

MICHIGAN SUPREME COURT

PUBLIC HEARING

MAY 22, 2019

CHIEF JUSTICE MCCORMACK: Good morning. Welcome to our May Administrative Public Hearing. We're glad you are here and eager to hear from you on the items on our agenda. Our typical way of going about this is every speaker gets three minutes. Your lights will tell you how that three minutes is going. Of course, if we have more questions, you may be up there longer than that, but that's the way we will proceed.

We'll get started with the first item, which is the proposed amendment to MCR 1.109 and the corresponding administrative order regarding the process for exemption from e-filing. And, whether to adopt proposed—the new proposed administrative order. And we will start with Kim Cramer from Michigan Legal Help.

MS. KIMBERLY CRAMER: Good morning, Justices. Thank you for giving me the opportunity to comment this morning. In my three minutes, I'm going to try to cover three elements of the rule in proposed Administrative Order, the exemption standard, the placement of Court resources inside/outside entities and then, finally, the necessity of cell phone use in courts once e-filing becomes mandatory for all litigants.

Starting with the exemption standards; to start in a system that's truly accessible for self-represented litigants, we would expect relatively few exemption requests. We would expect most people would rather file from their house than to go down to the courthouse and file. But for people who need it, we want to make sure that this court rule facilitates an even application of exemption requests, state-wide.

I have visited at least four courts that are currently e-filing in some capacity. They—in some courts for some cases it's already mandatory. And when I asked about the kinds of cases that would or would not get exemptions in each court, there was significant variability from court to court, applying what is essentially the same administrative order. So, providing specific factors to consider would go a long way towards standardizing who can get an exemption. And then signaling to litigants who is eligible to ask for an exemption.

Moving to issues with placing resources for self-represented litigants, partly or entirely in outside entities; we generally don't object to spreading resources across a community. We realize that there may be one courthouse in a county that might not be close to people, but we want to make sure that courts don't unintentionally decrease access to e-filing by placing resources in outside entities. It's easy to forget about something that you are not interacting with regularly; you are not going to be paying attention to staffing changes that might necessitate additional training. So we want to make sure the AO considers not just a start-up plan, but sustained engagement between the courts and that outside entity to provide continued services to make sure that people have continued access to assistance, once e-filing becomes mandatory.

And finally, cell phone use; I know this—this issue is going to come up again, because there's been a new proposed rule. But as it relates to e-filing, in short, by mandating e-filing while continuing to bar cell phones in many courts, the courts would essentially be telling users that they must have regular, convenient access to a device with e-mail and enter that access while simultaneously telling them that they cannot have their regular convenient e-mail access inside the court and any model access plan should address this incongruity.

CHIEF JUSTICE MCCORMACK: Thank you, very much.

MS. CRAMER: Thank you.

CHIEF JUSTICE MCCORMACK: Next, we have Kathryn Hennessey from the State Bar.

MS. KATHRYN HENNESSEY: Good morning, Justices. My name is Katie Hennessey and I am Public Policy Counsel for the State Bar of Michigan. The State Bar appreciates the Court's continued efforts to implement a state-wide e-filing system and appreciates the opportunity to provide comments as the Court develops its court rules to implement that system. And we hope that our comments have been and continue to be helpful to the Court.

The Administrative Order and court rule, under consideration today, recognized two vital aspects to Michigan's e-filing system; that the e-filing system should be accessible to as many litigants as possible, including pro se litigants. But, there are going to be circumstances in which exceptions to e-filing need to be made. The work station calculator, referenced in the Administrative Order, indicates that there may be circumstances in which a court can mandate e-filing, but not require an e-filing work station in the courthouse. The State Bar believes that if courts are mandating e-filing,

they should have a work station housed in their courthouse. And this is because litigants are used to filing court documents at court. The clerks have not only the ability to assist with e-filing, but also to assist with the more general filing questions that litigants have. And finally, this allows the court to directly monitor the work stations and the e-filing assistance that is being provided. And to make adjustments to the instructional materials and/or e-filing access plans.

And then moving on to the amendments to Proposed Rule 1.109; this recognizes that certain individuals may need to be exempt from the e-filing requirement, but it does not define factors that courts should consider in determining whether a litigant has established good cause. Now, the State Bar has proposed a number of factors that we believe courts should consider and many of those factors align with the factors suggested by Michigan Legal Help.

However, I did want to talk about three factors that we listed, just to clarify an issue; we list in subparts B through D, considering distance to travel to a public computer, barriers to travel and safety concerns. We believe these—these were intended to only come into place when a person does not have regular access to a computer or the internet so that they can e-File remotely. And that in this circumstance, these factors do provide significant hurdles to litigants being able to effectively e-File. Because not only are they going to have to go to an e-filing work station to file documents, but they are going to have to regularly check their e-mail on a public computer to see if opposing counsel has filed anything, or if the court has issued an order.

But the flip side of this, of course, demonstrates one of the great advantages to e-filing; when litigants do have reliable access to computers and the Internet and do not need assistance with e-filing, then they don't have to worry about these travel or safety concerns and can file in the safety of their own home or anywhere else in the world. Thank you, very much.

CHIEF JUSTICE MCCORMACK: Thank you, very much. Well-timed.

We will move on to Item #2, which—in which we consider proposed amendments to a number of rules to regulate the way restitution orders are entered, modified and appealed in criminal cases. And we have one speaker, William Vaillencourt, the Livingston County prosecutor.

MR. VAILLIENCOURT: Good morning. May it please the Court, William Vaillencourt. I'm the Livingston County Prosecutor and also the President-elect of the

Prosecuting Attorneys Association of Michigan. Appreciate the opportunity to appear today.

PAAM has filed a comment proposing some minor changes to proposed new rule 6.430. I won't reiterate those comments here, but one thing that was new in some of the other comments is, we would support the suggestions by the Michigan District Judges Association and joined by the State Bar, that where restitution is unknown at the time of sentencing, restitution could be determined within 30 days of sentencing. That's an appropriate proposal and reflect the reality that, especially in district court, restitution might not be known at sentencing. That would be preferable to simply deleting the restitution requirement as suggested by SADO. I'll take any questions.

