may it please this Court. I'm Angeles Meneses from the State Appellate Defender Office. I'm here today in support of the

proposed amendment to MCR 6.302, which would allow trial courts to advise defendants that, by entering a plea, they are giving up the right to appeal issues that might have otherwise been available to them after a trial. SADO is joined in support by the Board and subgroups of the State Bar of Michigan and we were recently notified that the Wayne County defense bar has also—is also in approval of this amendment. And I can ask the Board to submit something in writing to this Court should it require that. This amendment is necessary to ensure that defendants enter knowing, understanding, and voluntary pleas. It would put defendants on notice that entering a plea limits the scope of their appeal and waives most non-jurisdictional issues. It essentially ensures that defendants know what they're giving up before they enter into a plea. Furthermore, this would also streamline things on the appellate side. This is extremely important to SADO as our attorneys handle nearly 500 pleas a year. This amendment would decrease the number of defendants who appeal expecting to raise a number of issues, only to find out from their appellate attorney that they in fact waived those issues, which can lead to disgruntlement and—with the justice system at large on their behalf. Overall, the language in this proposed amendment strikes a balance between allowing trial courts to inform defendants that they are limiting their range of possible appellate issues by entering into a plea and not requiring trial courts to intrude into the attorney-client relationship. Unless this Court should have any other questions, I'll rely on the comment letter submitted by SADO to this Court.

**CHIEF JUSTICE MARKMAN:** Okay. Thank you for sharing your views.

**MS. MENESES:** Thank you.

**CHIEF JUSTICE MARKMAN:** Item number 6, Administrative File 2017-20, clarify—concerning a proposed court rule that would clarify what kind of [indiscernable] constitutes a final post-judgment order in a domestic relations cases [sic] for purposes of maintaining appellate rights. Our speaker is Scott Bassett.

**MR. SCOTT BASSETT:** Good morning, Chief Justice Markman, Justices. I am here on behalf of both the Appellate Practice Section of the State Bar and also the Michigan Coalition of Family Law Appellate Attorneys. Both groups submitted detailed comment letters in support of the proposal as drafted. I don't want to dwell on what's in the comment letters. However, the Michigan Court of Appeals did submit a comment letter on August 20<sup>th</sup> and the Appellate Practice Section has not met to consider that so I can't comment on behalf of the Section. However, the Michigan Coalition of Family Law Appellate Attorneys has, so I'd like to respond a bit to the Court of Appeals' comment. What they have said is that these post-judgment, particularly parenting time but also other issues that affect legal custody, such as health care, religious upbringing,

school enrollment, are best dealt with as leave apps as opposed to appeals by right. They think primarily because of the speed by which they can be resolved. We don't think that that's the case. There is nothing inherent in the leave app process that is faster than an appeal by right, particularly if it—the case is classified as a child custody case. The vast majority of child custody appeals, which are at least currently appeals by right, are resolved within a matter of six, seven, eight, nine months, occasionally a year. They are expedited on the docket. We presume that cases of parenting time, cases affecting legal custody rights would fall into that same category and would be similarly expedited. The leave app process, of course, and a number of you sat on the Court of Appeals, you file your application for leave and you often wait three, four, five, I've had some at six months before we know if the court is even going to hear the case. If the court hears the case, there's a new round of briefing, obviously, and we would often have that decision stretched out over longer than a year, sometimes 18 months. So the concern that this is a faster way to do it, by leave, just doesn't stand up. The Court of Appeals proposed two proposals as alternatives. We think they're both unworkable. The first one is actually stricter than the current rule and would only allow appeals by right for actual changes in custody, legal and physical, and not allow an appeal by right from the very important issues that affect legal custody rights, such as school enrollment. I was last before this Court almost a year ago when the Court held a MOAA on the *Marik* case. *Marik* is kind of an example of why we should have the rule that you've proposed. And it's a case that was originally an application for leave in the Court of Appeals. Leave was denied. This Court overruled the *Ozimek* case, sent *Marik* back to the Court of Appeals where they accepted jurisdiction, and it ended up being a published decision. It's because these kinds of cases are very factually complex and they really do deserve more of a look than you might get in your typical leave app process. The second proposal that the Court of Appeals came up with is to have an appeal by right only for permanent changes in the established custodial environment. There isn't any such thing as a permanent change in the established custodial environment. All custody orders are inherently modifiable. That would be an entirely new standard that we can't fit into any of our existing appellate case law. We wouldn't know how to apply that. So we don't think that's workable either.

