

MICHIGAN SUPREME COURT

PUBLIC HEARING
MAY 17, 2017

ITEM NO. 2 (ADM File No. 2015-11)

CHIEF JUSTICE MARKMAN: Thank you all for being here this morning. This is our May administrative hearing. We have a number of items and we look forward very much to hearing what you have to say about those items. We'd like to- In particular this morning, we'd like to welcome our newest colleague, Justice Kurtis Wilder, who is joining us today. This is absolutely his first hearing, administrative or otherwise, and we know he'll contribute, as he always does, with great insight and judgement. So we will begin. The first case that we have [PAUSE] is administrative file number 2015-11. This is a proposed amendment of MRE 404, and would require the prosecutor to provide reasonable notice of other acts evidence in writing or orally in open court. My understanding is we have two speakers, and the first one would be Mr. DeGroff, with the State Appellate Defender's Office. You have three minutes, as all of our speakers do today, and please use your time as wisely and as prudently as you can.

MR. DEGROFF: Thank you, Your Honor. Brett DeGroff from the State Appellate Defender Office, and I'm happy to- I have some remarks, but I'm happy to answer any of the Court's questions at any time, as well. SADO supports clarification of the form of notice of rule 404(B) evidence, but strongly opposes allowing that notice to be oral. SADO encourages the Court - as many other commenters have - to adopt a written notice requirement 15 days before trial. As we pointed out and other commenters have pointed out, a written notice requirement and a period of something like 15 days would be consistent with other- In other contexts such as prior domestic violence evidence, evidence in certain CSC cases, alibi defense, insanity. Those all require written notice in anywhere from 10 to 30 days before trial. I think it's worth pointing out, too, that those examples - the admission of those types of evidence - are somewhat less complicated than 404(B) evidence. As the Court knows, 404(B) evidence can be rather slippery. What is the evidence? What inference is it really being offered for? To give written notice and give everyone time to unpack that and get it right initially at the trial court stage, and if not, make the best record

possible for appellate review, is - Better serves everyone. Better serves defendants, the prosecutors, the courts, it saves judicial resources. So an oral notice would be- Would be difficult to review. As some commenters pointed out, it's not clear exactly what that would mean. The proposal only says in open court, but the transcripts are not always being- Not everything is recorded in open court, so would an offhand mention to defense counsel before transcription has begun, would that count? How could that possibly be reviewed? So there are a lot of questions and we would join with other commenters in recommending a written notice and a 15 day period.

JUSTICE MCCORMACK: Mr.-

JUSTICE VIVIANO: What kind of-

JUSTICE MCCORMACK: Oh, go ahead. [PAUSE] No, you. You're all over 404(B), you've got it.

[LAUGHTER]

JUSTICE VIVIANO: What type of work would a criminal defense attorney need to do upon receipt of notice that the prosecutor intends to utilize 404(B) evidence? Is it just legal work to try to oppose that evidence or argue why it may not be relevant in the specific case, or would there be factual investigation that would need to occur, as well?

MR. DEGROFF: There very well might be factual investigation. I've had a case recently where 404(B) evidence was offered of a lot of prior domestic violence incidents against a client, and defense counsel should- To give his client the best representation, would want to get ahead of that, find out exactly what those situations entailed, and then, once those facts- Once defense counsel has those facts and finds out what this evidence is going to be, then there's also the legal aspect of what is the inference here, and is that actually permissible under 404(B)? [PAUSE] I see my time has run out, but if-

CHIEF JUSTICE MARKMAN: Are there any further questions? [PAUSE] Okay, thank you very much.

MR. DEGROFF: Thank you very much, Your Honors.

CHIEF JUSTICE MARKMAN: Appreciate it. Our next witness will be Margaret Raben, representing the Criminal Defense Attorneys.

MS. RABEN: Good morning, Your Honors. My name is Margaret Raben, I represent the Criminal Defense Attorneys of Michigan, who are probably the subset of the Bar who would be most affected by this proposed change. The question isn't whether notice is required, the question is whether oral notice is going to be sufficient, appropriate, and fair. I have a sign in my office that says "writing is nature's way of letting you know how sloppy your thinking is."