CHIEF JUSTICE MCCORMACK: I see none. Thank you, very much.

MR. VAILLIENCOURT: Thank you.

CHIEF JUSTICE MCCORMACK: Next is Item #5 where we are going to consider a proposed addition of a new rule regarding the alternative dispute resolution process within the Friend of the Court. And we have Sean Blume from the Family Law Section of the State Bar.

MR. SEAN BLUME: Good morning, your Honors. Thank you for having us. As stated, my name is Sean Blume. I'm with the Family Law Section, speaking on behalf of the council.

We have, specifically regarding the ADR process, ADM 2018-13. The Family Law council has discussed at length this proposed amendment. And while council is supportive of the concept of Friend of the Court ADR, we oppose the rule as drafted unless some concerns are addressed.

The over-arching concerns are that the parties remain adequately present—represented throughout the process. And that they are protected. And we identified four specific issues regarding those concerns; one is that attorneys must have the ability to be present and participate in the process throughout; the other—another is that there needs to be sufficient domestic violence screening, training and protocols, contained in the rule, that the confidentiality provisions must—should be consistent in the new rule as there are different confidentiality mandates depending on the specific type of meeting that parties are present at. And that the language regarding an automatic order—and this was one that was hotly discussed that the—regarding an automatic order being generated should be stricken from the new rule.

Just in brief detail, while the attorneys are technically allowed to be present, speaking to the first issue, at these conciliation conferences and mediations, it has been the experience of many practicing attorneys that the attorneys present is not just frowned upon but actually discouraged at some of these meetings. The examples given range from attorneys being asked to sit in the hallway, outside the conference room, to attorneys being allowed in the conference room but directed not to speak. And as an example of that, I heard from one of the actual co-chairs of the Court Rules Committee that she recently received a notification from a court of a conciliation conference. And, the notification stated specifically, attorneys must be present but must remain in the waiting room. And so, this is—and I think this was stated in an earlier—this is the concern over different, without specific direction, different application throughout different counties.

Additionally, the proposed rule as written—moving to the second issue, addresses domestic violence and among other things, references the use of a screening protocol. However, the aspect of the rule is general and discretionary in its application; with the discretion being left in the hands of Friend of the Court employees.

So, the other issues are outlined in our written materials. But the last—I would say one last sentence is that language regarding an automatic order was a very serious concern that people show up to these and an order can be generated whether their attorneys are present and without their full understanding. And the rules need to be consistent with that. Thank you.

CHIEF JUSTICE MCCORMACK: Thank you very much. Thank you.

Next, we have Item #6, the proposed amendment of various rules relating to civil discovery, as recommended by the State Bar. And our first speaker is James Harrington from the American Academy of Matrimonial Lawyers.

MR. JAMES HARRINGTON: Good morning, your Honors, James Harrington. I'm representing the Michigan Chapter of the American Academy of Matrimonial Lawyers this morning.

But I will first say, as an individual practitioner, I absolutely concur with brother Blume, regarding the presence of attorneys at conciliation hearings. We should not be made to sit in the hall like second-class citizens.

Regarding the discovery court rule proposals, the American Academy has followed very closely all of the proposals. We commend Dan Quick, Matt Kobliska, the scores of other members of the committee. We support proportionality. We absolutely support a 35 interrogatory limit in family law cases. The issues in family law cases can be extremely complex and we believe the 35 interrogatory court rule, or limit, is appropriate.

The reason why I am here this morning is I have a concern over the language regarding limiting interrogatories and the discreet sub-part language; discreet sub-parts is a term of art derived from the federal courts. When I Googled Michigan cases, there are no Michigan cases on discreet sub-parts. My concern is that our trial courts may not understand what discreet sub-parts mean. And I have suggested and would recommend, either in the comments or in the court rule itself, that language make clear that a discreet sub-part is an interrogatory or a sub-part, not reasonably related to the principal interrogatory.

My concern is, we will have two or three years of appellate court cases come up to the Court of Appeals or the Supreme Court, because trial courts think that discreet sub-parts means all sub-parts. And it means the exact opposite.

The Academy's recommendation is that the language be along the lines of, if a sub-part is not substantially related to the principal question, it counts as a separate interrogatory; that can be in the comments, it can be in the court rule. I am proposing and urging the Supreme Court to make it clear, now, what the meaning of discreet sub-parts means. There is a footnote in the committee report referencing federal cases. That's how I learned what a discreet sub-part is, but I don't think our practitioners and judges are going to be up to speed unless we help them out with some clarifying language, either in the court rule or the comments. Any questions?

CHIEF JUSTICE MCCORMACK: Thank you. That's helpful.

MR. HARRINGTON: Thank you.

CHIEF JUSTICE MCCORMACK: Next is Dan Quick from the Civil Discovery Committee of the State Bar. And Mr. Quick, we want to thank you for all of the work that you all did on the front-end of this to reduce our work load, so we appreciate that.

MR. DANIEL QUICK: Thank you, Chief Justice. May it please the Court, Daniel Quick. Obviously we did submit a detailed report that gives the history and the reasons for the recommendations.

Clearly for some time, there's been a realization and a recognition that the course of discovery in civil cases is a problem. It's an access to justice problem and it's an access to the courts' problem, and it's a problem for the efficient administration of justice. And I would urge the Justices to take a moment, if you haven't already, to review some of the underlying studies that are cited in the report from the Center of Chief Justices and the National Center of [sic: for] State Courts, and the Institute for the Advancement of the American Legal System and others that really detail this problem.

Nineteen eighty-five is a long time ago. Frankly, I'm pretty fond of 1985, it was a good year. But it's a long time for there to have not been a holistic view of a major portion of the court rules in those 33 years. The goals here, the through-lines [ph] if you will, really are case management and proportionality and an increased emphasis on asking counsel to cooperate and get ahead of issues to make the process more efficient.

