

MICHIGAN SUPREME COURT

PUBLIC HEARING

March 13, 2019

CHIEF JUSTICE MCCORMACK: Good morning. Welcome to our March public hearing. We had four speakers endorsed. I believe three are here so far so we will proceed and—oh no four, Angela is here. Judge Sherigan is here. Welcome. We have all four speakers here. I think most of you have done this before so you know our rules are three minutes. Obviously if we have more questions, it could go on longer. We have special rules for Mr. Olsman—30 seconds. We start with Item number 3, which is the lawyer advertising rule. Mr. Olsman.

MR. JULES OLSMAN: Thank you very much. Good morning to all of you. May it please the Court. Here we are back again on Rule 7.2 but the proposed rule as the Court sent it out on September 27th, 2018, seems to fit the bill with the exception that I would request that terms “icon” and “image” be added to that rule following the words “web address.” And I—I say that because of the type of advertising that’s out there where there is no name, there is no number, there is no nothing candidly. Again we’re back to the whole issue of protecting the—the whole issue here is to protect the public, make sure if somebody calls a number or goes to a website, that they’re assured that the person they’re talking to is in fact an attorney, that it’s real, and that their interests are going to be protected here.

CHIEF JUSTICE MCCORMACK: Mr. Olsman, do you object at all if the—if that information is on the website and not necessarily on the advertising itself? As long as one—Mr. Gursten—

MR. OLSMAN: No, and I, in fact, Justice, the comments that were made by three of the people who wrote in talk about this Google click business and I’m too old to know what that is so I had to spend some time figuring it out. And in fairness, this has been part of a collaborative effort for—involving myself, Dan Quick, Professor Sedler, Ken Mogill, a number of people—I’m not—this is above my pay grade candidly.

CHIEF JUSTICE MCCORMACK: That’s supposed to make us feel better?

MR. OLSMAN: No but the argument there is—there is one reasonable statement that could be made about that, is that the Google click isn't the ad. The Google click is the portal to get into the ad and as long as—we're back to the same point—as long as the ad says who the lawyers are that will be providing the services, fine, fine. Do whatever you want. But to advertise with complete anonymity, public—services that the public—people are going to for serious personal matters, whether it's financial, whatever it may be, there should be some assurance that the person who's going to do it is competent, is—well, I guess competent is a, is a more subjective point—but minimally is a lawyer.

CHIEF JUSTICE MCCORMACK: But it sounds like you don't object as long as that information is on the website when somebody goes to the website.

MR. OLSMAN: Absolutely fine. And I—when we were here last summer, that came up with respect to my colleague, Mr. Kresch, who has the "1-800 Law Firm" building and I said if you Google "1-800 Law Firm" you go right to their website. You can see every person that works there and what they do in that business. I mean that's fine.

JUSTICE VIVIANO: Is it fair to say you're just trying to pick up the worst offenders?

MR. OLSMAN: Another way to say it would be, I—if you look at in a vacuum you could say—and this was Mr. Mogill's point—well, it's a small amount, it's a small number. It doesn't—I don't know if you even have to say worst offenders. I think we have the right to regulate it—

JUSTICE VIVIANO: By that, I mean that people that it's really hard to find out who's behind it.

MR. OLSMAN: Yes.

JUSTICE VIVIANO: Who's behind the—

MR. OLSMAN: Sure. And unfortunately the fact that those kind of entities exist, or case brokering services, or people that aren't lawyers that—if you call them and say "who's there," we—you know—we don't know, and I mean we can't tell you that kind of stuff. We're not—this is serious business and it—when I was here back, I think it was June of last year, Justice Markman raised the point about, well maybe we should just wait and see what the ABA does and you know I'm like, okay, well, I'm not going to tell

you don't do that but I don't think that—I just see what we have here as being pretty close to what we had before, which is fine, but Janet Welch was here and she heard the argument and she said, you know the real—the better argument is , we're officers of the court. This is—we don't sell plumbing supplies. We're not selling hardware. We're officers of the court. I mean there's got to be some standard to which you can be held. I did see one of the comments who pointed—one of the commentators, person who wrote in, talked about, analogizing this to a political campaign. And not that I would understand *Citizens United*, but Professor Sedler indicated that in *Citizens United* they don't say that all speech can't be regulated. They said that Congress has the right to lit—to regulate political speech and things like that. Like if you had a button, and it said "Jules for Judge" and it just didn't say "paid for by the Committee to Elect Jules for Judge" that, well, that's okay but Congress reserves the right to regulate that.