[LAUGHTER]

MS. RABEN: And I think that that becomes particularly applicable in this situation, where the proposal allows for a non-specific and haphazard disclosure of evidence that's going to be used as a trial against a litigant, generally, but primarily, criminal defendants. Justice Viviano asked what happens if it's not a timely notice. There is both the factual investigation - did this really happen? What is the evidence to support this? - and there is also the legal argument, because the prosecutor is required to state what aspect of 404(B) this evidence, in fact, is going towards, as to simply propensity evidence which is often the basis for seeking to admit it. That implies that there is going to be the possibility of investigation, research, counter-argument, and, of course, for those of you who were trial judges, the 404-403 inquiry to determine whether this evidence is admissible or not. An oral notice invites sloppy thinking, sloppy disclosure, and sloppy resolution. It puts the litigants and the judge in the position of looking- Trying to get a transcript of what might had been said if it's required to be on the record, of having to get the recording for the video courtrooms where there are no transcripts. It puts the judge in the position of perhaps being blindsided about was there even proper 404(B) notice? All of this- Oral notice always sounds real simple. In practice, I think it becomes a complicating factor in pretrial cases. And I will also tell you that a written notice can be very helpful in sitting down with a client and explaining why going to trial might not be the best solution in his case, if he knows exactly what the other evidence is going to be. I also am- CDAM is also in favor of the idea of imposing a deadline for this notice. The court rule speaks of reasonable notice. Reasonableness is in the eyes of the beholder, certainly. My time is-

CHIEF JUSTICE MARKMAN: Yeah, would you please finish your thought, if you would?

MS. RABEN: Thank you. Yes. And I think that the District Court Judges proposal for a 15 day written notice requirement is workable. It will not interfere with trial schedules, it gives the defense attorney the appropriate time to follow up on it, and the rule still provides for the exception situation where the prosecutor finds out something outside of the notice period. Thank you.

ITEM NO. 3 (ADM File No. 2015-18)

CHIEF JUSTICE MARKMAN: Thank you very much, Ms. Raben. Is there anyone else who would like to testify on that matter? [PAUSE] Okay, let's move to item number 3, administrative file number 2015-18. These are proposed amendments of MCR 9.108 that would clarify that the Supreme Court has the authority to enjoin an attorney from practicing law. Our speaker on this will be Ms. Cynthia Bullington, Assistant Deputy at the Attorney Grievance Commission, on behalf of the Grievance Commission and the Grievance Administrator. Thank you.

MS. BULLINGTON: Thank you, Justice Markman. Again, my name is Cynthia Bullington, appearing on behalf of the Grievance Administrator, who sends his regrets as being unable to appear here today in person; he is out of the country. The commission does wish to vote- Voice its support for the proposed amendment. It is a situation where the Supreme Court is appropriately seeking to clarify its authority to enjoin an attorney from the act of practice of harm- Practice of law, where there is the imminent potential for harm to the public from an attorney, typically engaging in repeated acts of misappropriation, but it could be other situations, as well. I note that the Probate Bar indicated that the phrase "against" should be placed in there, which is perhaps not a bad alteration, however, to make it consistent with other rules, perhaps the phrase of "or from engaging in the practice of law" would make it, again, more consistent with other rules in the disciplinary section. [PAUSE] Any questions?

CHIEF JUSTICE MARKMAN: Thank you very much.

MS. BULLINGTON: Thank you.

ITEM NO. 5 (ADM File No. 2015-24)

CHIEF JUSTICE MARKMAN: Let's move to item number 5, administrative file number 2015-24. Proposed amendments of MCR 2.116 and 2.119 that would allow for the filing of reply briefs

in summary disposition proceedings. Our scheduled speaker is Karen Safran, representing the State Bar of Michigan.

MS. SAFRAN: Thank you, Justice Markman. Good morning, Your Honors. Karen Safran, I'm here on behalf of the State Bar of Michigan. I am the chairperson of the Civil Procedure and Courts Committee, which is the committee that originated this rule, so it's our fault that this matter is before you, Your Honors. The rule was proposed to achieve with two goals in mind. One is to have some uniformity in the practice for dispositive motions. We currently have a situation where some judges will issue scheduling orders that will allow reply briefs, some judges allow reply briefs because the court rule doesn't expressly prohibit reply briefs, some judges will not allow reply briefs because the court rule does not expressly allow reply briefs. And we also have situations in dispositive motions where parties will occasionally, let's just say, dump in a brief at the last minute, two days, three days, the night before the hearing, which really doesn't- It's just not fair, either to the court or to the non-moving party. So the goal of the rule was to provide for uniformity in practice throughout the state, as well as to preserve the current system, which allows seven days to- For the non-moving party and the trial court to prepare for the hearing. The proposed amendment shortens- It achieves one of those goals because it achieves uniformity, but it doesn't meet the goal of giving the non-moving party and the trial court sufficient time to prepare for the hearing. Given the significance of a dispositive motion, which could result in the end of the case, shortening that time to three days is just not going to be enough time. I don't think it meets the interest of justice to require the non-moving party to scramble, and the trial court to only have three days to prepare for a hearing and to prepare adequately for the hearing. I understand the Court perhaps not wanting to extend the time because of the interest of moving cases forward, but in actual practice, changing it from 21 to 28 days really wouldn't have a significant impact on the administration of justice. We have a situation- I practice principally in Macomb, Oakland, and Wayne County, and those counties, the judges quite often will limit the number of dispositive motions that they hear on any given call because of the time it takes to prepare and the time of the hearing. So there isn't currently a situation where you file your motion, you're not guaranteed a 21-day hearing in any event. And I think it better serves the parties and the courts to bump the time out a week, give everybody adequate time to prepare, and that would absolutely meet the goals of the rule and the uniformity. So that's our position, if there's any questions?

