

MICHIGAN SUPREME COURT

PUBLIC HEARING
NOVEMBER 28, 2012

CHIEF JUSTICE YOUNG: Good morning. Welcome to our November public administrative hearing. This is the occasion when members of the public in addition to having submitted written comments on pending administrative matters are permitted to give statements about the various of our pending administrative matters. I would simply remind the speakers who are endorsed today, there are four of you, that you are asked to speak only to the administrative matter that you have signed up to address. And with that we will move to the first administrative item that is endorsed for speakers - that would be Item 2 - which is item 2011-14. It's a proposed amendment to Rule 2.105 whether to adopt an amendment to state that a diligent inquiry in support of a request for substituted service must include an online search if the moving party has reasonable access to the internet. The first speaker endorsed is Lori Frank. You have three minutes.

ITEM 2: 2011-14 - MCR 2.105

MS. FRANK: Thank you. Good morning. My name is Lori Frank; I have been practicing in the area of creditors' rights for over 23 years. I am here as an officer of the Michigan Creditors Rights Association and we appreciate the opportunity to speak here this morning. We understand the genesis behind the change and we understand that the internet seems to be an attractive option. But what is the internet? The internet is simply taking a bunch of information, compiling it, distilling it, repackaging it. Sometimes it's for a subscription service; sometimes it's just out there. But a lot of times this information isn't vetted. And I ran an internet search on myself - I found out I've been living at the wrong address for the last ten years. According to the internet, I've been living in Southfield where I have not resided in over - almost 30 years. Likewise, I had my paralegal do a search on herself. If she was going to be served, she would be served at an address that was foreclosed on two years ago and that was also incorrect. So we have a problem - or a question about the accuracy of the internet. The other question we have is whether this is really ripe for a

mandated court rule, and just because we're getting more information doesn't necessarily mean it's more accurate information. And let me kind of give you a real world example of what I'm talking about. A court officer goes out to serve a defendant, knocks on the door, nobody's home. Goes out there three times, still no answer. He sees a car in the driveway - runs the plate. The plate has the same last name, but a different first name. A postal trace is then run - good as addressed. Right now the process would be we'd walk to the trial judge and say your honor, we'd like an alt-service order. The judge would likely approve it and we would post it on the door and whatever other means the court would require. But for a mandated court search - or internet search rather, what could happen and what will probably happen is we'll wind up with a second address. Now does that mean we're going to have to serve two addresses? If so, we're going to serve - so one of them is going to be a wrong party. Then we're gonna get hauled into court say let's see your backup information which may mean we're going to present social security numbers, driver's license numbers, and that's private information which would then - will become part of the public discourse. And this is the opposite direction which this Court and other governmental agencies are headed in trying to get private information out of the public sector. So we believe it's an idea whose time may not have yet come, and we believe a more appropriate approach may be a permissive - so rather than shall change it to a may. And I thank you and will answer any questions that you may have.

JUSTICE MARKMAN: Well, Ms. Frank, I have just one question.

MS. FRANK: Yes, your honor.

JUSTICE MARKMAN: I mean I think everybody understands the inadequacies and the imperfections of the internet, but everything else being equal, isn't more investigation to be preferred to less investigation and more information to be preferred to less information?

MS. FRANK: More information your honor or Justice will sometimes lead to confusing information, and there's never going to be 100% degree of certainty until we actually get the defendant into court. And, as I say, it does - and if we wind up in a situation where you have

conflicting information, how does the court resolve that? How does the - how do we resolve that unless we do it by the best means available and that a lot of times means the eyes and ears on the ground for the process services. They actually go out there and then the postal authorities have to have by law the best address, so - I hope I've answered your question.

JUSTICE MARKMAN: Thank you.

JUSTICE MARY BETH KELLY: The focus of the proposed rule I think is really on diligence -

MS. FRANK: Yes.

JUSTICE MARY BETH KELLY: and the idea is how could a search be diligent in this day and age without use of the internet. I understand well you're focused that the internet perhaps sweeps too broadly and can lead to inaccurate information, but I don't think it was ever the idea that the search or the diligence would end with whatever the internet brought in. I think then there would have to be some mining, if you will, of the information.