We also did put a new coat of paint on a few issues, particularly the subpoena rules and third-party practice issues. And then, we did try to come up with a few innovative ideas, ESI Discovery Conference, Representative Deposition Objection concept which puts us ahead of the federal rules, are two that I would note. We do have committee members here to address some of the specific niche areas of the court rules.

I just wanted to respond to three points that came up in some of the public comments.

The first is the initial mandatory disclosure rule. This—when it first was adopted in the federal practice, some time ago now, also drew some concern and criticism most of which fizzled. Once it actually came into practice, there really weren't many issues. And, in fact, the proposal we've made is trying to improve upon that process. The key with that is that the parties can always opt out of it. If they don't think it makes sense for them, in that particular case, they can opt out or ask—or one party can ask the court to let them out.

It is also limited to reasonably available information and the duty to supplement is not some sort of a gotcha'. It's only if the information is not otherwise already out there in the case and is material. Similarly, the sanctions that correspond to that is not a "gotcha." It's no sanctions are permitted unless it is substantially justified, or if there is a harmlessness exception.

Secondly, the presumptive number of interrogatories has drawn some attention. Again, this has worked well in federal practice and we actually have pretty broad support from that among the stakeholder groups we spoke to.

And lastly, on the concept of district court discovery. Frankly, we just didn't deal with that issue. It's a separate issue with a separate set of concerns as to whether that door should be opened and we didn't. I would just urge the Court to, if the proposal is adopted, to work with us and we'd be happy to work with the Court on education for both the judiciary and the bar, whether it's video on demand, whether it's webinar's—whatever it takes to acclimate people before the rules go into effect.

CHIEF JUSTICE MCCORMACK: So you're willing to do that next phase of the work? Is that what I hear?

MR. QUICK: Yes.

CHIEF JUSTICE MCCORMACK: I hear—

MR. QUICK: That was voluntary, yes.

CHIEF JUSTICE MCCORMACK: All right. And will part of that be teaching judges and lawyers what a discreet sub-part is?

MR. QUICK: Yeah—so Mr. Harrington and I spent some time on the phone throughout this process and—and, you know, we erred on the side of just borrowing the federal phrase, hoping to pick it up because it has developed to a point of clarity, I think. But whether it's in the comment or whether they think—wanted to get out ahead of it and actually build it into the rule, I think it's a fine suggestion.

CHIEF JUSTICE MCCORMACK: Thank you, very much, Mr. Quick.

MR. QUICK: Thank you.

CHIEF JUSTICE MCCORMACK: We look forward to working with you, going forward. Next is Judge Yates, on behalf of the State Bar.

JUDGE CHRISTOPHER YATES: Good morning. your Honors and may it please the Court. My name is Christopher Yates. I'm a circuit court judge in Kent County, Michigan and I run a specialized business docket.

I was also a member of the committee and so was Judge James Alexander from Oakland County. We had experience in the business court, either pioneering or piloting many of the innovations that are included in these proposed rules. And so we've had a fair bit of experience with them. I would like to focus on four major changes and explain why I think each one is essential.

The first one is the increase in discretion in the sanction provisions. The current sanction provisions weigh heavily the awards of attorney fees as sanctions. And we would prefer, as judges, to be able to tailor the sanctions to the violation. So, for example, the ability to shift the burden of proof if the plaintiff has all the information or won't turn it over, or the ability to disqualify a witness from testifying, I think are all essential tools that we would prefer to have, than merely simply to award attorney fees for discovery violations.

Second, with regard to proportionality. That's a welcome innovation. I don't think I need to say anything more about that. We in the business courts have tried to fashion discovery plans that meet the needs and the economics of the case and I think that's been quite successful. And I'd like to see it done across the board.

Third, I appreciate that there's much more attention being paid to electronic discovery in the proposals. Whether we like it or not, electronic discovery is here to stay; it's a fact of life and it's tremendously complicated. I've had several cases where we have moved beyond what one would describe as word searches, to do much more sophisticated searching. And so I know one of the comments referred to defining the word search terms. That rules out the more sophisticated, computer-aided searches. And so I prefer that—that not be included.

The final concept is the mandatory initial disclosures. Winston Churchill said of democracy that it's the worst form of government, except that every—except for every other one that's been tried. And that's where I come down on initial disclosures. It's not ideal. There are lots of reasons to complain about initial disclosures, but I think they are far better than the current system where everything has to be directly requested in order to be obtained.

So in sum, I wholeheartedly support these proposals. I recognize that there could be some sandpapering done. But I think as a whole, it's a fine product. And I don't say that out of any pride of authorship. I say that out of experience, having worked with these concepts or seen them in operation. So, thank you very much for considering this very extensive proposal.

CHIEF JUSTICE MCCORMACK: Thank you very much, Judge.

JUDGE YATES: Thank you.

CHIEF JUSTICE MCCORMACK: Next we have David Christensen on behalf of the State Bar.

MR. DAVID CHRISTENSEN: Thank you. Good morning, Justices. I appreciate the opportunity to speak on this proposal. And I was a member of the committee and the chair of the subcommittee that developed the changes in the discovery rules. And also on that committee, we had judges, commercial litigators, trial lawyers, defense attorneys, poverty law attorneys. A really good representation of the spectrum of practice that deal with these rules on a daily basis.

And some of these, particularly the initial disclosures, were taken, borrowed in large part certainly from the federal model, but from Judge Popke's Wayne County scheduling order which required in the hordes of no fault cases that she deals with, and that bench deals with, initial disclosures along the same lines as what are proposed here—works extremely well.

I have had the opportunity to look at other states that have developed changes just like this and have had some time to live with them and report statistics. And even though from the intuitive sense that I have, because in working in this injury and no fault world as I do, the typical timeline of a case gets pushed way out, because the most essential and basic information isn't provided for months and months. You have—you file a suit, it's served, an answer comes, probably an extension was given, interrogatories are served, probably not answered in 30 days—maybe 60 days. Then, no medical authorizations were provided.