JUSTICE VIVIANO: When you're talking about adequate time to prepare, you're already in a situation where you have the moving party's brief and you have the response to that brief. Now we're on reply, and the brief - limited to five pages - would be, presumably, very targeted at one or two issues raised in the response. And so I guess I'm wondering - and I've, you know, sat on the Macomb County dispositive motion call, very busy call, but I've always managed to find time to look at those briefs before taking the bench because they're very short and they're very targeted and you've already done all of your other preparation before then. So doesn't that alleviate some of the concerns about the timeframe? The fact that the brief is short and that it's targeted and that it comes at the end, you know, of a lengthy briefing schedule.

MS. SAFRAN: It should be short, it should be targeted, that's what the rule is designed for, and that's why we tried to mirror it on the appellate rule. That isn't always the case, and-

JUSTICE VIVIANO: Well it has to be limited- Isn't it limited to five pages?

MS. SAFRAN: The proposal is limited to five pages, and it shouldn't be a situation- I know that was one of the concerns that somebody would try to sandbag and raise new issues and I think the trial courts would see through that. You're still, though, you're losing that extra couple of days to prepare. It's how many days, how much time, what else is on the caseload, and just, I think three days versus four days is just a little fairer for everyone, given the nature of the dispositive motion, but not-

JUSTICE VIVIANO: Three days versus seven days, right? Isn't that the [INAUDIBLE @ 16:03]?

MS. SAFRAN: Three days versus seven days, so it's a four day difference. The non-moving party is the party that's at the disadvantage, because the non-moving party is the one who receives the reply brief. So it's in fairness to the non-moving party to research- To have adequate time to research what may be raised in the reply brief and fair for the hearing. And also, if something is in the reply brief, to give the court and the court staff adequate time to prepare for the hearing. So we don't have a situation where the court's going to take it under advisement

and not be in a position to issue a ruling at the time of the hearing.

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

MS. SAFRAN: Thank you.

ITEM NO. 9 (ADM File No. 2016-32)

CHIEF JUSTICE MARKMAN: Next we have item 9, administrative file number 2016-32. These are proposed amendments of a number of court rules that would require that all appeals from the probate court be heard in the Court of Appeals, and would establish priority status for appeals in guardianship and mental health cases. Our first of two speakers is Sherlyn Robinson. [PAUSE] Please proceed.

MS. ROBINSON: Thank you, Your Honors. I would like to thank you today for this opportunity to speak. I'm a citizen. Anyway, I support the proposed amendment that would require all appeals from probate court to be heard in the Court of Appeals. My family was recently victimized by the theft of our father's estate by one sister, and again by the probate court. I believe that if this amendment were in place, the things that happened would not have happened, and it would improve opportunities for justice. I have transcripts and documentations to support my allegations that the probate court violated Michigan court rules and laws regarding disclosure of documents, rules of evidence, and threatened sanctions for us pursuing our rights, they appointed a personal representative to obstruct our access to documents and legal remedies for conversion and fraud. To summarize, the three hearings: At the first hearing, our sister confessed to embezzling the funds belonging to the estate from the State of Michigan unclaimed property and using them to pay her bills. Knowing that a crime had been committed, the judge refused to sign petitions for the release of discovery documents and accepted the word of the alleged criminal that she paid half of the funeral bill, despite receipts and sworn affidavit from the funeral home to the contrary. At the second hearing, when our attorney said we believe a crime has been committed, the judge abruptly ended the hearing, he refused to sign the orders for discovery documents, and threatened us with costs and sanctions for frivolous motion. At the third hearing, a request was made to remove the court appointed representative for doing nothing. The judge temporarily appointed another sister as requested, but when she asked the judge to sign the order to release documents, he reappointed the first personal

representative with explicit instructions for the sole purpose of remitting payments. Pursuant to statute, we were entitled to double damages for conversion of funds. The judge denied our request and recommended instead that we ask for costs for parking fees. Again the judge threatened us for the defendant's costs and sanctions. Without the judge's assistance, we were able to obtain the documents which provided evidence of fraud and perjury in order to obtain the funds and the life insurance policy that showed that our mother had possible ownership rights even though she and my father were divorced, but her name was on the policy. The case concluded with no record of any crimes ever being committed on file and all of the costs to collect the stolen funds were charged to the estate. I believe that had this policy been in place, that actually I don't believe that a lot of these things would have happened in the first place, so I'm not trying to increase the burden of the appellate court, I just think it would facilitate justice being done in the first place. I think not having any oversight that- It was just allowed to happen.