JUSTICE VIVIANO: Let me ask you one question because you're out of time but you want to add two words, "icon" and "image"—

MR. OLSMAN: Correct.

JUSTICE VIVIANO: Looking at my handing Dictionary.com definition of "icon," and the first definition is "a picture, image, or other representation" so you have the view—

MR. OLSMAN: Image—the word—singular word image is fine. I just look for all the ways—

JUSTICE VIVIANO: Icon. Icon would be the broader term, I think.

MR. OLSMAN: I just look for the ways somebody is going to say that doesn't include me. Or that isn't what I did. I'm just looking for, you know—I know my colleagues. Somebody is going to say that's not, that's really not—it's a sketch, it's not a picture, or something like that. That's fine. I think the Court knows exactly what we're aiming at here with regard to this. So, you know, based on all the commentary and based on what was said here back in June, I don't think there's much disagreement about this and I think that the notion that you're going to come up with perfect solution, or anybody will, is—you know the old admonition not letting perfect stand in the way of the good, so—

JUSTICE CAVANAGH: Can I ask you a question about, your thoughts on—there had been some concern about the impact of this rule on, you know, building

advertisements where you have the name of the law firm on the building. Or swag, you know, what have you. Does the—

MR. OLSMAN: What does that term mean? Somebody else used swag.

JUSTICE CAVANAGH: Swag. You know, pens—

CHIEF JUSTICE MCCORMACK: Water bottles, umbrellas, like hats, law firms give you a coffee mug that says, you know—

MR. OLSMAN: I told you, I'm too old for this.

CHIEF JUSTICE MCCORMACK: I know. You are.

JUSTICE CAVANAGH: But by my read, I would think that the introductory phrase of, "for the purposes of media advertising," would cover that so—or would, would, you know, naming on a building, identification on a building, wouldn't be for the purposes of media advertising?

MR. OLSMAN: Well, there's obviously—somebody else could argue it most certainly is otherwise you wouldn't want it on the front of your building. That may be—

JUSTICE CAVANAGH: Well it may be advertising but not *media* advertising.

MR. OLSMAN: I concur in that. And again, we're back to the point that, that was raised that if you Google—take for example my colleague Mr. Gursten whose law firm operates under the name of "Michigan Auto Law." You Google that, their whole law firm comes up instantly. You know who's there. I mean, they're not hiding behind anything. The people who are hiding are the ones who are of concern.

CHIEF JUSTICE MCCORMACK: The Lion one; the Goldstar one. They wouldn't tell me who they were. I called them. We got you. I think we understand. Thank you very much, Mr. Olsman.

MR. OLSMAN: Thank you much. Nice to see all of you. Thank you.

JUSTICE CAVANAGH: Thank you.

CHIEF JUSTICE MCCORMACK: The next item is the—Item number 5, the proposed amendments to Michigan court rule 6.425. And our first speaker is Bradley Hall. Mr. Hall.

MR. BRADLEY HALL: Good morning, Justices. As proposed, this amendment scares me a bit. The overwhelming majority of trial courts in the state, and court administrators, and clerks and others, I think, would accept a request for counsel that's handed in at sentencing, or mailed to the judge's chambers, or finds its way to some other room in the courthouse, and isn't properly filed with the clerk, as most lawyers understand that term. But there are judges, and I won't name names in this hearing, but there are judges who we see who will deny requests on day 43. Or where, in the old form, it wasn't notarized in the right place or, or a piece is missing from the indigency portion or somebody said during a presentence investigation interview that he, you know, is hoping for a big recording contract and so his ship's going to come in and well he's not indigent. So we see these things—

JUSTICE VIVIANO: How do we—I think the case that motivated this proposal was one where the defendant claimed that he had handed the form to the bailiff in the courtroom. And the court, of course, has no way of verifying that type of a claim. So the idea was, no it should be filed—maybe broadened to the request being made on the record. But how do we deal with a situation where it's unverifiable so then any time a person claims they did it, do we then have to credit that claim or, I mean—how do we ever enforce the limitation, I guess?