Now, you're four or five months out and somebody is going and asking for an extension, or an adjournment of dates from the court. And this is the rule, it's not the exception. You take the tens of thousands of cases that are in court and you see these cases growing in length, three months, six months routinely, because nobody is pressed and has to produce the information up front. Even though we should and the rules say we should, in real practice it doesn't.

This will shift, right up front, stuff we know we are going to have to do; we are going to have to give you medical record releases. Let's do it now so we don't have these adjournments. That's one case management that's going to make the courts work better, it's going to save a lot of money and save a lot of time for litigants.

And I've only—don't need to touch on the other proposals, particularly, because they all fit in and follow from initial disclosures. You don't need as many interrogatories. The limits on depositions are very reasonable. We've lived with those in the federal system. But the best thing is, you have—you can opt out. The rules have been—you know, are the same for a \$25,000 case as they are for a \$200,000,000 case, and these present a right sizing. And I think the most—

JUSTICE VIVIANO: Can I ask a question about the end of discovery?

MR. CHRISTENSON: Yes.

JUSTICE VIVIANO: Is the—under the proposed changes, is it the idea that—and under the current system, my understanding is as long as you initiate discovery before the discovery deadline, it's considered timely—

MR. CHRISTENSON: Yes.

JUSTICE VIVIANO: —the request. Is the idea to change that to a regime where you have to initiate it in enough time for the other party to have the time under the rules, that they are given for a response, before the completion date, or is that not something that was under your committee's jurisdiction?

MR. CHRISTENSON: Well, so let me answer what I understand the rule to be and I could be wrong, because—I believe you have to initiate it. But I don't believe it has to be, for example, 30 days before the cut-off for an interrogatory answer. I believe it has to be initiated in a timely enough fashion that the other side can begin to respond to it.

JUSTICE VIVIANO: So it doesn't—we're not trying to figure out—if a request—subpoena, for example, gives 14 days. That has to be done, you know, 15 days before the completion date? Or, if you have 28 days to respond—I don't know what a—I can't remember.

MR. CHRISTENSEN: So we didn't deal with the subpoena issue in my committee. And I know it was significantly re-worked in this proposal. I wish I could give you a clear answer on that, but I can't. I'm sorry. I do second the nomination of Mr. Quick to head-up the training for the bench. I'll help with that. Thank you.

CHIEF JUSTICE MCCORMACK: Thank you.

JUSTICE VIVIANO: Thank you.

CHIEF JUSTICE MCCORMACK: Next is Matthew Kobliska, also on behalf of the State Bar.

MR. MATTHEW KOBLISKA: May it please the Court, Matthew Kobliska appearing on behalf of the Discovery Reform Committee. My practice is limited to divorce and family law matters and mediation. And my comments will be directed to that area.

We often say that one thing that differentiates family law cases from general civil cases is that real people pay our fees. Dan Quick talked about access to justice and I can think of no greater area than the family law area where that needs to be addressed. We need to root out inefficiencies wherever they may be found.

And it's a difficult task, in family law cases, well in any general civil case, because you have the counter-veiling principles of efficiency and fair and equitable disposition between the parties, and best interests of minor children. But I think that the Reform Committee's proposal strikes that balance.

There are a couple of areas where the—where there are separate family law rules relating to discovery. And I think there's a recognition that in domestic cases that they're kind of a different breed entirely that warrants some change from the general civil rules. And I could go through a laundry list of reasons as to why that is.

But I'll mention that in a typical divorce case, you could have nine or more categories of issues, each of which have different evidentiary proofs. For instance, child support and spouse support. They may seem like they would require the same information but they don't. In child support, we've got a family formula that applies and we have certain bases for deviation; in a spouse support case, we've got the 14 *Olson v Olson* factors. So even two things that seem alike, really aren't. In a case involving a family-held business, it could require as much discovery as a single shareholder oppression or corporate dissolution case.

So again, I could go through a laundry list here, but I want to make the best use of the time that I have available. And one thing that I did want to talk about is the proposed 3.XXX rule which is keeping purely private matters out of court. What we've done as practitioners—responsible practitioners, is often whenever we have a sensitive document, whether it's a personal tax return, God knows nobody wants their tax returns

made public. When we have those situations, we might append it to the judge's copy of the brief and also opposing counsel's copy of the brief, but not include it in the public court file. There are problems with this. One of which is, there is simply no basis in the court rules to do so; it does not become part of the public record on appeal. And, of course, with the advent of e-filing, it's going to eliminate the judge's brief altogether. So we had hoped to address that issue of purely personal documents.

In the proposal, as written, there is an under seal mechanism under 3.XXX b [ph]. But that's—there's been some, I think, back-channeled discussion since then that would indicate maybe that's not the best tool to accomplish that. Rule 8.119, I think, has a process in which there needs to be a motion and some other things which I think make it very cumbersome to use.

I think—and many people think that the best method would be to employ a two-file system as is used in juvenile court, specifically MCR. 3.903 (A) (3) where there is a separate social or confidential file and then there is a public file. Many family court judges employ this two-file procedure as it is already. So, I think rather than have the under seal requirement, there should be documents marked as confidential which would simply kept—be kept in a separate court file. So, if the Court has any questions as to the rationale behind the proposed subchapter 3200 rules, I'd be honored to share my perspective.

CHIEF JUSTICE MCCORMACK: I don't see any. Thank you, very much.

MR. KOBLISKA: Thank you for the opportunity to be heard.

CHIEF JUSTICE MCCORMACK: Thanks for being here. Next is Joy Gaines on behalf of the State Bar.