MS. FRANK: Exactly. And that's the problem with all due respect. The problem is with the mining because in the event that we serve the wrong party then the question's going to be what - how did you comply with the court rule. It says you shall perform an internet search - what search did you run and can I see what you did. And that's where we're concerned with getting private information out into the public sector because I agree that, yes, we should - we do look at Lexis and other search engines. We want to make sure we're going to serve the best possible address. And that's why we think a more permissive may rather than the shall may be more appropriate and would give the judges a little latitude at the trial court level to say well, geez, you took the steps that seemed to be appropriate, now if we throw the mix - throw the internet search in there it may lead to more confusing rather than clarification.

JUSTICE MARILYN KELLY: Of course, the rule proposed doesn't require that you serve everybody who's at - serve people at every address that shows up on the internet. It was provoked because of a case where a default judgment was taken against a party and the assertion was made to the court that there was no known - other known address and an

easy internet search showed that party's name and current address.

MS. FRANK: And that's correct. I understand where the Court is coming from with that and for a litigant to go to Monroe to serve a Wayne County resident is a problem, but mandating this rule isn't necessarily going to solve that problem. And particularly when you look at fathers and sons who have the same last name but live in different addresses, how are we going to be certain we're serving the right one if we have to provide the internet search to the court. And as I say I'm kind of approaching this from a more practical aspect being in the trial court, being at the district court level, having to get these alt-service orders. And that's really our concern is more information isn't necessarily better information - more information can oftentimes lead to confusing and conflicting information.

CHIEF JUSTICE YOUNG: I'm not sure I understand. Are you saying you don't even want to have the information to assess?

MS. FRANK: No, no, your honor, that's not what I'm saying. What I'm saying is that we agree looking at the internet makes sense. What we have a problem with is mandating it as part of the court rule because then we're going to be required to provide the search to the court because in order to comply with the court rule - in order for the trial court to determine whether or not we've complied, they're going to want to see what we've done. And so we're concerned -

CHIEF JUSTICE YOUNG: You don't have that obligation now?

MS. FRANK: Not on an internet search.

CHIEF JUSTICE YOUNG: No, I understand -

MS. FRANK: No.

CHIEF JUSTICE YOUNG: but if you come to me and say I want alternate service I'm gonna ask you why and why this one. And whatever you've done to narrow down to the alternate service you're asking the court to provide you have to justify it, correct?

MS. FRANK: Exactly.

CHIEF JUSTICE YOUNG: And that doesn't - and that's true whether you have an internet search with a lot of perhaps false hits or just however else you collect the potential data field, right?

MS. FRANK: Correct, your honor. That's absolutely correct.

CHIEF JUSTICE YOUNG: So how does this - how does this other than saying this has to be in the mix of your investigation, how does that alter anything?

MS. FRANK: Because if it conflicts with what the court officer is finding, what a postal trace is finding, if we run a plate search -

CHIEF JUSTICE YOUNG: Yeah, but that's when you say your honor the postal trace has this, this data has this address, this looks like the best address of all of the ones we found, right?

MS. FRANK: That's true your honor, but our concern is if we're required to then serve - well I'm not really sure counsel which address is the best address so I want you to serve both addresses and that leads to some exposure on our part. More importantly, it leads to a nonparty getting served with a lawsuit and having to then take up court resources getting him or her dismissed -

CHIEF JUSTICE YOUNG: But isn't that the burden of your persuasion with the court to say, yes, there's an alternate one, but that doesn't look like it's accurate.

MS. FRANK: That is - you're right; it is our burden to do that. Our concern is if the judge isn't quite sure which address in his or her mind is the best one.

CHIEF JUSTICE YOUNG: Okay. Thank you.

MS. FRANK: Thank you. Any other questions? Thank you your honors.

CHIEF JUSTICE YOUNG: Patrick Clawson.

MR. CLAWSON: Thank you your honor. May I approach with some handouts for the Justices?

CHIEF JUSTICE YOUNG: You can give it to the crier.