CHIEF JUSTICE MARKMAN: Okay, well thank you very much Ms. Robinson for sharing your thoughts.

MS. ROBINSON: Thank you.

CHIEF JUSTICE MARKMAN: Appreciate it. On the same matter, we have Marlaine Teahan of the Probate and Estate Planning Section of the State Bar.

MS. TEAHAN: Good morning Chief Justice, Justices. It's a privilege to be here today. I am the chair-elect of the Probate and State Planning Section of the State Bar of Michigan, and my comments are the comments and positions of the section and not the State Bar, and I've submitted a public policy statement through the Court to that effect. And so today I'm here as the committee chair of the Probate Court Rules Committee, and we've been at work at this task since 2010. We originally came to this Court asking for a rule change and we were directed to the legislature. Laws have now been changed and so now we're back to try to get the rules replaced. I've had the privilege to work with the Supreme Court analyst, Robin Eagleson on this, in preparation of the ADM before us, and in response to the Probate Section Chair, submitted a letter February 28th of 2017 commenting. And I'm here today to stand- You know, representing to you that we stand firm on most all of that letter, but there's a few distinctions that I'd like to make, and so the few changes we have to that letter are based on our reading of Chief

Judge Talbott's letter of the Court of Appeals. So when I first read his letter, I was a little concerned because I thought our positions were very far apart. But then when I looked at his actual proposal, I realized that we're very close and our positions are very similar. So most of our changes are technical changes. There's one public policy change that we would suggest, and so I have four rules that I would like to talk about, and one is 5.801. We do like his approach to maintain the structure and integrity of the rule as it was originally drafted, and to have a simpler approach. So we like that. But there's one change that we would suggest and that's in the paragraph in 5.801(A)(2) that precedes the laundry list. Because the first item on the laundry list includes the word "fiduciary," we think we need to add in the term "guardianship" under EPIC and the Mental Health Code. The second thing is for 7.202 and 7.203, we agree with Judge Talbott, no changes should be made to those section. And I note in the ADM there are some changes - it's to 7.202, the definition of final judgement of final order. I strongly urge the Court not to adopt sections VI and VII because what it has is partial laundry list in chapter seven, and then we have a long laundry list in chapter five. And so my concern is these lists differ. And so if we have the right to have an appeal under some things in chapter seven and many things in chapter five, it'll be confusing and it could adversely affect the rights of the appellants. And then 7.210, the record on appeal. I would suggest a shorter version. It looks like Chief Judge Talbott is trying to add in the different types of things that equal proceedings in probate court. So I think it would be easier to just say the- In an appeal from a probate court proceeding, then the full record would not go up, but just the order appealed from. And then the full record would go up on civil actions. And then, finally, the public policy position. And this was in our letter, but the Probate Section feels so strongly about it, I just wanted to highlight it. We agree with what is in the ADM now, that the priority of calendar items would include guardianships under EPIC and the Mental Health Code, and- I'm sorry, it's just those two things. Guardianships under both. But there's one term that needs to be changed. The ADM references mental illness cases, and the term used in the Mental Health Code is "involuntary mental health treatment," so I would suggest that we keep that consistent with the statute. And I'd be happy to answer any questions and I will provide the text of my suggestions to Ms. Boomer.

That would be helpful if you would share that and we'll certainly give it every bit of consideration we can.

MS. TEAHAN: Thank you very much.

CHIEF JUSTICE MARKMAN: Are there any questions? [PAUSE]
Thanks very much.

MS. TEAHAN: Thank you.

CHIEF JUSTICE MARKMAN: Thank you, Ms. Teahan.

CHIEF JUSTICE MARKMAN: Next we have item number 11,
administrative file number 2016-35. Proposed addition of-

[INAUDIBLE FEMALE VOICE NOT 25:27 - 25:34]

CHIEF JUSTICE MARKMAN: Okay. I'm sorry. What is your name,
ma'am?