MS. JOY GAINES: Good morning, your Honor. May it please the Court, Joy Gaines. I am a member of the Washtenaw County Public Defender's Office. Along with myself, we had representatives from the—we had a judge from the juvenile court in Oakland County, we also had a—an attorney who specialized in working with parents, we had an attorney from the University of Michigan Child Advocacy Law Clinic where they represent children, parents and even sometimes the State, in child welfare meetings—I mean hearings. In my office, we represent either parents or children in child welfare cases and we also take representation for delinquency cases.

When we were looking at the juvenile court, court rules, we focused on three major things; the first would be that we wanted to ensure that discovery was automatic,

full and timely; the second is that we wanted to look at the different delinquency rules and ensure that youth received similar protections and—as adults; and the last thing we looked at were the determination of parental right, the court rules dealing with the termination of parental rights, because that is such a crucial part of the proceedings. And they work really, the same body of discovery rules to protect those type of proceedings.

So, the first thing we did in terms of 3.922 sub (A), our recommendation was that the discovery be automatic as opposed to having to be requested. And this court rule applies to both the delinquency and the child welfare proceedings. And we thought it was very important that given the high liberty interest, that discovery be automatic. And also given, in particular in the child welfare cases that often the State—pardon me, the Department of Health and Human Services has information that may not even be available to—in our county, it's the prosecutor who is handling those cases just to really make sure that it became available.

It was suggested that I give some examples. And we all have examples of this, but I would say that probably one of the more egregious ones was a hearing in which I participated. And, you know, the timelines are very short for the adjudication trial. And it was about a week before and we were still waiting for the medical discovery, which is the key part of the case. And I was being told that there wasn't medical discovery, but available, yet they were still waiting for it. But when we were in court, the statement by the petitioner, the department, was that I don't have all of it and that's very different than not having some of it and—or not—I don't—having some of it is very different than not having any of it, which is what I was led to believe just about a week before trial. And it was ultimately about, you know, two-to-three inches thick worth of medical discovery alone, not mentioning their reports.

The other thing that, in terms of time frames of various points, not only through 3.922(A), but also when we were addressing the court rules that have to do with the permanency planning hearings and the dispositional review hearings, and the post-termination review hearings. We also put in a request or recommendation that the—that the discovery or the reports that are submitted regularly at these review hearings, be submitted seven days in advance. And also that there be complete information.

In our practices, we had all seen where what we had received—sometimes the night before, sometimes the morning of, would have a range. Sometimes we'd get everything, everything that we'd asked—that we'd really want. The case workers' reports, the psychological evaluations, the substance abuse results. But we'd get, again, a very thick packet the morning of or coming through at 5 o'clock the night before.

Other times, we might get very timely, or sometimes they'll get 'em the day of, a two-page report that would not give all the information. One example was that one of the reports said that all of the drug screens had been clean. But upon receiving the log, the parent had been required to do random screens that would have been 15 over the reporting period and had only taken two, all of which had been clean. So we want it to be complete, full and timely in that sense.

With regard to the delinquency proceedings, the court rule for that had really just been 3.922, so we also incorporated what we thought were the relevant parts of the criminal law discovery rule so that children would receive similar protections.

And then the last thing with re—to the termination of parental rights hearings, we—in that court rule, we made reference to and asked—and recommended that be included, the changes that we had made to 3.922 (A) and also the timelines that we had—that we thought were appropriate. If you have any questions?

CHIEF JUSTICE MCCORMACK: Thank you, very much, Ms. Gaines, appreciate it.

MS. GAINES: All right, thank you.

CHIEF JUSTICE MCCORMACK: And finally we have George Strander, also on behalf of the State Bar.

MR. GEORGE STRANDER: May it please the Court. My name is George Strander. I was a member of the committee and also a chair on one of the subcommittees. I'm here to speak on the probate amendment.

There's long been a tension between the role of probate court matters, generally involving petitions, respondent and often multiple interested persons perhaps for an estate or the care or treatment of an individual and that of general civil procedure, which assumes cases with the plaintiff summoning a complaint and one or more defendants. Such is the case specifically in the area of discovery.

The current rule that 5.131 (A), indicates that the general discovery rules apply in probate proceedings. While this directive is not particular specific, subchapter 2300 is the one place in the court rules, where the rules governing discovery are fully outlined. And these general discovery rules assumed cases with a dichotomy of plaintiffs and defendants.

General discovery rules assume an adversarial action where distinct parties are seeking information to prepare their cases adequately. Interestingly, matters that are contested to the same degree as a lawsuit can exist in probate proceedings. Examples might include will contests, actions to remove a trustee or fights over attorney fees. To the litigating-interested persons, discovery can be just as important as it is to a plaintiff and defendant in a lawsuit.

The question, then, is how to fashion our rules to fit the general discovery structure to all probate matters and especially to those actions which display the litigation we expect to need discovery most. The reposed [sic] amendment [sic] at 5.131 answers this question, by first making clear that all discovery tools in subchapter 2300, with the exception of mandatory initial disclosures are open to any interested person in a probate proceeding.

The proposal goes on to carve out a specific minority of probate actions that require mandatory disclosures under newly proposed 2.302 (A). The aim is to specify those highly litigious probate proceedings which function much like lawsuits, and make the active, interested persons make disclosures just as plaintiffs or defendants would have under MCR 2.302 (A).

Under the proposed amendment to 5.131, mandatory initial disclosures are triggered after the filing of the initial petition by either the filing of a demand for such disclosures by an interested person, or the judge determining that such disclosures are appropriate after an interested person contests the petition. Disclosures must be made by both petitioner and the demanding or objecting interested person. In this way, we require disclosures when needed and from those who need to provide them.

The proposed amendment also provides a mechanism for ordering disclosures from specific interested persons at some point after the initiation of a proceeding, or from those in addition to others already needing to make disclosures. This recognizes that the scope of interested persons' interest may not always be apparent at the time a petition is filed. And that another, who may not yet have filed a demand for disclosure or otherwise objected, may need to make disclosures.

CHIEF JUSTICE MCCORMACK: Thank you, very much. Appreciate it.