MR. CLAWSON: Thank you. Good morning. I'm Pat Clawson from Flint. As you know, I'm a process server and legal investigator, but what I really am is I'm a professional man hunter. Every day I spend time on the streets of Michigan hunting defendants, hunting witnesses, getting them served with civil process. I support the intent of the rule, but I do have some disagreements with its specificity. All internet searches are not equal. Much of the consumer related internet personal locator information on the internet is absolute junk. It's outdated; it's absolutely useless for searching. If the Court adopts a rule, I suggest the Court specify that specifically individual reference services, as they're known in our industry, should be the databases that are searched. These are the professional power tools like Lexis Accurint, TLO, Westlaw PeopleMap, LocatePLUS. These are specific databases that are specifically created for locating individuals. This is the professional grade stuff. It's not available to the average consumer - you have to be a lawyer, you have to be a law enforcement officer, you have to be a licensed private investigator, to be able access this information. Usually, it's reasonably accurate - I use it every day. The real issue here is the quality of due diligence in obtaining alternate service orders in Michigan. I deal with alt-service orders from attorneys and judges all the time, and I will tell you that most of the alt-services orders that are being granted in this state are being granted on the basis of insufficient investigation and, frankly, useless information. Many judges will grant an alt-service order based on the fact that you've got a postal report. I will tell you right now postal reports, unless they actually have a new address for an individual, are pretty well useless. The post office routinely delivers mail to abandoned buildings - I know, I'm there every day dealing with it. The Court should specify, in my opinion, some standards as to what due diligence is necessary to be able to obtain an alternative service order - other states have done that. In the materials I've just given your clerk, there are copies of forms from Florida, from Alaska, from Nevada, from other states that actually have specific rules detailing out what due diligence it is and what type of information that

attorneys have to present to the court to be able to get an alternate service order. At a minimum in Michigan, I believe as a professional process server, there should be a postal report, check of a driver's license, a check of voter registration records, a check of local real estate records, and a check of local court records. And I impress upon this Court that it needs to open up the judicial data warehouse to public access. We need to be able to search statewide and see where defendants are located so that we can serve process. Right now that information is not available to the public, but it should be. The public is paying for this information; we should be allowed to use it. I also caution the Court that the privacy regulations that you've adopted on these electronic filing systems are increasingly impeding our ability to locate defendants and witnesses to serve them with process. Specifically, the rule relating to address information being in the filings. So with that I'd be happy to answer any kind of questions.

CHIEF JUSTICE YOUNG: Thank you very much.

MR. CLAWSON: Thank you.

CHIEF JUSTICE YOUNG: The next item for which there are endorsed speakers is Item 4 which is a proposed amendment to rules 1.111 and rule 8.127 relating to foreign language interpreters. The first speaker is Susan Reed.

ITEM 4: 2012-03 - MCR 1.111, 8.127

MS. REED: Good morning. My name is Susan Reed and I am supervising attorney at the Michigan Immigrant Rights Center. I appear as a member of the Steering Committee of the Michigan Coalition for Immigrant and Refugee Rights—a coalition of more than 30 nonprofit and faith organizations founded in 1989. We are extremely pleased that this issue is being addressed. Although not all persons with limited English proficiency are immigrants or refugees, our immigrant communities in some parts of the state experience uncertainty, fear, delay, and sometimes injustice due to the current inconsistent practices - in civil matters in particular. We believe that lack of access for some affects the entire community. For the reasons detailed in our written comments, we strongly believe that only alternative B in the proposed rule can create full access and meaningful participation for people with limited English proficiency. Lack of language access can constitute

national origin discrimination and only alternative B fully ensure compliance with Title VI of the federal Civil Rights Act of 1964 and with constitutional due process. The courts must comply both as a matter of law and as a contractual obligation as recipients of federal funds, and failure to comply could trigger termination and even recovery of those federal funds. Still, we understand that the costs of compliance are a concern. We know firsthand as organizations that serve immigrants and serve many language groups that a well-designed language access plan that includes a balance of bilingual staff, contract services, and a telephone language line can be cost effective. And we note that in their comments on the present rule the Legal Services Association of Michigan, whose federal funder has mandated full language access since at least 2004, also finds that "the cost of providing language access to all is not an unreasonable expense." Compliance assistance is available from the United States Department of Justice to develop the kind of strategic approach that we envision.

JUSTICE MARKMAN: Ms. Reed?

MS. REED: Yes.

JUSTICE MARKMAN: I've been on the Court now for about 13 years and I can't recall a single instance in which there has been any argument made that somebody was deprived of an interpreter and not allowed to participate in either a civil or criminal case that's come up to our Court. Now I understand our Court doesn't see every case that's percolating in the justice system in Michigan, but can I ask you to tell me what exactly is the problem that warrants us reviewing our regulations and essentially revamping them in a very substantial fashion?

