**MICHIGAN SUPREME COURT**

**PUBLIC HEARING**

**March 24, 2021**

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**CHIEF JUSTICE BRIDGET MCCORMACK:** Good morning, everyone. Welcome to the Supreme Court's March administrative public hearing. We have twelve endorsed speakers this morning on six different proposed rule changes. As we always do, we ask the speakers to limit their comments to three minutes. If the Court has questions, you will probably be on for a little bit longer than that. But otherwise we ask everyone to please keep the three minutes so we can hear from everybody this morning. We're grateful that you're all here. We will start with the first item for which we have an endorsed speaker and this is a proposed amendment to Michigan Court Rule 6.502 that would eliminate the requirement to return successive motions to the filer. We have one speaker endorsed for this item and it's Professor Imran Syed. Professor Syed, you may proceed.

**PROFESSOR IMRAN SYED:** Good morning, Chief Justice. As the Court is aware, I submitted on behalf of my Innocence Clinic colleagues a letter that details our views on this particular change. I won't rehash those details. I'll just add a couple of small points. First, the rules pertaining to successive of 6.500 motions are anything but simple to understand. I know the Court has tried to clarify in recent years. How the *Cress* claim standard fits with 6.500; what is and isn't appropriate to present on a successive of 6.500. I think the easy lesson out of that is that these are difficult determinations in some cases and they should be left to trial courts to make in the first instance. And there should always be the possibility of a leave application because, as the examples in my letter suggested, there are meritorious claims that are overlooked sometimes by the trial courts who may just misunderstand whether a certain piece of evidence qualifies as new evidence for a successive motion or not. So the rules, in particular the rule eliminating the provision that says there may not be an appeal, which as I described in my letter has generally always been a dead letter anyway, I think is very important—and I do apologize if my Internet is struggling, which is—and—

**CHIEF JUSTICE MCCORMACK:** Uh-oh, you got frozen for a second.

**PROFESSOR SYED:** Okay. The only other point I wish to make is I support the suggestion in the State Bar of Michigan's letter as far as adding the words "was filed" to the rule to show that the operative date of—for successive motions is when the last motion was filed. However, the letter suggests adding the date with respect to the provision of retroactive changes in law. I think the words "was filed" should be added to both the retroactive change in law and the new evidence parts of the of the successive motion rule. The Court of Appeals issued an opinion, a published opinion, in the *Swain* case in 2010 which clarified that the operative date for whether the evidence you're now presenting is new is whether you had it when you filed your last motion but that—this idea that we start counting from when you last

filed the motion is not clear in the rule itself and I think it would be—it would be certainly a benefit to clarify it. Other than that I would obviously, you know, stand by everything that was said in our letter and welcome any questions.

**CHIEF JUSTICE MCCORMACK:** Are there any questions for Professor Syed. Thank you so much for your written submission and for being here this morning. It's very helpful. We appreciate it. Have a great day.

The next item is item number six—I'm sorry item number five. This is the proposed amendment to Michigan Court Rule 9.261 that would allow the Judicial Tenure Committee—Commission to share information with two separate divisions of the State Bar: The Judicial Qualifications Committee and the Lawyers and Judges Assistance Program. We have one speaker endorsed on this item and it is attorney Michael Leib. Attorney Leib, you may begin. You are muted. Attorney Leib, we can't hear you. Why don't I let you work on that and we're going to move to the next item. We'll come back to you; we can circle back so you don't have to sit here, figuring that out in front of everybody, okay?

Okay. We will move to item number six and this is a proposed addition of Michigan Court Rule 3.906 that would establish a procedure regarding the use of restraints on juveniles in court. We have four speakers endorsed on this item. The first is attorney Christina Gilbert from the National Juvenile Defender Center. Attorney Gilbert, you may begin.

**MS. CHRISTINA GILBERT:** Thank you, Chief Justice McCormack. Hello, my name is Christina Gilbert. I'm a senior staff attorney and policy counsel at NJDC. Thank you for giving us this opportunity to talk about how this proposed rule comports with national best practices, creating a presumption against the automatic shackling of young people in court. Before talking about shackling itself I think it's important to note the racial disparities in the juvenile justice system. Nationally, children of color are disproportionately arrested, charged, and confined in comparison to white youth. And Michigan is no different. During our most recent assessment of the juvenile defense system, we found that many youth confined in Michigan's facilities we're youth of color. And youth who are confined have often experienced trauma, been involved in the child welfare system, and had difficulties in school. And we need to note that these mostly black and brown children are the children that are walking into Michigan's courtrooms in chains. The practice of automatically shackling or restraining a youth during a court proceeding impedes the attorney-client relationship, chills a child's constitutional right to due process, runs counter to the presumption of innocence, and draws into question the rehabilitative ideals of juvenile court. Children are different than adults and the juvenile justice system is different than the adult criminal justice system. The physical and mental harms and trauma caused by shackling youth are broadly recognized and documented by juvenile court leaders and other juvenile justice system professionals, adolescent behavior specialists, and national associations of judges, prosecutors, psychologists, child welfare professionals, and others. There's strong evidence that shackling impairs a used ability to receive and express information effectively and denigrates the opportunity to promote self-regulation. Indiscriminate shackling goes against the tenets of procedural justice and there are alternative