MR. STRANDER: Okay, thank you.

CHIEF JUSTICE MCCORMACK: And our last item is number seven, the proposed amendment to MCR 6.001, to allow for discovery in criminal cases in district court. And our first speaker is Joshua Blanchard.

MR. JOSHUA BLANCHARD: Good morning and may it please the Court. I think that making MCR 6.201 applicable to misdemeanor cases will increase the cost to a few citizens, will invite error in misdemeanor proceedings and isn't workable given the current scale case management guidelines.

Right now, we have misdemeanor cases that are handled fairly expeditiously. If we require criminal defense lawyers to provide reciprocal discovery, produce witness lists, those costs are going to have to be passed on to citizens. Right now, misdemeanors that are generally less-serious than felony cases get handled quickly and at less-cost than a felony charge.

And, the other thing that we see is in the district court more than any other court; we see pro se litigants. In my home county, every time there is a jury pick I see people picking their own juries and ultimately trying their own cases. And we also see a lot of folks that dabble in misdemeanor criminal cases. We'll see lawyers who don't practice criminal defense, regularly showing up; if we have the reciprocal discovery rules, I think we're going to see people missing deadlines. You know, right now you are required to file a witness list. It can be amended without leave of the court up to 28 days before trial. I think we will see people blowing that deadline, we'll see pro se litigants who don't know about the requirement; they're going to show up to trial and have their witnesses struck because they didn't comply with the reciprocal discovery rules.

That ties in, somewhat, with the SCAO case management guidelines. Right now, they require pretty quick resolutions. In one of my local counties, at arraignment they set your trial date. And it's often a little bit more than 30 days out is your first jury trial setting. If it actually goes at that time, you will have a week or less to investigate the case and provide the notices, unless you are able to file a motion and obtain leave of the court to notice witnesses inside of 28 days. And so if the court is going to impose reciprocal discovery, in misdemeanors, I think we also then need to extend out the case management deadlines.

So, I think the solution is to either make MCR 6.201 (B) applicable to misdemeanors—that's the requirement that prosecutors disclose, really the stuff that's in their file, generally. I think that's one solution. If the Court doesn't like that, a second solution is to track Federal Rule 16 which conditions a defendant's obligation to provide reciprocal discovery on him first making a demand. So that someone could either make

a tactical decision not to demand discovery or, if somebody doesn't know about that obligation of pro se defendant and doesn't request it, then they are not penalized for not also providing it; so I think one of those two solutions would make it workable and I'd ask the Court to do one of those things.

CHIEF JUSTICE MCCORMACK: And is it your view that one of those solutions would be better than doing nothing? If our choices are do nothing, do what we propose, or take one of your middle ground options—

MR. BLANCHARD: Yeah, I would—

CHIEF JUSTICE MCCORMACK: —do you have a ranking?

MR. BLANCHARD: —I would prefer to see 6.201 (B) made applicable so that prosecutors have an obligation to turn over essentially the stuff they have.

CHIEF JUSTICE MCCORMACK: Thank you.

MR. BLANCHARD: Thank you.

CHIEF JUSTICE MCCORMACK: Next is John Shea.

MR. JOHN SHEA: Good morning and thank you. Although I disagree with my brother counsel Josh Blanchard's opposition to the proposal, I think that we're largely on the same page with respect to what a proper solution might be.

I want to start by saying, first, misdemeanor cases are necessary. And I've read all of the letters that were submitted to the Court in connection with this proposal. And frankly, I'm a little impatient with the positions of some that these are petty offense cases where we don't need to take them seriously. The heartland of misdemeanor cases, in all of the courts that I practice in, are domestic violence cases, stalking cases, aggravated assault, malicious destruction of property, drunk driving, retail fraud, civil infraction causing death, civil infraction causing serious injury. These are serious cases. Those are the bulk of the cases.

You sample randomly any three district court judges in this state and they're going to tell you the bulk of their cases aren't animal at large, noise violations, or blight tickets. They are the ones I have just described. They're serious cases with serious consequences for people; not just jail, driver's license sanctions, professional license sanctions, immigration sanctions, loss of housing sanctions oftentimes, loss of gun

rights, loss of hunting and fishing rights. These cases involve, if a person is convicted improperly or convicted of something more than what they should have been convicted of, oftentimes create life-changing outcomes for the defendant.

So, these are important cases and that's one of the reasons why a rule is necessary; these cases are oftentimes not simple. Ask any drunk driving lawyer how complicated a drunk driving case may be; any lawyer who has ever tried a domestic violence case how complicated that kind of a case may be. They are not simple, oftentimes.

And discovery is essential regardless of whether you are going to go to trial in those—you know, less than 5 percent of cases. Or you're going to negotiate a plea, because whether you are a civil lawyer or a criminal defense attorney, or someone who does both, you recognize that how you negotiate a case depends on what the case is about. And if you don't have discovery, you can't honestly say you know what the case is about.

There is no uniform rule across the state. There's—it's a patchwork of response by district court judges. I think that's one of the reasons why the MDJA supports this, they'd like to see some uniformity. And it's important.

CHIEF JUSTICE MCCORMACK: Mr. Shea, what's your response to what we do about the pro ses? I mean, how do we—what do we—how do we handle—or, you know, the major—the number of cases in district court, which really do—are resolved by, you know, quick pleas. You know, and where that makes sense. You know, it might be used in the other—

MR. SHEA: Sure.

CHIEF JUSTICE MCCORMACK: —dockets.

MR. SHEA: Yeah. I—

CHIEF JUSTICE MCCORMACK: Do we bring the system to a crushing halt?

MR. SHEA: No—no, I don't think so. I like Mr. Blanchard's—first, I like Mr. Blanchard's proposal that—I'm sure the prosecutors wouldn't like the 6.201(B) option, but I like Mr. Blanchard's proposal that there be an opt-in. If a defendant or defense counsel does not want discovery, then they don't have to provide it either. That is the Rule 16 federal rule that seems to work well there. And, I think that would work well

here. I think it would take care of many of the cases that your Honor has just asked me about. The pro pers or the people who want the quick plea. You know, you go to your first pretrial and the prosecutor offers to drop it to a civil infraction, if you—you know.