MS. REED: I personally typically practice in immigration court - in federal immigration court where interpreters are provided, but many of our members serve as interpreters -

JUSTICE MARKMAN: And by the way I do want to ask you afterwards, are they provided in federal court by the same standards that you'd be imposing upon the state justice system by alternative B.

MS. REED: Interpreters - I'll answer that question first -

JUSTICE MARKMAN: Please.

MS. REED: to ensure that I answer it fully. Interpreters are provided at no cost to the respondent - it's a respondent in federal immigration court -

CHIEF JUSTICE YOUNG: Federal immigration -

MS. REED: regardless of the ability to pay.

CHIEF JUSTICE YOUNG: Federal district court.

MS. REED: The federal district court I believe has a different standard, but I do not practice there.

CHIEF JUSTICE YOUNG: Are they providing interpreters in civil cases in federal district court?

MS. REED: I'm not aware of whether interpreters are provided in civil cases in federal district court. I'm more familiar with the contractual obligations that Title VI creates.

CHIEF JUSTICE YOUNG: Justice Markman asked a second question.

JUSTICE MARKMAN: Or the first question.

MS. REED: And your first question, yes. Our members serve as interpreters often - our members often serve as interpreters as volunteer interpreters by community members who recruit them who have been told at the district court level that they need to locate their own interpreter or bring their own interpreter to court. Another significant concern -

JUSTICE MARKMAN: But my question is, has anybody been deprived in the end of either meaningful access or, in particular, access to an interpreter who needed an interpreter in order to participate in a criminal case or a civil case?

MS. REED: I'm not aware of an example in a criminal case, but in civil cases, yes, our members do report -

JUSTICE MARKMAN: Do you have any evidence of that as opposed to anecdotes?

MS. REED: Well, I today only have anecdotal evidence. I have been interviewed by attorneys from the Justice Department and put them in touch with individuals who have firsthand knowledge - the individuals who practice in the state courts.

CHIEF JUSTICE YOUNG: Is it your position that if the Sultan of Brunei who is a plaintiff in a civil action over a commercial transaction is not provided at Michigan state taxpayer expense an interpreter that that's an act of discrimination on alienage?

MS. REED: It is our position that -

CHIEF JUSTICE YOUNG: Really?

MS. REED: interpreters should be provided at no cost -

CHIEF JUSTICE YOUNG: To the Sultan of Brunei?

JUSTICE MARILYN KELLY: Well if the Sultan of Brunei were in an immigration matter, would he be provided an interpreter if he didn't choose to hire his own?

MS. REED: Indeed, he would in federal immigration court.

JUSTICE MARILYN KELLY: At state expense.

MS. REED: At federal government expense.

JUSTICE MARKMAN: And if he wasn't, you would conclude that he's been deprived of meaningful access to our justice system, is that correct?

MS. REED: Well, I would want to look at the - he would have to be a member of a language group. I would want to look -

CHIEF JUSTICE YOUNG: Well, he is, he is. He doesn't speak English as a first language.

MS. REED: I would want to look at the analysis that's set out in the Executive Order that becomes part of the Title VI framework to ensure that the cost -

CHIEF JUSTICE YOUNG: The Sultan of Brunei, a very wealthy man.

MS. REED: It is our position that all people from the Sultan of Brunei to the migrant farmworker be provided an interpreter at no cost to the person needing an interpreter.

CHIEF JUSTICE YOUNG: In a civil action.

MS. REED: In a civil action.

JUSTICE MARY BETH KELLY: How does that fit into your cost of compliance issue that you raised at the outset? Obviously, you know that our state is struggling right now to provide indigent lawyers to persons and that struggle continues. You recognize, you say, that this issue provides a cost of compliance. How do you expect the state of Michigan to even start to provide this option B that you recommend? Where is this taxpayer dollars going to come from? What is the state not going to do to fund this?

MS. REED: Well, we certainly think that cost of compliance in some cases can be addressed through bilingual court staff. The cost of -

CHIEF JUSTICE YOUNG: What do you mean bilingual - we hire people to do - who are bilingual?

MS. REED: Well, for example, in some parts of -

CHIEF JUSTICE YOUNG: Is that a cost free alternative?

MS. REED: For example, in some parts of the rule of alternative B -

CHIEF JUSTICE YOUNG: Are you bilingual?

JUSTICE MARILYN KELLY: Could I - can I hear the answer before you -

CHIEF JUSTICE YOUNG: No. Are you bilingual?