MS. DANIELS: Sherry Daniels.

CHIEF JUSTICE MARKMAN: Okay, would you please come up here.

MS. DANIELS: I'm sorry for the [INAUDIBLE @ 25:4]
important-

CHIEF JUSTICE MARKMAN: No, we don't have a lot of people
coming from Alabama so we certainly want to hear you.

[LAUGHTER]

CHIEF JUSTICE MARKMAN: Now, you understand you have three
minutes.

MS. DANIELS: Yes.

CHIEF JUSTICE MARKMAN: Okay.

JUSTICE ZAHRA: Can you give us your name please?

MS. DANIELS: My name is Sherry Daniels.

JUSTICE ZAHRA: Okay, thanks.

CHIEF JUSTICE MARKMAN: Please proceed.

MS. DANIELS: I do believe that in the probate court, any
appeals should go to the Court of Appeals. It's very important.
I feel that some of their decisions are reckless, at best, and

that if the Court of Appeals heard these arguments, that the courts would be more appropriate in their rulings, the probate judges would be more thoughtful in their rulings. I have three examples. I was in a court, probate court, one family had a son that was born by another father. And there was a life insurance policy involved. They went to the probate court to find out how to resolve this issue. The judge leaned back, sputtered some Ronald Reagan quotes, then told the family "you haven't grieved long enough," and sent them home. I'm not sure what the grieving period is, but things like this, these decisions, need to be sent to the Court of Appeals. If they were, these judges would make more relevant decisions. In the second case, an 84-year-old woman was deemed incompetent by two of her daughters. They quickly went through their money. Their son disagreed with this. He had her evaluated by three neurologists, they each found her competent. One even said to stop this nonsense. The probate court continued the nonsense. She was given a conservator and a guardian, which cost her even more money. The son, he was found in contempt of court, he was removed from the home, and he had to pay fees to the court. A third argument was my case. We went to court regarding a life insurance policy of my father. One sister stole the policy. We had to go to court, try to figure out how to rectify this. The judge had extra-curricular dealings with my sister and her attorney. I do understand that extra-curricular activities is allowed if it's to advance the law. But if it's not, then those extra-curricular activities should not occur. The judge- We put in a motion to receive those paperwork she used to steal the money, the judge never marked dismissed, denied, granted, or granted in part. He never signed it. We requested the actual life insurance policy to look at all benefits- All beneficiaries and any stipulations. Again, the judge never marked denied, dismissed, granted, or granted in part. He never signed it. As it turned out, I sent a complaint to Judicial Tenure Committee. They actually called me back, I was so happy. And then they asked well why don't you all get the insurance policy and look at the beneficiaries and the stipulations? Yeah. Well that's what we had asked for. But the judge did not- He did not rule on our motion. Judges- Incumbent judges rarely are challenged. And judges usually don't have appeal group to monitor each other's decisions. Therefore, we need these decisions to go to the Court of Appeals. Every appeal should go to the Court of Appeals and these judges would make more relevant decisions, rather than you haven't grieved long enough. They paid for an attorney. Now if they have to go back, they have to pay a second time.

CHIEF JUSTICE MARKMAN: We know the distance you've come here today emphasizes the strength of your feelings and we really appreciate you taking the time.

MS. DANIELS: Thank you very much.

CHIEF JUSTICE MARKMAN: Thank you for sharing your experience.

MS. DANIELS: Thank you.

ITEM NO. 11 (ADM File No. 2016-35)

CHIEF JUSTICE MARKMAN: Let's move now to item 11, administrative file number 2016-35. That would add a provision MCR 6.008 that would eliminate the practice of circuit courts remanding to district courts except where otherwise provided by law, and our speaker is Tom Power, of the 13th Circuit Court. [PAUSE] Judge, we know you've come a long distance, maybe not quite as far as your predecessor speaker, but thank you for being here.

JUDGE POWER: Well thank you Justice Markman and members of the Supreme Court, and I particularly want to congratulate my friend Justice Wilder, we came into the circuit courts about the same time and he's going to be an outstanding addition to your bench, I'm very proud of him. I'm here to speak against this proposal. I represent or have a circuit with a colleague of three counties. We have a district court with two district court judges covering the same three counties, so we have developed over a period of 20 years and more, a web of understandings and arrangements to handle our relationship has worked quite well. One of them is to make use of the district court and specialty courts. We particularly- The sobriety court, which is alcohol abuse, the domestic violence court, and the mental health court, and those have been especially useful. And the way it's done, in our system, is a felony case, if the parties- Which is a plea bargain, the prosecutor and defense lawyer agree to an arrangement to remand to the district court to participate in one of these specialty courts, and if the specialty court, the district court accepts it, then the district court will take a plea, either to a felony or a misdemeanor, and the understanding is if the defendant successfully completes a sobriety court, they won't go to jail and the conviction will be reduced to something lesser. If it's a felony, it will be reduced to a misdemeanor, if it's a misdemeanor, usually to something lesser. If they're unsuccessful, then they are sentenced on the plea