CHIEF JUSTICE MCCORMACK: Right.

MR. SHEA: And so I think that's an easy—an easy fix. On the pro pers who want to litigate their cases, that's a problem. It is a problem. But I think we can—we can—we do it in small claims; we have information sheets where we tell pro se litigants how it is you can prosecute a small claims action. We do it in many courts when it comes to pro pers who are prosecuting or seeking personal protection orders. I think there are certainly ways that we can do that.

More importantly, and I have said this before, including in this Court, I don't think the rule should be drafted to accommodate the minority of cases. I think the rule has to be drafted to accommodate the heartland of cases. And the heartland of cases are not pro pers. So I don't want the perfect to be the enemy of the good.

I don't—my time is up. I don't want—

CHIEF JUSTICE MCCORMACK: But I interrupted you, so if you have any other important things to tell us—

MR. SHEA: I'd like to say that reciprocity, I think, is kind of a false evil that is set up by some of the people who have commented on this. We deal with reciprocal obligations in felony cases, we do it in the federal system again. Most of us who do criminal defense work are familiar with what that is and, frankly, I don't think it's all that hard. It's—I don't find it to be unduly burdensome to have to give prosecutors in felony cases discovery when they request it. And finally—

JUSTICE MARKMAN: Mr. Shea, can I ask you one —

MR. SHEA: Yes—yes, sir.

JUSTICE MARKMAN: Can I ask you one question, please?

MR. SHEA: Yes.

JUSTICE MARKMAN: I think you have been very articulate in communicating how important these cases are and in making the point that these are not insubstantial

or insignificant cases; point well taken. However, how have we muddled along for so many years without lawyers, in your words, “knowing what their case was about?”

MR. SHEA: I am fortunate to practice in southeast Michigan, you know? I—Washtenaw, western Wayne, Livingston, Jackson, little bit of Lenawee, little bit of Monroe. In the counties where I practice, prosecutors historically have had an open file policy in misdemeanor cases. But it’s been a courtesy. It’s been at their largesse. And I don’t think that that’s a good way to run a railroad.

There are other parts of the state where that doesn’t occur and where I think it is more difficult, and attorneys have to utilize stop-gap measures. They have to use the Freedom of Information Act where it may apply and there is lots of problems with that. For one thing, it’s not enforceable in the criminal case itself if the municipality or the local unit of government doesn’t respond. Or, they rely on private investigators which can be expensive. Or, they rely on the attorney doing his or her own investigation which can be incomplete. It’s just not fair.

So we muddle along—I think that’s a good way of saying it. We muddle along. And let’s remember, what do our statistics tell us? Two to three percent of cases go to trial. So, you know, usually we don’t see the problems because they don’t get tried and they don’t get appealed. And so nobody sees the problems. And one of the problems, I believe, if you look at exonerations, for instance. If you look at people who run innocent projects, they identify three primary areas why convictions are either overturned as either unlawful or the penalty was excessive. One is bad science, another is bad witness identification, and the third is defendants not getting a full batch of investigation, including discovery, conducted by defense counsel. And somebody going back, after the fact, and redoing the investigation and finding things that should have been found in the first place.

If there is a discovery obligation on prosecutors, then that takes away, I think, a good portion of that in an area where we have been silent on it for too long. I don’t think the Michigan Supreme Court has spoken on misdemeanor discovery ever. We’ve relied on cases like *In re Bay County Prosecutor* and others like it, and general custom and practice.

I think—and I want to say, I think enlightened prosecutors provide discovery for a good reason; when my client looks at the drunk driving video that we got from the police officers’ patrol car, and sees himself tottering all over the road, he all of a sudden isn’t quite so sure that he passed those field sobriety tests. And it makes for a better

outcome for everybody. So I think that it's efficient; I think it is fair and I think that the cases are too serious these days for us—

JUSTICE MARKMAN: Well do you disagree with what seems to be the premise of those who disagree with you that this is going to result—your position is going to result in a lengthier and costlier process, or is your view just that—that will resolve but that's just part of the cost of a fairer justice system?

MR. SHEA: That's a fair—very fair question. There are costs in any rule, no matter what rules we—I mean, there are consequences to the rules. And oftentimes, it makes things—it can make things more complicated and it can delay things. I agree entirely with Mr. Blanchard's observation that the SCAO guidelines, when it comes to misdemeanor cases, will need to be modified in some fashion so as not to set up defense attorneys to fail who do have reciprocal discovery response obligations. And that will entail some lengthening of misdemeanor dockets in courts that have those fast-paced dockets.

I don't practice in many of those kinds of courts, Mr. Justice Markman. I—it's not uncommon where a case is going to be litigated, a misdemeanor case is going to be litigated where we litigate them, for it to take six, nine months for a case to come to trial, which already is outside of those SCAO guidelines typically.

So I don't think it's going to make any difference where I am. I think in cases that have more fast-paced dockets, like the one that Mr. Blanchard described, it is going to require some adjustments.

JUSTICE MARKMAN: Well to put the same question to you that the Chief Justice just put to Mr. Blanchard, do you see any merit in the—some of the middle of the road propositions that he has laid out to the Court here?

MR. SHEA: I do. And I—as I said earlier, I like the opt-in option, where it's not—it's not—a prosecutor doesn't have to provide it unless it's requested. The defendant does not have to reciprocate unless the defendant requests it. If the defendant wants to rely on his or her own means to investigate the case, and not seek discovery from the prosecutor then I think that's a fair middle ground. And there are some competent, good misdemeanor defense attorneys who have operated that way for a long time and really don't want to change. I don't see a problem with that because I think they still do a good job. But I think that there should be a uniform rule for discovery where defendants and defense counsel feel that they need it.