MS. REED: I am bilingual.

CHIEF JUSTICE YOUNG: All right. Now if you were to be replaced, that's fine, but if you're not bilingual, somebody has to go out and hire somebody to -

MS. REED: I'm bilingual and I was recruited as a bilingual employee and I'm paid the same salary as all other employees of my organization whether they are bilingual or not.

CHIEF JUSTICE YOUNG: My point is we have staff and your proposal - you just said that you just hire bilingual staff. Well that's not a cost free alternative, is it?

MS. REED: A phased in approach that included the recruitment of bilingual staff would in many ways be a cost free alternative when it comes to identifying language groups in a particular area and ensuring, for example, at a clerk's office or in other interactions with the court that bilingual staff are available. You know could it be achieved in a cost free way in the next 24 hours, no it could not. But as part of a phased-in strategic approach, bilingual staff are an extremely cost effective way to ensure access.

CHIEF JUSTICE YOUNG: Okay. Any further questions. Thank you very much.

JUSTICE MARILYN KELLY: Did you - I have a question.

CHIEF JUSTICE YOUNG: Okay.

JUSTICE MARILYN KELLY: You were interrupted with a question before you finished your presentation. Was there another point you wanted to make?

MS. REED: I simply wanted to say that we do believe that this issue does not only affect immigrants. We have experienced situations where U.S. citizens or other nonlanguage minority groups have had their rights affected by concern about cost or poor quality interpretation when witnesses or opposing parties are not able to fully participate. And we would urge the Court to see this not only as an issue that benefits language minority groups, but that benefits the entire community.

JUSTICE MARKMAN: Counsel, can I ask you which circumstance do you think implicates a meaningful access in a more pronounced manner - an immigrant of means - whether or not the Sultan of Brunei or someone else - an immigrant of means denied access to free interpretation in a civil case or a nonimmigrant of similar means not entitled to free counsel in either a criminal or a civil matter? Which implicates in your judgment meaningful access in a more substantial and significant way?

MS. REED: I see these as similar but individual rights and so I don't feel comfortable choosing one right over another. I understand the implication is that if there are scarce dollars then dollars must be used to pay -

JUSTICE MARKMAN: But, of course, we don't one right so you are choosing one of the rights over the other in effect by suggesting that immigrants of means should be entitled as a matter of law to interpreters in civil cases because we don't have the nonimmigrants of similar means entitled to counsel in any kind of case.

MS. REED: I'm sorry. We don't have nonimmigrants of similar means entitled to -

CHIEF JUSTICE YOUNG: You don't have a right to have a taxpayer paid for counsel if you can afford to hire your own.

MS. REED: In a -

CHIEF JUSTICE YOUNG: In any -

MS. REED: In any matter.

CHIEF JUSTICE YOUNG: In any matter - criminal or civil. But here, you're proposing that taxpayer funded interpreters to be provided to people of means if they have a language - English language deficiency.

MS. REED: I acknowledge that and I would look at this question as a question of access primarily.

CHIEF JUSTICE YOUNG: Yeah, but that's what we're really struggling with. Why is a person of means who can afford his own interpreter or lawyer meaningfully deprived of access? What is that theory that says that if I can

afford to come to court with my own lawyer or interpreter that I am deprived of access unless the state pays for those?

JUSTICE MARILYN KELLY: Of course, the question presupposes a determination that you're able to pay -

CHIEF JUSTICE YOUNG: Correct.

JUSTICE MARILYN KELLY: which could be the problem.

CHIEF JUSTICE YOUNG: Just a moment. My premise is I am able to pay - we have a whole system with respect to appointment of counsel for determining whether somebody meets the indigency threshold, so we do this every day in the judicial system to determine who's entitled to taxpayer supported attorneys. My question - the premise of my question is we have a person of means who could pay for an interpreter, what is your theory that that person must be afforded a taxpayer supported interpreter or that's an access issue?

MS. REED: I would submit that the inability to understand any language at all is a more meaningful disability in a legal process than the inability to have legal counsel.

CHIEF JUSTICE YOUNG: I don't disagree, but you certainly want to be able to understand the process, the question is who's got to pay for the interpreter to do that. So the premise is - of needing an interpreter is not one I dispute. What I'm challenging you on is to explain to me why somebody who can afford an interpreter is nonetheless entitled to a taxpayer paid for interpreter or he is meaningfully denied access to our system. What is that theory?