measures to ensure safety that are effective. Currently 32 states, including DC, have limited the use of restraints on children in the courtroom, with the majority banning all shackling except after a finding of need due to flight or safety risks. Experts continually have noted a link between the use of restraints and resulting trauma, and shackling often involves a sense of powerlessness, betrayal, fear, humiliation, and pain—many of the same feelings associated with abuse. Unfortunately, we know, as I mentioned, that many youth in the juvenile justice system have had multiple incidents of trauma. Additionally, based on NJDC research during the time of our outreach in states that have passed rules and laws regarding the presumption against shackling, there have been few, if any, incidents following the change in court rules or law. For example, in Maricopa County, Arizona, after nearly 2,500 detained youth appeared in court once the county began limiting shackling, the court had remained safe and they had no incidents, no escape attempts. Connecticut ended indiscriminate shackling in 2015 and after 1,500 youth came through the court, 94% of them were unshackled. There was only one escape attempt but the youth just walked out of court and later that day turned himself in. We've also heard consistently from many judges that not only has ending the automatic shackling of youth not caused problems but it's also made improvements in the court process. And finally, I just want to note that this—we have to remember that this is about the pers—it's a presumption against shackling. Judges still will maintain discretion in their own courtrooms. I'm happy to answer any questions. Thank you so much.

**CHIEF JUSTICE MCCORMACK:** Thank you, Ms. Gilbert. Thank you for talking really quickly to get all that in there. Are there any questions for Ms. Gilbert?

**JUSTICE DAVID VIVIANO:** I have one or two. Thank you. Ms. Gilbert, can you help me to understand what—how you would describe indiscriminate shackling? Is that the shackling of all juveniles regardless of what crime they're charged with? Or is there a different way that I should understand that concept? Did we lose her?

**MS. GILBERT:** —any coming from detention, regardless of anything—offense, behavior, anything—just all youth who come from detention come into a court in shackles. And what we're talking about is just to flip the presumption that—

**JUSTICE VIVIANO:** I understand your proposal. So you're saying, the problem is that courts who tackle every juvenile whether they're you know whatever—whatever the charge might be, bringing them into court in shackles. And I guess my question for you is, in your research that you did—I think you mentioned that your organization did some research in Michigan—did you identify courts that had, that used this practice, that this is how they operate?

**MS. GILBERT:** Yes, so we recently released an assessment of Michigan's juvenile defense system and it's a statewide assessment. And part of our assessment is confidentiality based on interviews and counties, so we don't identify specific counties in the report. But there were definitely counties that were using this practice, where children were just automatically

coming in to Michigan's court in shackles. And I also want to note that this is typically done pre-trial so these children have not been adjudicated of anything yet either.

**JUSTICE VIVIANO:** No, I understand. I'm just trying to figure out what the problem is that we're trying to solve. And if there is a problem, how large of a problem it is. But so, I guess if you know, was it our largest—larger counties that are—

**MS. GILBERT:** I think it varied widely. And also what I can say is, I wasn't on the ground in our Michigan assessment but we also didn't go to every county. So we only go to a sampling of counties. But within—I think we went to about 10 different counties in very wide geographic—and I could follow up and try to get some of that detailed information about which specific counties are but I don't—I can't provide that. And we also certainly didn't look at every county in the state.

**JUSTICE VIVIANO:** Okay, thank you.

**CHIEF JUSTICE MCCORMACK:** Thank you very much. The next speaker is Ellen Lipton on behalf of the State Bar of Michigan.