MR. HALL: I think that the proposal to require a trial court to accept it if tendered at sentencing would address the problem that apparently prompted this proposal.

JUSTICE VIVIANO: So you agree, filing would be okay? You have no objection to filing? But you're saying filing or received on the record in open court?

MR. HALL: I was prepared to support the Board of Commissioners, State Bar Board of Commissioners, proposal, which adopts the vast majority of what we suggested but keeps the word "filing" because it defines the word "filing" to include tendered at sentencing and should be deemed filed when received by the court, which makes me feel much more comfortable. Last week I sent—

JUSTICE VIVIANO: But tendered on the record, right? In open court. Not tendered after the case is—

MR. HALL: Yes. Not handed to a bailiff, etc. But the absence of that provision today apparently means somebody will hand it to the bailiff on their way—as they’re being led out of the courtroom under the assumption it’s going to be turned in and probably it would in 99% of cases but they come up. But if the court rule requires the trial court to accept it at sentencing then I think it provides that opportunity on the record rather than forcing it to be handed to a bailiff. What concerns me about the word “file it”—“filed,” still, even with that additional language that we suggested and the Board of Commissioners endorsed is—you know, I’ve seen a draft, I don’t think it’s official, but I’ve seen a draft of CC 265, the request form, and what it would look like if the Court adopts the word “filed” and it tells a defendant, “you may request an attorney by completing the request for appointment of attorney section below and filing it with the trial court within 42 days of sentencing.” I mean it says you file by sending it here but I can see indigent defendants who are incarcerated, in transit, etc., saying “I don’t know how to file this.” I mean, this seems very complicated. To the extent the rules are inconsistent, I think it’s appropriate here. We want—I think we want a liberal mechanism to allow indigent, typically incarcerated, defendants to request counsel and it doesn’t—I don’t think we need have consistency just because it makes us feel more satisfied. I think, I think the language should remain “completed and returned” with the additional pieces.

CHIEF JUSTICE MCCORMACK: But—so you—I think I might—you lost me at the end. So your objection now is to the draft form that is supposed to effectuate the rule?

MR. HALL: This is something we can take up—this is something we can take up with the forms people.

CHIEF JUSTICE MCCORMACK: With the Forms Committee?

MR. HALL: But if this Court adopts the Board of Commissioners’ recommendation, okay, we’ll change it to “filed” but we’ll redefine “filed.”

CHIEF JUSTICE MCCORMACK: Right.

MR. HALL: That makes me feel much more comfortable but—

CHIEF JUSTICE MCCORMACK: Right.

MR. HALL: But, you know, if that language then makes it onto the form then—and this is how it’s communicated to a defendant, that concerns me.

CHIEF JUSTICE MCCORMACK: So we have to look at the form. Okay, yea.

MR. HALL: Yea, I think so. I think—I mean there are other reasons to look at this form as well, to direct trial courts that they must accept it at sentencing, etc. But in any event, my biggest concern and what prompted me to come is that the Court might be inclined to kind of, “well, if the Board of Commissioners supports the word ‘filed’ we’ll go with ‘filed.’” I’m okay with it but only with the other pieces. I think it’s a dangerous road without defining the word “filed” more liberally.

CHIEF JUSTICE MCCORMACK: Thank you.

MR. HALL: Thank you.

CHIEF JUSTICE MCCORMACK: And next we have Steven Helton on this same topic.