MS. REED: Our concern continues to be that even people of modest means would struggle to pay for an interpreter and the access that we've struggled with. I'm not sure I have a legal theory with which to answer your question other than that at the point of implementation it's of great concern to us that people would have to step into a courtroom, potentially have costly language services incurred, and receive a bill at the end of that process.

CHIEF JUSTICE YOUNG: But there's an alternative on the - among those that says you get your interpreter upfront, but if you can pay for it you may have to pay for it at the back end. And why is that an offense for those who can afford it?

MS. REED: We support alternative B because we believe it has the most potential to ensure consistency and fairness in the proposals.

CHIEF JUSTICE YOUNG: But is it required by law, that's the issue. You would prefer it, I would prefer to have lots of things, but I can't afford them. So that's the question for us. You're saying to us as a matter of law, Supreme Court, you must mandate that the state taxpayers pay for everyone who needs a language interpreter irrespective of their ability to pay for it. And I'm questioning what's the legal theory for why somebody who can pay for those services the taxpayers must nevertheless pay for them.

MS. REED: We believe that Title VI and its implementing regulations as well as many decisions and opinions of the United States Department of Justice in their compliance actions with courts really best support alternative B's universal access.

CHIEF JUSTICE YOUNG: Thank you.

MS. REED: Thank you.

CHIEF JUSTICE YOUNG: That concludes all of the - oh, I'm sorry. I'm sorry. Oh, yes, Anne is it Schroth?

MS. SCHROTH: Schroth.

CHIEF JUSTICE YOUNG: Schroth. Okay. Sorry.

MS. REED: Thank you your honor.

CHIEF JUSTICE YOUNG: I apologize.

MS. SCHROTH: That's okay. My name is Anne Schroth; I'm from the University of Michigan Law School Pediatric Advocacy Initiative where I'm a clinical professor in one of the law school's clinical programs. In our clinic we see every day the importance of meaningful access to

justice for all of our clients including those who don't speak English. And, therefore, I very much appreciate the opportunity to speak to you today on this important issue of language access in the courts. We also support alternative B as - of the proposed court rule as a possible remedy to the current situation in our courts which is currently an arbitrary process that does deny limited English proficient litigants to access to justice in the courts of Michigan. Our support of alternative B is grounded in Title VI of the Civil Rights Act of 1964 and its implementing regulations in addition to federal contracting law and the federal contracts that the court has entered into that also contain Title VI mandated compliance rules. Proposal 1.111(b) which has the first set of three alternatives is regarding the appointment of interpreters. I would argue that alternative A and C are not compliant with Title VI. Alternative B is the only alternative that comes closest to ensuring meaningful access by mandating appointment of interpreters for all limited English proficient individuals specifying who are the parties of interest who should have an interpreter appointed and specifying what court operations must provide interpreters. For example, alternative A does not provide these safeguards, allows enormous discretion in the court, requires the limited English proficient person to first ask for an interpreter, and then limits the interpreter to while testifying which is much more limited than Title VI allows. The second place where there are there alternatives - Rule 1.111(f)(4) - regards compensation of interpreters. Again, I would argue that alternatives A and C are not compliant. The Justice Department has made it clear that charging litigants for interpreting services is inappropriate in order to comply with Title VI. Requiring limited English proficient individuals to pay for interpreters has a clear chilling effect on their willingness to come to court whether it's before they come to court or after the court is over. If they know they're gonna be charged, they're not gonna come which is not only illegal with national origin discrimination, but creates self-help and extrajudicial decision making that is inappropriate in our society. I have basically two points to conclude. One is that I would argue that this Court is legally required to implement alternative B to comply with Title VI and its own contracting law. I would also argue that in terms of the symbolic importance of the role of this Court and the courts in Michigan and the public confidence in the consistency and fairness of the judicial

system the right thing to do is implement alternative B so that everybody has equal access to the courts and the ability to understand what's happening and fully participate in the court system.

JUSTICE MARKMAN: Counsel, I understand that you prefer alternative B, but we're kind of quibbling over very small things at this point, aren't we. I mean alternative A covers not only parties but also participants and witnesses and those people who have a substantial interest. It covers civil and criminal. It seems to make the default position in both civil and criminal cases that the court does - that the government does have to pay for interpreter fees. I mean the differences between A and B are fairly inconsequential at this point, aren't they?