**MS. ELLEN LIPTON:** Good afternoon, Your Honor and members of the Court. My name is Ellen Lipton and I'm here on behalf of the State Bar of Michigan but more specifically the Access to Justice Policy Committee. The opinion is set forth in the State Bar of Michigan letter of February 26 to this Court so I will not reiterate that. But I would just like to comment briefly on the process that we used in the Access to Justice Policy Committee in proposing these changes. First, we would like to enthusiastically applaud the Court in considering a rule regarding shackling and the proposed amendments are in no way to take away from the overall support of the Committee for a rule such as this. In terms of the process, as I said, it was rigorous within the Access to Justice Policy Committee. We did form a work group, three members of which have extensive experience in representing juveniles on the ground in juvenile proceedings. As was mentioned, Michigan is one of 18 states that does not have a court rule, statute, administrative order governing the restraining of juveniles. And in our process, we began with the examination of the proposed rule and then compared it to a model rule that was—has been proposed by the National Juvenile Defender Center. We incorporated many of their concepts to both clarify and strengthen the original proposed rule. As I said, but in no way taking away from the overall effort, which the Access to Justice Committee strongly supports. We consulted their multitude of shackling resources and materials, including their fact sheets, comparison with other states, shackling and courtroom safety, many policy statements put forth. And as—as was—I would quote from the retired Chief Justice Martha Grace of the Massachusetts juvenile courts, she said, and I quote, "If there is a valid rationale for shackling juveniles I have never heard it. If the goal of juvenile justice is rehabilitation, shackling a young person is not the way to achieve it. So why do we continue this practice? I do not know and few others claim to know either." Again, thank you so much for allowing me to present and I will take any questions if there are any. Thank you.

**CHIEF JUSTICE MCCORMACK:** Thank you so much. Are there questions for Ms. Lipton? Thank you for being here. Next is attorney William Ladd. Attorney Ladd, you may proceed.

**MR. WILLIAM LADD:** Yes, good morning Justices. I would first of all like to respond to Justice Viviano's question and note that shackling is a general practice in many counties in the state. My experience is primarily in the Wayne County juvenile court over a number of years. And large numbers of kids are shackled in Wayne County in particular. The practice is that most all or all detained kids that are brought to court are shackled while they are in court. Also with kids that are in the higher security placements, are brought to court and are shackled while they're in the courtroom, Interestingly enough, kids that are not in the higher security placements are brought to court after being adjudicated and yet are not shackled so it's kind of an irrational system. As I would note that from Ms. Gilbert in particular, set out kind of the general background and the reasons why this is so important. The courts need to be sensitive to the interests of children who come to court in the adverse effects that shackling has on kids and how their—how it affects their experience in court. And practically speaking, the court should recognize that shackling is not necessary. Given those facts, I think that in the fact that we already have 32 jurisdictions that have gone through this experience, I would ask that this court take benefit from that experience and adopt a rule that's much more broad-based and make the presumption against shackling, also have a standard of proof and also have elaborate restrictions so that it's only for kids that are an actual danger to others in the courtroom or who have evidence and active interest in escaping from the courtroom and there are no other alternatives. The thing is, also, I should note that, as the NJDC has noted, we cannot just let this issue be up to the defense counsel in these cases because they're resistant to actually challenging the court. And also it's the responsibility of the court to make this decision to maintain the dignity of the judicial process. Thank you.

**CHIEF JUSTICE MCCORMACK:** Thank you, attorney Ladd. Are there any questions for attorney Ladd? Thank you for being here and thank you for your testimony. Next is attorney Jennifer Pilette. You may proceed.

**MS. JENNIFER PILETTE:** Good morning, Your Honors. My information to you is more anecdotal and perhaps also will speak to Judge—Justice Viviano's concerns. I spent 15 years as a referee on the Wayne County juvenile court until my retirement in 2015. And in Wayne County, the referees do everything that the judges do except for waivers and jury trials. In that period of time, I can remember only two cases where I strongly felt a child should be restrained. And this is probably in the most active court, most high volume court in the State of Michigan. But I know there was a policy for a good portion of the time I was on the bench in Wayne County to let the sheriffs make that decision. Now, certainly input from the sheriffs is important but to echo what attorney Ladd (also my husband) said in this matter, was that these are courts of law and courts should be making this decision. Since my retirement one of the things I've done is I've been this—a child welfare essentials trainer for the State Court Administrator's Office, traveling pre-COVID all over the state, talking to judges and referees and lawyers, and have discovered that, in many places, children are routinely shackled. They're shackled based

upon the request of the sheriffs. They're shackled as a matter of policy. I'm also on the council of the Children's Law Section and have then thus information from various attorneys across the state and find out that in certain counties, and I am told that particularly in Oakland County, kids routinely come into the court shackled and shackled together. I know when I was in my prior ideation as a lawyer at SADO all the inf—all the inmates were shackled together in the courtroom and would stand up kind of "Quasimodo" hunchback-style to give their allocution because they were all similarly restrained. This apparently is true in a number of the courtrooms for juveniles who come in. So I would like to reiterate that this should be a judicial decision. I know that some members of the judiciary have written to the Supreme Court and said they think the sheriff should be making this decision. But to echo what Mr. Ladd said, these are courts of law and certainly information from the sheriffs is important and should be considered but the impact upon children, as has previously been mentioned is—can be devastating. That we should not treat children differently [sic?] than we treat adults who come into the courtroom. If anything, we should be treating them better. And I would ask the Court to establish this court rule and set a legal standard by which the court would make this decision. One final thing is, I am not sure it was conveyed to the Court that the Children's Law Section of the State Bar joined in with the Access to Justice Section, as did the Criminal Law Section, in supporting their proposal. So I want to be sure that the Court is aware of that. And if there are any questions, I'm ready to answer.