that they made. If it's a felony, it's sent to circuit court and we sentence them, if it's a misdemeanor, the district court sentences them and manages the probation. And this has worked quite well. It allows us to take us advantage of the initiative and leadership our district court has shown in establishing these specialty courts. This will be forbidden under this proposal. Now there may be a way around it, I've thought of a couple rule-beaters already, you know, dismissing the case and filing it again. There are other ways to do it. But there's no reason to outlaw this system. In general, what's wrong with having misdemeanors sentenced by the same court and felony sentenced by the same court? For over 20 years, 24 years, we've been having district judges take felony pleas before bind over if the parties reach an agreement. Then it comes to circuit court for sentencing. And our probate- Our DOC probation officers handle it. That ensures some consistency in sentencing and probation management for the felony caseload. And if we resolve a case or the parties do in circuit court to a misdemeanor, it goes to district court and they manage it with their probation officers. Again, for consistency. I don't see what's wrong with that. I suspect this proposal is to solve local problems somewhere where district judges and circuit judges aren't getting along, but it's a statewide solution that creates problems for a lot of the rest of us. I suspect there are other courts that have arrangements out there who are going to have the same problem, they just aren't aware of what's about to happen. So I would urge you, first, reject it. If you do pass it, there is a provision bin there that we can- From misdemeanors, at least, use the district court probation system, and that would make a lot of sense. That would go a long way towards having some consistency and management. But I would eliminate the provision that's got to be part of a concurrent jurisdiction plan. That's a whole other discussion, but the probate, circuit, and district judges - 8 of us at that time in our three counties - unanimously voted not to do a concurrent jurisdiction plan, I could elaborate as to why that is, but that's not important. I would eliminate that restriction if you're going to adopt the proposal, at least take that one provision out. Thank you for your time, I appreciate it, and- Okay.

CHIEF JUSTICE MARKMAN: Thank you very much for coming from Grand Traverse today.

ITEM NO. 11 (ADM File No. 2016-35)

CHIEF JUSTICE MARKMAN: The last item we have is Item 13, administrative file number 2016-40. Proposed amendments of MCR 2.625 and MCR 3.101. And these would address recent amendments of MCL 600.4012, and clarify the authority and process for recovering postjudgment costs and provide clearer procedures for garnishment proceedings. Our first speaker is Michael Nelson, representing the State Bar Consumer Law Section. Thank you for coming, Mr. Nelson.

MR. NELSON: Thank you, Your Honor. My name is Michael Nelson, I'm a member of the counsel of the Consumers Section, and I'm also one of the attorneys for the plaintiffs in *Rehberg* and the other cognate cases now pending in the Western District of Michigan, where the issue of garnishment costs is currently being litigated. Michigan- Current rules, particularly MCR 3.101(R)(2) prohibit judgment creditors from taxing the costs for unsuccessful garnishments. At least that's the interpretation by the State Bar in its submission to this Court, and it's also the reading by the federal court in the cognate cases. Despite that rule, creditors have routinely added the costs for unsuccessful garnishments to their judgments until 2013-14, when they were sued under the Fair Debt Collection Practices Act. The change proposed by these debt collectors would effectively allow them to return to the previous practice, which was not permitted by the court rules, and continue to tax the cost of unsuccessful garnishments. The amounts involved for most cases are minimal. We're talking, in an average case, maybe 20 to 80 dollars. But in the aggregate, they're substantial. Most of these cases are filed by large debt buyers. In fact, those debt- Who buy these debts at about three cents on the dollar and then file the majority of civil cases in Michigan district courts. The cases that we have settled in the federal court, those debt buyers have either backed out or returned at least 9.2 billion dollars. So in the aggregate, they're substantial, and I submit that this windfall would go almost entirely to a few large debt buyers who, as I said, paid pennies on the dollar for their debts. The proposal is written in such a way that- [PAUSE] Do I have- -that it does not effectively make the creditors back out the cost of unsuccessful garnishments, and the reason is it would do that only if the creditor receives a negative garnishment return. And, in fact, most of these- The majority of the garnishments are state tax returns and the Department of Treasury does not issue garnishment disclosures when there is nothing to intercept. So in those cases, it would not apply. In closing, the Michigan courts have held in a number of cases that garnishment is a harsh remedy and the rules should be governing garnishment should be construed to protect the

debtors. I think there is no good policy reason to change that. The State Bar, in its submission, has divided the various proposals in support of those proposals which actually go to the change in the statute, and oppose those that don't. And I would urge this Court to follow the State Bar's position.