**JUSTICE VIVIANO:** What if it said, what if it said something like "material" or "significant change"?

**MR. BASSETT:** Justice Viviano, what that gets us back to is the problem we have now. The current language of the current rule, of 7.202(6)(a)(iii), says "affects custody." That's a very hard thing to determine. We'd have the same thing with determining what is "material." What we see is, we can file in a claim of appeal in a case that we think affects custody, it goes to the jurisdictional review attorneys in each of the district

offices of the Court of Appeals, we sometimes get inconsistent results because it's not easy to come up with, you know, what does that mean? The beauty of the rule that's been proposed is that it's easy to apply. If it's parenting time, if it affects one of the three major areas—healthcare, you know, medical treatment, religious upbringing, or school enrollment or actual changes in custody—those are going to automatically be appealable by right. It's an easy to apply rule. What you're suggesting with "material," we'll have the same problem we have now with "affecting custody."

**JUSTICE VIVIANO:** Isn't it a little bit better? I mean it gets—"affecting custody" is pretty broad. Now we're highlighting one aspect of how it could affect custody and sort of inviting the courts, I guess, to develop a standard to help practitioners understand that. So you know we—obviously, there's different ways to go. We could have the laundry list, which is a bright line, laundry list, the one we publish. But we could also—or we could take the very restrictive approach that the Court of Appeals seems to favor or we could—this seems to me a middle ground approach that may sort of give some consideration to both sides.

**MR. BASSETT:** The appellate practitioners view the proposed rule as kind of a middle ground approach because, while you say it's a laundry list, it isn't exactly because it leaves out things that until 1995 were appealable by right—enforcement issues in domestic relations cases, spousal support modification, child support modification. All of those things before the 1995 rule change were appealable by right in post-judgment domestic relations matters. So what the proposed rule focuses in on is only those things that are central to the welfare of children, which I think—we think is a good line to draw. Thank you.

**CHIEF JUSTICE MARKMAN:** Thank you very much, Mr. Bassett. Our next witness will be a returnee, Rebecca Shiemke, again from the Michigan Poverty Law Program. You're doing heavy duty today.

**MS. SHIEMKE:** Thank you.

**CHIEF JUSTICE MARKMAN:** Thank you.

**MS. SHIEMKE:** I'm here to speak on behalf of, again, the Legal Services Association of Michigan who submitted comments in support of the proposed amendment as written. And I just really wanted to touch on two kind of primary issues. One is following up a little bit on what Mr. Bassett talked about in terms of the need for clarity and the other issue is the concern addressed by some that it will lead to abuse of the process or opening the flood gates to appeals. As to the first issue, the need for

clarity, again the proposal before this Court does reduce the ambiguity of what exactly it means whether an order affects custody. By creating this list of orders that are clearly appealable by right, it reduces that ambiguity, makes it much easier for families to—and for attorneys to determine whether a case should be appealed or not. The fact is that it will protect some limited family resources, it will eliminate the need under the current propose—under the current rule to file when it’s unclear whether an order affects custody to file a claim and an application, which increases the cost to families. By creating this specific list of orders that are appealable by right, families know whether to file a claim or not. And again, it helps families make decisions about the limited resources they have. There’s concern that the—this list of orders that will be appealable by right will lead to an abuse of the process that attorneys or pro se litigants will just appeal every single parenting time issue that they don’t agree with. I don’t think that—in my experience, I don’t think that’s likely to happen and I am one who is concerned about abuse of the process in terms of representing domestic violence survivors where abusers do at times abuse the court process in order to continue that abuse of their partners. Those individuals are going to do that to the extent that they can regardless of what the rule says. And I think that there are current practices already in place that allow courts—the appellate courts as well as the trial courts to address abuses. Vexatious appeals can be sanctioned. Prevailing parties can get costs and fees. So I think that can be addressed, and I think the fact that these orders affecting—this list of orders that are appealable by right affect important constitutional rights of parents to the care and control of their children that was recognized by the United States Supreme Court and this Court in a number of cases. I think that important policy concern to give families the right to review those important constitutional decisions outweighs the potential increase in cases. And I see my time’s up. I’m happy to answer any questions.

**CHIEF JUSTICE MARKMAN:** Thank you again, Ms. Shiemke.

**MS. SHIEMKE:** Thank you.

**CHIEF JUSTICE MARKMAN:** Thank you. Our last item is Item number 9, Administrative File Number 2017-29, which pertains to an amendment of the rule—Michigan Rule of Professional Conduct that would define the professional responsibilities of a lawyer inadvertently receiving documents. Alan Gershel. Mr. Gershel, our state Grievance Administrator once again.

**MR. GERSHEL:** Thank you. Briefly, we would support the adoption of the rule. The only change we would make is add a cross reference to 2.302(B)(7). The reason why I think that’s helpful is that it would provide a lawyer who perhaps [was] inadvertently sent privileged material, it’ll provide a roadmap as to how to go about dealing with that.