**CHIEF JUSTICE MCCORMACK:** Thank you very much. Are there questions for attorney Pilette? I don't see any. Thank you very much for being here. Thank you all for your testimony. I'm going to circle back—

**JUSTICE VIVIANO:** Chief, I have one—I have one question.

**CHIEF JUSTICE MCCORMACK:** I apologize. Sorry; I'm sorry, Justice Viviano, I was too quick.

**JUSTICE VIVIANO:** —wasn't your fault. I was on mute, trying to talk to the screen. I—just in terms of a practical question, Ms. Pilette, when an adult or juvenile is in custody, they're in the custody of the sheriff, correct? When—both when they're in the jail and when they're being transported—is that right?

**MS. PILETTE:** They—well if they're in custody, yes. I can only speak to Wayne County and I assume it's the same statewide but yes, they were in the custody of the sheriff.

**JUSTICE VIVIANO:** Yeah, we're not talking about shackling people who aren't in custody, right? The sort of the population of people we're concerned about are those who are in—already in custody, right?

**MS. PILETTE:** Well that's true but we're also shackling many children who are pre-adjudication whose parents haven't taken them home, who have been detained and maybe those children—

**JUSTICE VIVIANO:** I'm aware that it happened at all stages of the proceeding. But my point is they've already been taken into custody. For whatever reason, they're in custody, right?

**MS. PILETTE:** They are in custody, that's correct.

**JUSTICE VIVIANO:** And it's up to the sheriff, as I understand it, what safety protocols to use both within the jail and during the transport, is that right?

**MS. PILETTE:** That is true, what safety protocols to use. That is, oh I'm anticipating your question. Go ahead. I'm sorry.

**JUSTICE VIVIANO:** I mean, you can you can talk more. I don't mean to cut you off but I'm just trying to help myself recall, because I was a trial judge, how this works. And the point at which it becomes a judicial determination is when somebody enters the courtroom.

**MS. PILETTE:** That's correct.

**JUSTICE VIVIANO:** Right?

**MS. PILETTE:** That's correct

**JUSTICE VIVIANO:** And I don't disagree with you that ultimately it should be a judicial determination. But what a number of judges, in fact all the judges' associations, have raised as a concern and other judges from other courts, is the notion that a person should be unshackled in either the hallway or the judge's chambers and then brought into court unshackled and then a determination should be made whether the person should be reshackled. And I guess my question to you is, do you think that's a good procedure or should we try to figure out a better one?

**MS. PILETTE:** Well, let me first say, Your Honor, that many, many children are brought in, I would say a number of them, are brought in from lock up unshackled. They're just walked into the courtroom by the sheriff's department. Occasionally, kids come in shackled, in hand shackles and sometimes came in in hand and leg and that was the—

**JUSTICE VIVIANO:** Let me just jump in, let me just jump in because you kind of made the point of my first question which is, I don't think that courts do indiscriminate shackling. I think we've kind of made this big problem that we do this—everybody gets shackled when the reality is, that's not the case. You sort of confirm that now but the law enforcement is making some initial determinations on their own as to who should be shackled and who should not. Whether we agree with those determinations or not, is that fair?

**MS. PILETTE:** No and I'll tell you why anecdotally. In Wayne County, there were days that kids were all shackled and we were advised that kids were shackled because the sheriff's

department was short staffed. That had nothing to do with the safety and the behavior of the individual child. That had to do with administrative staffing problems.

**JUSTICE VIVIANO:** But how will our rules solve their staffing problem exactly?

**MS. PILETTE:** Well, because if it's a judicial determination the court can determine regardless of the staffing problem whether this child is a danger.

**JUSTICE VIVIANO:** So now—now we're to the nub of the issue. So the judge is going to say, "Well the—I know we don't have adequate staffing and security personnel in court but we're going to unshackle this person anyways."