CHIEF JUSTICE MARKMAN: Thank you very much, Mr. Nelson. On the same file, we have Douglas Van Essen of the Michigan Creditors Bar Association.

MR. VAN ESSEN: Thank you Chief Justice Markman, and thank you to the Court on behalf of the Creditors Bar for the tacit admission that how and when postjudgment costs are taxed needs clarification and administrative attention by this Court. I would like to focus on what I- What we see as the flaw in the State Bar's proposal to the court. There's really two flaws. One is that unlike the prejudgment process, which, as a seminal, defining moment, which is the entry of the judgement, there is no seminal event in the postjudgment process. In fact, hopefully the postjudgment process ends without any final intervention by the Court or any opportunity to true-up costs incurred during the process. If the court were to wait until the underlying judgement and interests are collected to true-up these taxable costs, you would have a series of perpetual motions where there's another judgment following the original judgment, more postjudgment collection on the second true-upped cost. We think that's inefficient and ineffective for not just the creditors, but also the debtors. These costs need to be- That are taxable, need to be collected as they are being incurred. The second flaw that we see in the State Bar's proposal is the concept of success, while it may apply to garnishments, does not apply to the other taxable costs defined by the legislature in the postjudgment collection process. How, for example, do you define whether a debtor's exam is successful? Is it unsuccessful if the debtor doesn't show up pursuant to service? It is unsuccessful if the debtor doesn't provide any useful information? The legislature has determined that there are taxable costs associated with those events, and we believe the system needs to allow the Creditors Bar and the clerks, who are issuing these writs and other postjudgment vehicles, to assess these costs as they are being incurred. Is there adequate remedy for debtors who are being victimized in this process? Certainly there are. The supervising court is always available to sanction debtors who are not playing by the rules. There are, as Mr. Nelson has noted, federal and state statutes when onerous sanctions, if the creditors are not sufficiently following what are truly taxable costs. There's also remedies under the State Bar. We're all

officers of the court, and if lawyers are not- Are engaging in a pattern of inappropriately proffering these costs, they should be disciplined. So we believe that the system that we proposed would be efficient and would be fair to both the court system itself and also the debtors and the creditors, and then it allows these costs to be efficiently taxed as they're being incurred. I just want to make one final comment: We are not suggesting, in any way, and our proposal does not allow or change the fact an unsuccessful garnishment may not be collected. And so I disagree with Mr. Nelson on that fundamental point. Thank you.

CHIEF JUSTICE MARKMAN: Thank you, Mr. Van Essen. Our next witness is Elisa Gomez, of the State Bar.

MS. GOMEZ: Good morning, Your Honors. Elisa Gomez, speaking on behalf of the State Bar on this proposal. I'm honored to present comment on 2016-40. The Bar supports the proposal in part and does not support the proposal in other parts, obviously. I think that I'd like to focus on the portions that we've opposed and the effect that these proposals would have on the most vulnerable populations in the state of Michigan. We're talking about very unsophisticated consumers who may not have much familiarity with the court system. They limit access to justice for those unrepresented litigants, which is the vast majority of those debtors who are appearing in these types of creditor-debtor collections. The proposals, as presented, impose this new affirmative burden on debtors. It's a new process to object when the taxation of costs is imposed. The rule seems to indicate that- Or, the proposed rule seems to indicate that when the garnishment is issued, the creditor is allowed to tax costs, regardless of the success or lack of success of the garnishment. And that if the garnishment is unsuccessful, it then is the sole burden of the creditor, with no affirmative oversight or affirmative disclosure to subtract out those assessed costs. Again, this is a system that is deeply one sided and effects the ability of debtors to understand how costs are accruing, related to a judgement debt that they may have, and affects their ability to clearly object to them in any sort of meritorious way that the court could make sense of in such a motion. I want to address some of the comments that were made by the previous speakers. There's been comments that the supervising courts are always available, and I think that from the perspective of the State Bar, the question is how available, truly? Is it available in any sort of straightforward process that is accessible to a debtor who may not understand very much about the paperwork that they have received? Is this proposal, in fact, adding more

layers and more barriers to the process of objecting that tends to act to the detriment of the more unsophisticated party in these proceedings?

JUSTICE VIVIANO: What are the barriers that are being added?