Whether to destroy it, go to a court, secrete it somehow. But at least it gives them some guidance on what to do. I should add, though, that this is—for as long as I've been the administrator, this has not been an issue. I don't recall a single case where this has been brought to our attention. That a lawyer who inadvertently received privileged information acted inappropriately when receiving it. So I'd like to think that lawyers tend to work that out between themselves if and when this happens. But, again, we would support the inclusion of 4.4 with the cross-reference back to 2.302(B)(7).

**CHIEF JUSTICE MARKMAN:** You're going to waive the rest of your time?

**MR. GERSHEL:** I will. Thank you.

**CHIEF JUSTICE MARKMAN:** Good. Thank you very much. Our last witness today will be attorney—an attorney at Varnum law firm, John Allen.

**MR. JOHN ALLEN:** Mr. Chief Justice, members of the Court, good morning. Thank you for the opportunity to speak here. When I think back to the earliest days of my practice, now almost a half century ago, I remember sitting down with those first few clients and undergoing the epiphany of hearing them tell me things that I knew they would tell no one else. They would then ask me advice. Usually on how to comply with the law and I would give it to them. And for the last half-century I continued to be amazed that almost always, 99.9% of the time, that client follows the advice even though they don't like it, they didn't want to hear it, might cost them money, or we've told them not to do something they really wanted to do. The attorney-client privilege in America is the greatest law enforcement vehicle on the planet because that conversation I just described to you happens hundreds of thousands of times a day in America. And almost, almost every time, the client obeys the advice. It's all done in secret. It's done without government involvement. There's no cops. There's no regulators. There's no taxpayer expense. It's a marvelous device and it deserves the great attention and protection that you and the AGC and the State Bar of Michigan are giving it. My concern with the proposal is not that. My concern is the inconsistency of the proposal with your court rule 2.302(B)(7). Your own staff noted this when you published the notice and said that at least the last paragraph of the proposed Comment might be inconsistent with that court rule, and it certainly is. But I think it's also the proposal, the rule itself. In discovery, where this usually comes up in litigation, 2.302 says that the receiving lawyer has no duty to do anything until he or she is notified by the sender that there was an inadvertent production. And that's reasonable because only the sender knows whether there's a claim; only the sender knows whether there was inadvertence. The rule 4.4 proposed, and it is similar to the ABA rule which has a similar problem, turns that on its head and makes the receiving lawyer come to a degree

of either knowledge or should have known, and then it's the receiving lawyer that has the duty to give the notice, which frankly to me doesn't make much sense. I think the rule that's used in civil discovery, same rule that's in Rule 26 of the federal rules, makes a lot better sense, and that is, before you impose a duty on a receiving lawyer to do anything, the sending lawyer ought to be the one with the duty to give the notice. And let me tell you another thing that the receiving lawyer has hanging over his or her head if they themselves look at something and it says "privileged and confidential" or "plan for the litigation," something obvious, that makes it likely inadvertent and that is a series of cases, particularly in the federal courts, that say if a receiving lawyer looks at and reviews what is obviously inadvertently sent privileged information, that receiving lawyer and potentially the entire lawyer firm will be disqualified from serving in the case. Probably the lead case is *Maldonado*; it's mentioned in the article that I sent to you. So there's a dilemma on the part of the receiving lawyer even if notice is not given by the sender. But I certainly don't think it ought to be the subject of a disciplinary proceeding. Where we run into these rules these days is not so much before the AGC. They just told you, it doesn't happen; they've never heard of it being brought up there. Where we run into the rules of professional conduct, not only in this context but in every, is in civil proceedings where they are weaponized as a means of moving to disqualify or causing some other issue to arise in the litigation, or in a fee dispute, or in a malpractice case. And they are used to establish standards of conduct. And I encourage you not to use the rules for that reason. That is not what they are there for. They're not there for better practices. They're there as a strict or absolute liability, quasi-criminal code to regulate serious misconduct by lawyers. There's other branches of the law that take care of rest of it. It's also why the Comments are not a good place to put substantive content into the rules. First of all, your own decisions say the Comments in this state aren't law. The only authoritative law is found in the rules themselves. Many states no longer publish Comments for that very reason. But it certainly is not a place—anyone who's been involved in a rule drafting process knows that the Comments are the burial place for the compromises and the proposals and the discussions that were not adopted by a majority of the rule-making group.

**CHIEF JUSTICE MARKMAN:** Well there's our undertaker. [Gesturing to Anne Boomer.] Your time is up, Mr. Allen. We appreciate your thoughts very much.

**MR. ALLEN:** Thank you very much. Have a good day.

**CHIEF JUSTICE MARKMAN:** Is there anyone else who we're overlooking? We will then stand in adjournment. Thank you.