**MS. PILETTE:** That's true. The court—

**JUSTICE VIVIANO:** That's good decision for a judge to make?

**MS. PILETTE:** Yes, it is and I'll tell you why. The court can say, "I realize you don't have adequate staffing. However, this child, who's here for school truancy in my courtroom, has all the appearance of sitting in front of me, sobbing, can be unshackled." And I'm talking from experience in cases where I requested the kids were unshackled and—

**JUSTICE VIVIANO:** The point is I guess, yeah, I understand your point. I mean once they're in court, I don't disagree with you. The court can make that determination. But in terms of getting them there, I think this might be one of the concerns in Oakland County. I don't think they have adequate staffing in the courtrooms either and that probably explains some of their practices as well. So anyways, your answers have been helpful. I appreciate your time and interest in this issue.

**MS. PILETTE:** Oh, thank you.

**CHIEF JUSTICE MCCORMACK:** Thank you very much, attorney Pilette. Thank you all for your help on this issue. I'm going to circle back to attorney Michael Leib on the 9.261 JTC rule. Attorney Leib, are you ready to go?

**MR. MICHAEL LEIB:** I'm ready. I'm ready.

**CHIEF JUSTICE MCCORMACK:** Awesome. We can hear you. Go for it.

**MR. LEIB:** All right, Chief Justice and members of the Court, I appear for myself and not on behalf of an organization. I support the proposed court rule as published for comment. I would note initially that the court rule, as published, does apply to federal judicial qualifications committee—committees and that's my most recent experience as chair of a two merit selection panels regarding bankruptcy judge applications. My observation is that nobody who commented objects to the concept of the rule, which is that information should go directly from

the Judicial Tenure Commission to judicial qualification committees. My observation is that the Michigan Judges Association is uncomfortable with confidentiality issues other than for the State Bar Judicial Qualifications Committee and Lawyers and Judges Assistance Program. [Cough.] Excuse me. I'm concerned about any attempt to publish I guess the word "discretion" or use discretion in determining who should—which committee should receive information directly. I'm concerned about whether there are standards, who's exercising discretion, and I don't think the public is served by that kind of discretion in the rule. The committees need to receive information directly without a filter. That said, I don't think—I think there could be an easy fix in the proposed rule, which is simply to add the words at the end of J, section J, "that has demonstrated its process is confidential." The merit selection bankruptcy panel has specific language in its procedures that were created by the 6th Circuit—the U.S. 6th Circuit. Those procedures are public and the merit selection panel process itself is to be kept in quote "strict confidence." So I don't think that would be a specific issue that would be difficult for the JTC. But that said, I'm happy to answer questions and I rely on the statement that I provided.

**CHIEF JUSTICE MCCORMACK:** Thank you very much. Are there questions for attorney Leib? Thank you for being here and thank you for your testimony. We appreciate it. Next item is item number seven, which is a proposed amendment to Michigan Court Rule 2.302 that would require transcripts of audio and video recordings intended to be introduced as an exhibit at trial to be transcribed. We have one speaker endorsed on this question and it is attorney Kenneth Burger. You may proceed. Mr. Burger.

**MR. KENNETH BURGER:** Yes. Good morning, Madam Chief Justice and Associate Justices. So the issue that I have with MCR 2.203 [sic: 2.302] is that the amendment is going to create a problem where it's not specific enough to re—as to what is required of the transcript or who can transcribe it. Does it have to be a certified court reporter? Can the parties do it? Also is there a way to object to the content of the transcript, in which case is the court going to have to listen to it anyway? The other issue is that, in certain types of cases especially domestic relations cases, the content of the recording is only part of it. The tone is just as important, if not more important, to determine the meaning and relevance of the recording. And my concern is that this amendment may lead judges to decide not to listen to or watch the recordings because they have the transcripts available instead. It's a little bit different when you're in the appellate court. You're just reviewing the record. By its very nature, you're only looking at transcripts of the hearings anyway. But if you're a trial judge and you have to make credibility determinations and determine relevance on evidentiary issues, I think that being required to listen to the actual recording itself is helpful and, in fact, I think in some cases it's essential. Also if I may Madam Chief Justice, can I address MCR 1.109 as well because I actually wanted to talk on both.

**CHIEF JUSTICE MCCORMACK:** As long as you're—you can do it in one minute 41 seconds.

**MR. BURGER:** Yes I can—very quick. MCR 1.109, my concern is the amendments would inject uncertainty into cases where there's limited scope representation. Again this is almost

purely a domestic relations issue. I might have a case where a client wants me to get a QRDO entered or clean up some post-judgment matters and, in the middle of that, wants to file a custody motion but doesn't want to pay me a large retainer to do so. This leaves the client with the choice to either wait until the other matters are finished, pay a large retainer that he may not be able to afford, or hope his attorney is willing to take on a case pro bono, or with the hope that the attorney—that the client will pay the bill after the attorney has to redraft the motion to comply with the requirements of MCR 2.119. And that's basically all the co—all the comments I have. If anybody has any questions, I'll be happy to take them.