MS. SCHROTH: I don't agree they are your honor.

JUSTICE MARKMAN: Well, tell me what you think is most substantial. I'm having a hard time understanding what those differences are.

MS. SCHROTH: I believe - excuse me. I believe it is extremely substantial that alternative A first requires if a person requests a foreign language interpreter and the court determines such services are necessary for the person to meaningfully participant. I could imagine a situation where - because I am bilingual I go to court with my client who speaks Spanish and I ask for an interpreter and the court - and this has happened - and my local court says well you Ms. Schroth you speak Spanish, why should your client get an interpreter. You can explain it to your client. I'm a lawyer, I'm not an interpreter, and I've had courts require -

CHIEF JUSTICE YOUNG: But the rule makes it -

MS. SCHROTH: that I provide the interpreting services.

CHIEF JUSTICE YOUNG: All the rules except C I think, maybe even C, require the court to make an independent determination and have a subscribed or certified interpreter - you're not that. And so I don't understand - that may be an issue that exists under the current regime, but I don't see how it could exist under A.

MS. SCHROTH: Because your first point your honor is that it makes the judge in every individual case make an individual determination if an interpreter is appropriate.

JUSTICE MARKMAN: But he does it by the same standard as he would do under B, a meaningful access standard - they're both implicated -

MS. SCHROTH: Under B the requirement is the court shall assign an interpreter for a limited English proficient person.

CHIEF JUSTICE YOUNG: But you have to determine that there is a language -

MS. SCHROTH: But it does not require that the court determine if such services are necessary for the person to meaningfully participate in the case, and it doesn't limit it to while testifying in a civil or criminal case.

CHIEF JUSTICE YOUNG: Just a moment. Isn't the standard meaningful access and participation?

MS. SCHROTH: Yes, but that should be a decision that comes from your honors - it should come from the top - it should be a uniform rule throughout the state. It shouldn't be something that every individual judge gets to decide.

CHIEF JUSTICE YOUNG: Just a moment. Every individual has a different level of competency with language. And if we're talking about persons who have difficulty with English, then you have to make that determination, right, somebody has to make it.

MS. SCHROTH: If a person is limited English proficient, whether they can conduct themselves in everyday life and go to the grocery store and talk to their child's teacher does not mean they are competent to participate meaningfully in an intimidating court proceeding.

CHIEF JUSTICE YOUNG: And how - who determines that in your best world?

MS. SCHROTH: If the court is mandated to provide an interpreter if someone is limited English proficient - if someone comes to their court and says - this is something

that would have - this is a protocol that this Court would have to determine.

JUSTICE MARY BETH KELLY: Ms. Schroth?

MS. SCHROTH: Yes.

JUSTICE MARY BETH KELLY: I really don't think that's the issue. Trial court judges would understand and that issue would be handled. I think the real difference between the two options is the scope of the proceedings to which the interpreter is used. The collateral proceedings is included in option B, so the extrajudicial - the friend of the court proceedings, the psychological exams that are ordered, there's no - there is no question that that's the difference between the two. And in option B interpretation proceedings are much broader. Now, again, the question is posed to you, how is the state of Michigan going to pay for this when the state at this point is struggling to come up - to come up with a plan to pay for indigent counsel. We as a state cannot pay for indigent counsel right now and you're arguing for interpretation fees for collateral extrajudicial proceedings. How - what are we going to give up in this state to fund the plan you urge?

MS. SCHROTH: I - first of all, I don't think you have to give anything up. I think there have been many -

JUSTICE MARY BETH KELLY: Well, let me - let me phrase the question first then. How do you propose we fund indigent counsel fees that we cannot fund presently?

MS. SCHROTH: Yes. I believe there have been many studies and information promulgated by the Department of Justice which demonstrate that the cost issue is really not as burdensome as it might seem. There are specific federal financial - federal grants for interpreting services. There's also federal technical assistance that can help the courts figure out efficiencies and existing infrastructure that can be used to provide these services. The Legal Services Corporation has mandated, as Ms. Reed said earlier, Title VI compliance for legal aid providers who are historically short funded, they've been mandated to provide these services since 2004. They have strategic implementation plans -

JUSTICE MARY BETH KELLY: Well, there's been no empirical information that your - and I think your submission to the Court was very good - I think Ms. Reed's submission was very good - but there has been no empirical data that has been submitted to us in this public hearing that suggests that the Department of Justice or anyone else could possibly fund exhibit - or could possible fund option B.