MS. GOMEZ: So the process specifically in 2.625(K) is that rather than just filing a motion, there's like a demand letter that is supposed to go from the debtor to the creditor with the sworn affidavit, and then if there's an accounting received that the debtor doesn't agree with, then there's a motion filed at that point, rather than just being able to straightforwardly file the motion.

JUSTICE VIVIANO: When you say "barrier," you mean added procedural steps?

MS. GOMEZ: That's correct. And, I mean, and I think that when we're talking about added procedural steps, the question is what are they accomplishing? Are they accomplishing, you know, additional access to justice for individuals? Are they accomplishing efficiency of the courts? Are they accomplishing justice, whatever that might mean in a particular situation? And so if procedure- Procedural steps are being added that tend-

JUSTICE VIVIANO: Are you saying that these steps are cost-prohibitive for people, and therefore that would be a barrier to people accessing the court system?

MS. GOMEZ: I'm saying that I don't think that most debtors, especially unrepresented individuals, are going to understand what they need to do in order to sufficiently follow the proposed court rule as laid out. I routinely represent very low-income people and I'm not-

JUSTICE VIVIANO: So it's not a cost issue, it's a confusion issue?

MS. GOMEZ: It's a confusion issue. So, I mean, when I- When I speak of access to justice, I think that we talk about having a system of justice and a court system, especially at the trial- At the district and circuit trial levels that is understandable and comprehensible, assuming an unrepresented litigant. I think that's how we have to consider much of this, because the vast majority of litigants across the state of Michigan are unrepresented.

JUSTICE BERNSTEIN: So how best should the Court proceed?

MS. GOMEZ: I mean, I would recommend that the Court adopts the comments made by the State Bar. There are portions of this proposal that do effectuate the legislative intent, the very explicit legislative intent, and it's outlined in our March 29th letter, and I don't think that the State Bar objects in any way to those adoptions. But the portions related to the taxation of cost- The new taxation of cost procedure, the limits on disclosures of information by garnishees - neither of those portions are supported by any legislative change that we were able to discover, and, in fact, in many ways, they are proposals that are specifically in response - as Mr. Nelson spoke to - in response to lawsuits against creditor- Creditor firms. So, I mean, I think that the Supreme Court should proceed in a way that ensures access to justice. I mean, the Bar is committed to trying to resolve some of these ambiguities, if there truly are ambiguities in how the taxation of costs- Taxation of cost is done is postjudgement garnishment proceedings.

CHIEF JUSTICE MARKMAN: And your views are reflected in the letters over the signature of Janet Welch, is that correct?

MS. GOMEZ: Yes.

CHIEF JUSTICE MARKMAN: Okay. Well thank you very much for sharing.

MS. GOMEZ: Thank you.

CHIEF JUSTICE MARKMAN: Any further questions? [PAUSE] Okay, thank you, Ms. Gomez. Our next speaker is Jeff Kirkpatrick of the Court Officers & Deputy Sheriffs Association of Michigan.

MR. KIRKPATRICK: Morning. My concern on this is more from a practical application of what happens with us and when postjudgment costs are assessed and how- I know that the comments thus far have been on garnishment, but there's many other remedies besides garnishment on postjudgment collections. One of those is seizure orders. And currently the court's request and order to seize process, in its own form, the MC19, specifically delineates the postjudgment cost to date. So when we, as a court officer or deputy sheriff go out in the field to carry out that court's order, we are able to tell that defendant and collect from that defendant the funds that are due as of the date when we go out. My concern is if we do this as the State

Bar is proposing, after any successful postjudgment collection, then we would go out on the original judgment, we would collect that, we would tell that defendant, "you're going to get a bill for some amount of costs. When that bill comes you need to pay it. If you don't pay it, then we're back out to collect that money again." Thus, there's another fee, there's another service fee, additional mileage, and, to me, it just seems like we're just going around in a hamster wheel. So, in my view, the ability for the defendant to know what those costs are, are advantage. And for us as court officers, it's an advantage for us to know, because the defendant wants finality when we're out there dealing with this. And it's already, as I said on the form, it's the process, the way that it's handled currently. And I really don't think the issue needs to be changed. I believe the Michigan Creditors Bar Proposal does provide the appropriate protections, you know, for the consumers. Thank you.

CHIEF JUSTICE MARKMAN: Thank you very much. Are there any speakers that we have overlooked? [PAUSE] This is our effort to open up the administrative process more directly to public comment. We appreciate all those who participated today, we will do our best to take your comments seriously into consideration and we're pleased that we're now able to do that with the assistance and benefit of our new colleague, Justice Wilder. Thank you very much for being here, we stand adjourned.