**CHIEF JUSTICE MCCORMACK:** Much faster than 1:41. Any questions for Mr. Burger? Seeing none, thank you so much for being here and thank you for your help on both of those issues. We appreciate it. The next item is proposed amendment of Rule Number 7 of the Rules Concerning the State Bar of Michigan. And this is about that—requiring the main officers to move sequentially through the leadership roles of the Board of Commissioners. And we have one speaker endorsed on this question and it's Dennis Barnes on behalf of the State Bar of Michigan. Mr. Barnes. [Pause.] I see his Zoom square.

**MR. DENNIS BARNES:** I'm sorry—

**CHIEF JUSTICE MCCORMACK:** There you are.

**MR. BARNES:** Yes, I was fumbling to get me unmuted.

**CHIEF JUSTICE MCCORMACK:** That's all right. That's what—that's what this is about. That's what Zoom's for.

**MR. BARNES:** Good morning, Your Honors. My name is Dennis Barnes and I'm the immediate past president of the State Bar of Michigan. I'm here to speak in support of the proposed amendment to Rule 7 of the Rules Concerning the State Bar of Michigan, which is a proposal that was unanimously adopted by the State Bar Board of Commissioners on the recommendation of a work group that we put together to consider this and study this and a few other related matters. It's essentially a succession planning provision. Currently, as you know, Rule 7 is a—what we call a grandfathering provision, which extends the term of the president-elect and the vice president to allow them to complete their leadership as officers of the State Bar without running for re-election to the Board of Commissioners. The recommended revision is to extend this grandfathering provision to include the offices of secretary and treasurer so the State Bar is internally organized in a way that each officer chairs one of the five primary substantive standing committees of the State Bar and with each successive step through the officer progression, the officer is responsible for and really learns the substance of a different and very important facet of the Bar. This succession allows the president to be really better informed on all major operations of the State Bar, puts the officer in a better position to represent the State Bar to all of its members, to the court, to the public, and also to lead its initiatives. So in recent history, thankfully, we haven't—the officer progression hasn't been interrupted by a BOC election. However, it's possible that if the officers elected to secretary or

treasurer were to face a re-election and lose, that progression would be interrupted and an invaluable part of the—really the training of the higher offices, the president in particular, would be interrupted and we'd be forced to fill those officer positions with people who haven't had the opportunity to serve as treasurer or secretary. I think service as—in the treasurer position and understanding the finances is particularly important to prepare one to serve as the president and, in fact, each of the other offices. The State Bar recently has been taking great efforts to better align its strategic planning with its finances so the experience of sharing the finance and the audit committees is invaluable for an officer rising through the ranks. Likewise, serving as secretary, an officer learns the details and the regulatory functions of the Bar, including character and fitness, the client protection fund, and judicial and professional ethics. I can tell you that, after serving as State Bar president, I found the opportunity to have served in each of the—in the treasurer and secretary positions to be invaluable to be a better leader and a better representative of the State Bar of Michigan. I think it makes sense for the State Bar. I think the proposed amendment to Rule 7 is a sensible provision. It's in the best interest of the State Bar and the public we serve and I recommend that it be adopted. I appreciate the opportunity to speak and I welcome any questions.

**CHIEF JUSTICE MCCORMACK:** Thank you, Mr. Barnes. Are there questions for Mr. Barnes? Seeing none, thank you very much. We appreciate you being here. And the final item for this morning's hearing concerns the administrative order that governs the distribution of IOLTA funds. We have four and a half speakers. Jennifer Bentley is here to answer questions only it seems like. But we have four speakers endorsed. We will start with the president of the Michigan Supreme Court Historical Society, Carl Herstein. Carl, you may proceed. I see your Zoom box, Carl. Do you want to turn on your video and your audio? Okay.

**MR. CARL HERSTEIN:** Do you see me now, Your Honor?

**CHIEF JUSTICE MCCORMACK:** No, but we hear you. [Pause.] No, no, no.

**MR. HERSTEIN:** Um, I apologize for my video. I'm not sure why it's not working but let me proceed in the interest of time.