MS. SCHROTH: The Department of Justice, for example, in their letter to the North Carolina courts explicit - spend a lot of time explaining and - I'm not privy to the line items of the Michigan court budgets, but in North Carolina, for example, the court - the Department of Justice specifically went through and did the math and showed them that, in fact, the cost was not as burdensome an issue as they were projected it to be. For example, Language Line is a telephone service which Legal Services uses and I know some local legal services organizations in this state have done their own internal studies, which I'm sure they'd be happy to share, that show, for example, that it was not nearly as burdensome as they were worried about after doing a study of I think two or three years of use of Language Line. It's a fairly relatively inexpensive option that could work. There are also other options - many of the federal grants - you can build in the cost of interpreting to the federal funding. There are ways to accommodate the money. And the bottom line is that fiscal pressures can't be an exemption from civil rights obligations anyway.

JUSTICE MARKMAN: Ms. Schroth? I'm inclined to agree with Justice Mary Beth Kelly that the only decision of any consequence - the only distinction of any consequence does have to do with the universe of ancillary proceedings that are subject to coverage. But I think you're very wrong in suggesting in response to the initial questions that the Chief Justice and I asked you that there's a significant difference that's a function of the fact that the party has to ask the court for permission to get an interpreter. Nobody comes into the courtroom with a you know a scarlet letter or a red badge on them saying I am a limited English proficient person. And, in fact, alternative B defines a limited English proficient person as one who does not speak English as his or her primary language and who has a limited ability to read, write, speak, or understand English, and by reasons of his or her limitations is not

able to understand and meaningfully participate in the proceeding. Who exactly is supposed to make that determination that somebody satisfies that standard that they are not able to understand and meaningfully participate? There's no automatic satisfaction or lack of satisfaction for that standard. A court has to make a judgment in that, don't they?

MS. SCHROTH: Yes, they do. And part of the comprehensive language access plan which is not articulated in this rule anywhere, but some of my comments in my written comments included them are there would need to be provisions - notice to people that they have the right to ask for these things, information about how to go to court and ask at the initial entry point -

JUSTICE MARKMAN: I don't disagree with you, there'd have to be standards and criteria. My only point is I don't see there being any different need for standards and criteria under alternative A than under alternative B, and I'm having trouble understanding why you see there to be a significant difference between those two -

CHIEF JUSTICE YOUNG: On that point.

JUSTICE MARKMAN: in that respect.

MS. SCHROTH: Excuse me?

CHIEF JUSTICE YOUNG: On that point.

MS. SCHROTH: On just that point?

CHIEF JUSTICE YOUNG: Yeah.

MS. SCHROTH: Taken as a whole, alternative B I would say complies. On the particular point of whether or not -

CHIEF JUSTICE YOUNG: Why doesn't A comply on that point? If your concern is somehow A as opposed to B imposes some additional burden because there's a determination as to whether the person is an LEP and therefore eligible for an interpreter, that has to be - that determination doesn't fall out of the sky under proposal B, that's still a determination that has to be made by the court, correct?

MS. SCHROTH: A determination that a person is LEP is different from a determination that a person needs an interpreter to meaningfully participate in the action at issue.

CHIEF JUSTICE YOUNG: Just a moment.

JUSTICE MARILYN KELLY: Could we hear the answer before you ask your next question?

CHIEF JUSTICE YOUNG: Justice Markman just read the definition of what an LEP is under B.

MS. SCHROTH: I'm reading the different sentences in option A - alternative A and alternative B. Alternative A limits it to a person - the court determines such services are necessary for the person to meaningfully participate in the case or court proceeding. And alternative B the court shall assign an interpreter for limited English proficient person during or ancillary to a court proceeding or court operation for all parties in interest.

CHIEF JUSTICE YOUNG: Part of this is the breadth of B versus A, but the actual determination - the eligibility question is the same under both, correct?

MS. SCHROTH: Perhaps we're having a semantic difference of opinion. I believe the language in B is broader, more consistent, and more uniform for the state.

CHIEF JUSTICE YOUNG: Okay. All right. Thank you.

MS. SCHROTH: Thank you very much.

CHIEF JUSTICE YOUNG: Now we're concluded. Thank you very much.