MR. STEVEN HELTON: Good morning. Thank you very much for allowing me the opportunity to comment. My name is Steven Helton. I’m an assistant defender with the State Appellate Defender Office. Before that, I was a MAACS roster attorney and about half of my assignments came out of the 3rd Circuit. So I would just like to talk to the Court a little bit about the likely practical effect of increasing the things that go wrong when a defendant attempts to request counsel. So on many, many occasions, I have had a client who had their request was deemed submitted late but it was clear they had attempted to request counsel within the 42 days. In those situations I would usually file a motion to reissue the judgment of sentence with the trial court. I know it’s also common to file a motion to reinstate the claim of appeal. Generally, where it’s clear that the attempt was made to submit it, the People would file a response stating that they neither, you know, agree with or oppose the motion, and leave it to the court’s discretion. So we have to have a hearing on the motion and the trial judge is almost always sympathetic to what occurred and will grant the motion. I think in one case, which was a more complicated case than usual, it was denied. But I think only one case I had it denied. So it seems like a rule that increases the number of things that could go wrong. Will lead to more of these types of motions being filed, which will increase the burden on parties for both—on counsel for both sides as well as trial court judges and slow down the merits being reached on appeal. And it doesn’t really appear that any stakeholder would be benefited by this modification. So I would strongly encourage the Court not to adopt the proposed modification.

The other thing I just wanted to briefly comment on is the Prosecuting Attorneys Association of Michigan’s proposed modification to subsection (E)(1)(e) to omit the

requirement that sentencing judges articulate reasons, quote, justifying that specific departure. Whether that language is still applicable and appropriate post-*Lockridge* and *Steanhouse*, it's currently before the Court in *Dixon-Bey* and so I don't think it makes sense for the Court to modify the rule before it's actually announced where the ball stands. And if the Court has any questions, I'd be very happy to answer them but otherwise thank you very much for your time.

CHIEF JUSTICE MCCORMACK: Thank you for being here. We appreciate it.

MR. HELTON: Thank you.

CHIEF JUSTICE MCCORMACK: And our final item is Item number 7, which is a proposed amendment to Michigan court rule 3.993 and Judge Angela Sherigan from the Little River Band of Ottawa Indians is here.

JUDGE ANGELA SHERIGAN: Thank you very much. Good morning. I am actually here on behalf of the State Bar of Michigan today.

CHIEF JUSTICE MCCORMACK: Oh, sorry. I identified you on the way you were on my sheet. Thank you for being here.

JUDGE ANGELA SHERIGAN: I'm here to comment on this rule. This rule proposal originally came to the State Bar of Michigan through the Representative Assembly from the Indian American Law Committee. The Indian American Law Committee, as you all are aware, is a [sic] instrument that the Tribal Federal State Federal—Tribal State Federal Judicial Forum—uses to put into action the recommendation. The forum was actually a creation of the Michigan Supreme Court so I'm very happy to be here today.

The current court rules do not allow all of the appeals that should be covered as a matter of right under the Indian Child Welfare Act and under the Michigan Indian Family Preservation Act. Specifically, under the Indian Child Welfare Act, it is 25 USC 1914. MIFPA, the Michigan Indian Family Preservation Act, has a very similar provision that allows for appeals for violations of 1911, 1912, and 1913 of the federal code. Unfortunately what is happening in the Court of Appeals is that these are being treated as discretionary because they are not final orders. The Court of Appeals inasmuch as noting this in *In re McCarrick versus Lamoreaux* [sic: *In re McCarrick/Lamareaux, Minors*], suggested that the Michigan Supreme Court consider modifying MCR 3.993 to expand the permissible appeals directly to the court so there was no confusion to the Court of Appeals what is matter of—right of appeal.

The comments that had come in written to the Supreme Court Administrator's Office, none of the comments were opposed. The Court of Appeals did actually look at the rule and they did make a comment saying they are not taking a position one way or the other but they are not objecting. The Michigan Judicial Association did weigh in on it also and they support it. This certainly—if this proposal is adopted it certainly would clear up the discrepancy between the federal law, the now Michigan law, and the court rules and allow the appeals that are given as a right under the Indian Child Welfare Act and the corresponding Michigan Indian Family Preservation Act, it would help all children in Native American communities because the ultimate, um—I'm losing my word here—the ultimate consequence for a violation of this is that it's invalidated and you start over. If the Court of Appeals is not able to hear these in a timely fashion then what happens is that cases drag on for two years and then two years later you're invalidating something that could have been invalidated in the first 45 days. Thank you.

CHIEF JUSTICE MCCORMACK: Thank you much for being here. Thank you all. We appreciate your input. It helps us do our job.