**CHIEF JUSTICE MCCORMACK:** No problem.

**MR. HERSTEIN:** Thank you for this opportunity to speak. And two of my colleagues will be joining me as well. We were surprised and concerned that our voluntary agreement to cap the amount of IOLTA revenue that we receive has resulted in calls for our small share to be eliminated altogether. So we wanted to address that question. The Society was asked to limit the IOLTA revenue that it could receive in any one year and we voluntarily agreed to that before the proposed order was even issued. The proposed order was based on the premise that efforts to enhance IOLTA collections would—may dramatically increase the available funds, perhaps four-fold or more. And certainly we agreed that if the Society's five percent of IOLTA funding increases dramatically in terms of absolute dollars, a cap is certainly reasonable. But there is no guarantee that collections will increase to that extent and, of course, any decrease in collections

will decrease the funds available to the Society, as has been the case historically. If it wasn't for the hope for increase in absolute dollars to the IOLTA funding, there would be no reason for a change in a 26-year program that has worked well. The Court proposed in its comments that we accept a cap reflecting our annual operating expenses, which we agreed was reasonable. And accordingly we proposed a cap of $99,999 on that basis. We detailed those expenses that we have projected of about $96,000 for 2021. Over two-thirds of that amount is for our single paid employee. All board members serve without pay or reimbursement and do the vast amount of work for the Society. Those expenses also include things that would otherwise have to be paid for by the Court, such as the care of our portrait collection and administration of the Learning Center. Because the prior order remained unchanged for 26 years, we also proposed the cap be subject to inflation protection. Why is it appropriate for us to use IOLTA money? Avoiding the appearance of undue influence by lawyers or law firms through financial support for the Society where it might otherwise appear that they were purchasing influence with the Court was something that our founders, Justice Dorothy Comstock-Riley and her husband, Wally Riley, and our board have been careful to avoid from the very beginning of the Society 30 years ago. IOLTA support for the Society has helped maintain its independence from undue reliance on a small group of those with business before the courts. My colleagues will be speaking to some of the other points that have been raised in objection to our IOLTA funding and explain in more detail why the Society can't fulfill its functions without the kind of support that IOLTA has provided for us in the last 26 years. I'm happy to respond to any questions.

**CHIEF JUSTICE MCCORMACK:** Thank you, Mr. Herstein. I was going to ask, do folks have questions for Mr. Herstein? All right. Well, we will move on to John Jacobs, the treasurer of the Michigan Supreme Court Historical Society. Mr. Jacobs, you may proceed. I thought I saw Mr. Jacobs here. Oh, you are here. You're going to have to unmute yourself. Turn on your camera maybe. [Pause.] All right, how about Mr. Gavin. Joe Gavin is also here, I believe, on behalf of the Historical Society.

**MR. JOSEPH GAVIN:** That's correct, Your Honor. Thank you for the opportunity for speaking today. I am—my name is Joe Gavin. I am a member of the Supreme Court Historical Society on the—serving on the board of directors. I'd just like to note at the outset that I also had—was given the opportunity to volunteer and serve as part of this Court's Access to Justice program last year. I worked on one of the subcommittees, addressing pro bono issues throughout Michigan. So I know firsthand the important work that the Court is undertaking in that respect. And Justice McCormack and Justice Zahra, I understand the efforts you've personally undertaken. So I know firsthand how important it is. I'd like to point out though that the fact that one goal, such as Access to Justice, is a laudable one, that doesn't diminish the importance of others. The mission of our Society—one of the missions of our Society is about the education about the Court as an institution. As I'm sure that the Court members are no doubt aware, the aspects—distrust and attacks on institutions of our society have in some ways become part of the zeitgeist. And I would submit for the Court's consideration that education about the institutional importance of this Court in its very, very rich history is an equally laudable goal that shouldn't be discarded in the pursuit of others. Now, one of the arguments that's actually advanced for eliminating our Society's IOLTA of funding is the claim that no other

society receives IOLTA or similar type support. And that—that argument is actually inaccurate and somewhat misleading. As best we can tell, there are 23 states that have supreme court or legal history societies and several are funded by the states or adjuncts of it: The Illinois commission is funded by a state agency with state appropriations; the Virginia advisory committee, as related to the state library; the California society has the benefit of state bar dues and support through a staffing arrangement, meaning their overhead expenses are covered for them; the Texas executive director's compensation is supported by the state bar, as well as various administration and contract employees. So I think it's it is misleading to suggest that other states don't do something similar to what Michigan has elected to do—has historically done. And in fact, the lack of support for comparable societies and other states has been a serious problem for those societies. Rhode Island at this point is merely a fund created from the remaining monies left over from various contributions. Alabama society has been nearly dormant since 2013, was even trying to get off the ground in 2019 and 20 but without funding that's proven challenging. And Washington state society, we learned, has been funded by sales of commemorative gavels so you can imagine how well that's going. Several societies are a little more than websites. The bottom line is that having sufficient funds to pay an executive director and other operational expenses is essential to maintaining a successful society over time. One submission to the Court speculated that we have 500 members paying $150 each but that's not correct. In fact, for several of our—for several reasons, including lifetime memberships, we have fewer than half that number. The implication that we're flush with cash is just not correct. I'll take any questions the Court may have but I thank you again for the opportunity to speak on this important issue.