CHIEF JUSTICE MCCORMACK: Thank you.

MR. SHEA: Thank you.

CHIEF JUSTICE MCCORMACK: Next is Stuart Friedman.

MR. STUART FRIEDMAN: Good morning, your Honors. I'm going to dispense with my prepared remarks because I think much of the territory has already been covered by my brother counsels. If forced to choose between the two compromise options that have been proposed, I would opt for copying the federal opt-in proposal.

With respect to the discussions about pro se witnesses, I would commend for the Court's attention California Judicial Court Form, FL 321, which is a witness list exhibit form that specifically was tailored for pro se litigants.

I would note, as other counsel has stated, that the consequences of a modern misdemeanor conviction are far greater than they used to be. I have a client who was—I just won in the Board of Immigration Appeals, while he's been deported to Albania, he was removed for two different offenses involving small personal amounts of marijuana. So the consequences of the collateral effects of these convictions can often outweigh the actual conviction.

I would also point out that we do not have provisions in our current court rules for motions for new trial or motions to withdraw pleas in these misdemeanor cases. So it's sort of difficult to determine, actually, how much damage has been done because you have to go through a very tortured route to get these facts in the record in some courts. I know later this term, this Court's going to be dealing with a mess I may have created about whether or not we have a writ of coram nobis. And it was out of one of those cases that those—that originally conceived that issue.

I do think we have a problem. I note in closing that 50 years ago, in *People versus Wimberly [ph]*, we stated that the policy in Michigan was not to have dueling legal gladiators, but to have broad discovery, because trials were supposed to be a search for the truth. I find it puzzling that we are still having this discussion literally 49 years after the Court wrote that. Thank you.

CHIEF JUSTICE MCCORMACK: Thank you. And finally, we welcome Prosecutor Vaillencourt back to the podium.

MR. WILLIAM VAILLIENCOURT: Good morning, William Vaillencourt, prosecuting attorney from Livingston County.

PAAM supports the concept of a court rule regarding discovery in misdemeanor cases. But, we think the application of the felony discovery rule is too broad in light of the nature and volume of cases in district court, as well as the shorter time frames involved for disposition of these cases.

The staff comment points out that—quote—full-blown discovery for misdemeanors would be the default with the district court having the discretion to order limits. [Where the quote ends is not indicated by the speaker] The reality of that position is that it would effectively be full-blown discovery in every case. We'd suggest that it is more appropriate to flip it, make more targeted discovery as a default. But the district court would have the ultimate authority to order broader discovery in appropriate cases. It could be flexible to handle the different nature of the broad variety of cases that come to the district court. So our proposal is to adopt something that was based on a proposal, a number of years ago, from the committee on the rules of criminal procedure that this Court appointed in 2002.

Instead of a one size fits all approach to discovery, it would be more right size that reflects the practical differences between felonies and misdemeanors. And no ops on person, or a driving while license suspended case, is dramatically different from a CSC or an assault/murder case.

CHIEF JUSTICE MCCORMACK: Mr. Vaillencourt, I appreciated that—learning about that prior proposal because I didn't know about it. And I appreciated PAAM bringing it to our attention. Do you have a view as to that proposal versus some of the other middle ground proposals that have been talked about in the courtroom today?

MR. VAILLIENCOURT: Well I know that we've heard from our friends on the defensive, a bit of a disagreement about reciprocal discovery. If you look at the rule that is proposed by us, the only duty imposed on a defendant is to disclose witnesses. None of the other duties imposed—

CHIEF JUSTICE MCCORMACK: Right.

MR. VAILLIENCOURT: —by 6201 [ph] would apply under our proposal. And for prosecutors that's especially important to avoid trial by ambush, because—especially where experts are concerned. Currently, there is no requirement any for—anywhere for a defendant to disclose an expert. So the first time the prosecutor might know there is

an expert is when they show up for trial; that would include experts in drunk driving cases where you are dealing with issues of retrograde extrapolation or accident reconstruction experts in moving violation causing death or serious injury. So disclosing witnesses really is not a burdensome requirement. And I think our proposal—

CHIEF JUSTICE MCCORMACK: But I didn't hear—I didn't hear Mr. Shea or Mr. Friedman necessarily to disagree about reciprocal discovery. I guess I'm more curious how you feel about the Federal Rule 16, opt-in/opt-out—

MR. VAILLIENCOURT: I mean, I will confess I'm not familiar with the federal rule. I know the reality is that every defense attorney on a case is going to ask at some point to either see the police report—you know, even if it's just to verify if it's a suspended case. I want to see what the basis for the stop was. Or, they are going to want a copy of the report. And as a matter of practice, as Mr. Shea pointed out, there is a benefit for us in giving—

CHIEF JUSTICE MCCORMACK: Yes.

MR. VAILLIENCOURT: —discovery because we show the defendants, hey, we've got a good case here. And so I think opt-in/opt-out, I don't think is necessarily the answer; I think doing something really targeted where it essentially is, it says if the defendant asks, the prosecutor has to give these things, the only requirement on the defendant is to identify witnesses. And if there's an attorney involved, that's usually pretty easy—yeah, we're calling an expert, its so-and-so. Or, at the final status conference, when you are starting jury selection, the judge can say, does the defense have any witnesses, so we can identify for the jury. So, our rule really—I mean—is—

CHIEF JUSTICE MCCORMACK: I think your rule sounds like opt-in/opt-out. But maybe more—even more tailored.

MR. VAILLIENCOURT: Yes.

CHIEF JUSTICE MCCORMACK: But I just was—okay. Thank you.

MR. VAILLIENCOURT: Just one final observation. Generally, discovery in misdemeanor cases really isn't a problem. Police reports and lab reports are routinely provided expeditiously. If there are discovery issues, they are either resolved by the parties. Rarely is judicial intervention required. So, thank you.

CHIEF JUSTICE MCCORMACK: Thank you very much. That concludes the hearing. We appreciate you all being here.