**CHIEF JUSTICE MCCORMACK:** I've only—I have one question for you, Mr. Gavin. Do commemorative gavels sell better or worse than Justice bobbleheads?

**MR. GAVIN:** Your Honor, as an aside, I happen to be a collector of bobbleheads so if there are any Justice bobbleheads that you're—the Court is issuing, I'd love to know about it.

**CHIEF JUSTICE MCCORMACK:** Okay, just wondered what the data was on that. Are there any other questions for Mr. Gavin besides my important one?

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

**CHIEF JUSTICE MCCORMACK:** Thank you very much. Mr. Jacobs, you seem to be unmuted. May we hear from you now?

**MR. JOHN JACOBS:** Well, thank you. I love my role as Luddite. May it please the Court, Honorable Justices of the Michigan Supreme Court, and the Chief Justice. I am John Jacobs. I appear today as treasurer of the in Supreme Court Historical Society. I thank the Court for its opportunity to speak in favor of the support of the IOLTA system in advancing the very important historical mission of the Society. It has been so for 30 years and almost from the beginning we enjoyed IOLTA support and hope to do so in the future. I salute the stalwarts who indefatigably litigate on behalf of indigents and for the sake of justice. I have contributed

probably more through the Equal Justice for All initiative than I have to the Society itself but I now find myself in a position of great disagreement with those who wish to negate the importance of the IOLTA funding where the focus of our group is historical preservation and protection of the important work of the Michigan Supreme Court. Respectfully, in my office as treasurer, I have first-hand experience about what will likely happen in the real world if the expected economic impact of erasing IOLTA after all of these nearly 30 years takes place. My aim here is to continue the unbroken and meaningful use of recently approved current levels of IOLTA funds which have been allocated and which assist in part for preservation of the work of the Supreme Court for a historical legacy that I think is extremely important to have. The newly fixed budget allocation in the past month or so provides a vital and essential component of roughly 55% of our existing budget, leaving officers on the board to continue as they do each and every year to attempt to obtain operational funds from charitable contributions under 501(c)(3) or grants or anywhere else that we can find the money usefully. And we get those dollars from Society officers, board members, members, and laypersons of interest to historical matters. It is important to note that the Society has never, in its 30-year—well to my mind, 30-year—history achieved a charitable levy that was 100%. We are always roughly about half our members contribute—our members contribute about half and if we lose the IOLTA funding, we are going to have serious shortfalls and with very little motivation from the membership to throw the money back into us—

**CHIEF JUSTICE MCCORMACK:** Thank you, Mr. Jacobs. Your three minutes is up. Let me see if anybody has any questions for you. Are there questions for Mr. Jacobs?

**MR. JACOBS:** Thank you for stopping me.

**CHIEF JUSTICE MCCORMACK:** Yeah, no problem. Thank you very much for being here. Thank you for your help. The next speaker is Kenneth Penokie from Legal Services Association of Michigan. Mr. Penokie, you may proceed.

**MR. KENNETH PENOKIE:** Thank you. I'm the director of Legal Services of Northern Michigan and a member of LSAM. I'm available to answer questions for LSAM's position but I also would like to speak to Legal Services of Northern Michigan's unique perspective on this. LSNM is charged with providing legal assistance and representation to the low-income population of two-thirds of the state of Michigan. That's 36 counties. Unlike most other areas in the state, we are the sole poverty law provider. There are no other groups providing legal services to our clients and pro bono services are problematic for small rural firms. IOLTA funds which are intended to and should be dedicated to providing greater access to justice for those with meager means. While we respect the work of the Historical Society, the fact is that it receives more funding from IOLTA than does Legal Services of Northern Michigan. Michigan's low-income population, living in communities from Cadillac to Copper Harbor, receive less funds from IOLTA than the Historical Society does. This is what informs our position and perspective in asking that the funds be limited or eliminated. We need this money. The meager funds we get from IOLTA, it's my understanding, even those are—have to be shored up by the State Bar Foundation to maintain a minimal level. Thank you.

**CHIEF JUSTICE MCCORMACK:** Thank you very much. Are there any questions for attorney Penokie? Thank you for being here this morning.

**MR. PENOKIE:** Thank you.

**CHIEF JUSTICE MCCORMACK:** Jennifer Bentley is here from the Michigan State Bar Foundation and I think available to answer questions. I believe, Jennifer, you don't intend to offer any statements; you're just here for questions. Is that correct?

**MS. JENNIFER BENTLEY:** That's correct.

**CHIEF JUSTICE MCCORMACK:** Are there questions for Jennifer? Okay. Thank you all for being here and for your help on this question as well. That concludes this morning's administrative public hearing. We will have one more in May and we will see you all then. Thank you for tuning in.