

MICHIGAN SUPREME COURT

PUBLIC HEARING
September 25, 2013

CHIEF JUSTICE YOUNG: Good morning and welcome to the first public administrative conference of our new term. Justice Zahra will be joining us momentarily, but we're going to proceed. We have a fairly full house for an administrative hearing today. For those of you who are not familiar with our administrative process, all of our proposed administrative rules are published - both on our website and in the Bar Journal - and the public has an opportunity to comment on all of those in writing. And this public hearing is an opportunity for members of the public to address us directly about various of the administrative - proposed administrative rules that are before us. And today we have endorsed no one on Item 1, but on Item 2 we have Liisa Speaker of the Appellate Practice Commission. Each speaker has three minutes to present their position and to respond to questions by the Court. Ms. Speaker.

ITEM 2: 2011-31 - MCR 7.105, 7.11, 7.205

MS. SPEAKER: Good morning your honors and I apologize for the cough drop in my mouth. Liisa Speaker on behalf of the Appellate Practice Section here as the past chair for that section. First, we want to thank this Court for taking up the proposal that the Appellate Practice Section submitted back in December 2011. And you might have noted that we even made a comment that slightly modified our proposal that the Supreme Court took up for good reasons with - once the reply brief proposal was put in when we first discussed it it was before the circuit court appeals holds were adopted and was based on the proposed circuit court appeal rules and I think once the appeal rules were actually adopted by this Court after that December 2011 hearing there were some modifications to the timing that the circuit court had to decide applications for leave to appeal. They only have 35 days which if you add a reply brief in there it's really not going to give the circuit court very much time to consider and we didn't want to put the circuit courts in a bind. So part of our comment in the May 2013 letter is to add a little bit of time to the time to file a reply in a circuit court appeal application and also to give the circuit court on appeal a little bit more time commensurate with that so that they can make a good decision. I believe our letters that

we've sent - the December 2011 letter and the May 2013 letter - adequately lay out our reasons of why we think adopting this rule change would be a good idea so I will just defer to any questions that you might have.

JUSTICE MARKMAN: Ms. Speaker, I understand that you know the request that you're making for modifications are entirely reasonable, but I wonder is there ever a point at which an additional day added to the appellate process can be characterized as representing the straw on the camel's back in terms of the length of the appellate process. I mean we hear so many complaints that the process is so lengthy and drawn out and so - so burdensome for so many people and I wonder whether or not there doesn't come that point at which we ought to say yeah, this is not unreasonable looking at it in isolation, but kind of taking a big picture view of things this is making an already extended process even more extended.

MS. SPEAKER: You know I think it's a legitimate question to ask, but I would like to address it at each of the three phases that we propose a reply brief. When it's a circuit court appeal application, the timing for a circuit court to decide the application is very short - it's only 35 days, even if this Court adopted our proposal to add 7 days onto that period - it's still gonna be decided within 42 days and so having the reply brief at that circuit court application stage is really not gonna extend things very much. At -

CHIEF JUSTICE YOUNG: It - but there is - it is an extension. We just went through a stem to stern revision of all these appellate rules. It was determined that 35 days was an ample amount of time to do appeals at this trial court level. Why should we change it?

MS. SPEAKER: Well, if you were to allow a reply brief it would just be fair to the circuit court for them to have a little bit more time to be able to review everything. Otherwise, they would have 7 days to review the application, answer, and reply. As far as an appeal by right at the circuit court, in my experience doing circuit court appeals, which is not the bulk of my practice by any means, but arguments are scheduled several months after the briefing is done - when I say briefing I mean the appellee's brief - and in one case I have pending right now it's six/seven months after the appellee's brief was filed so adding in 14 days to file a reply when argument's not gonna be for several months done the road is really not impacting - it's not delaying the case in my mind

because it's just the time where the case is just sitting there waiting for it to be scheduled for oral argument. And then finally with regards to applications at the Court of Appeals, right now anecdotally appellate attorneys have been seeing it taking approximately one year to decide applications. And so having 21 days to file a reply is really basically having no impact at all in the time to decision when after the application's filed it takes 12 months before a decision's made on the application. It's really during that period before any commissioner or anybody's even looking at the case. So I think of the three categories that I addressed in response to Justice Markman's question I think Justice Young your point is well taken that the one that is most likely to have an impact on timing is on the application of circuit court appeals, but for the other two categories which is appeals by right in the circuit court and applications in the Court of Appeals, I don't think there will be an impact on the timing to decision.

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

MS. SPEAKER: Thank you.

CHIEF JUSTICE YOUNG: Item 3 which is proposed amendment of Rule 2.302 concerning technical changes regarding discovery only depositions. We have two speakers. Mr. Brian Whitelaw.

ITEM 3: 2012-02 - MCR 2.302

MR. WHITELOW: Greetings. I'm Brian Whitelaw; I'm from the law firm Aardema and Whitelaw in Grand Rapids, Michigan. For 31 years I represented healthcare providers in medical malpractice cases and during that time unlike the training I received when I worked for the city attorney's office under the court rule while a law student, I learned that trial preparation consisted of more than just saying where's my police report and where's my police officer and then walking into the room. With medical malpractice cases trial preparation's extraordinarily complex. There is an expert on standard of care or more than one expert on standard of care for each defendant doctor in the case with each particular specialty they may have as well as causation and damages witnesses in many cases. We need to find out what the opinions of those experts are in order to prepare for trial, in order to prepare to cross-examine those witnesses. We have tools for that. MCR 2.302 provides that - in subsection (b)(4) - it's entitled "trial preparation experts" and it gives us two tools to use - interrogatories, which have proven to be sort of

woefully inadequate in that they do not give us enough detail to know what the experts opinions are and what the factual and scientific bases for those opinions are, and, of course, an interrogatory won't tell you what sort of a witness the individual makes. I can't judge his appearance and his ability to respond to questions by reading answers to interrogatories. So the second tool is set forth in MCR 2.302(4)(c) which says - I'm sorry - (4)(a)(2) - which provides that a party may discover the facts known and opinions held by experts through the taking of a deposition of a person whom the other party expects to call at trial. So if my trial preparation tools consist of interrogatories and taking their deposition, what good is it if the deposition can be turned around and used by plaintiff's counsel as the witness's trial testimony. My fear is if this court rule is adopted I will notice the deposition of a plaintiff's expert, the plaintiff's attorney will follow with, oh, I'm gonna take it by video, they will let me ask all my questions which I guess I'll have to structure completely differently because right now I want to know every single thing -

CHIEF JUSTICE YOUNG: What about the order precludes a deposition taken for discovery purposes only?

MR. WHITELAW: I'm sorry, say again.

CHIEF JUSTICE YOUNG: I don't understand your concern since the rule permits the parties to stipulate or have an order providing that that deposition is for a limited purpose.

MR. WHITELAW: It requires a stipulation or an order and if the other side doesn't stipulate I have to ask the circuit court judge to provide an order to give me the right to take a discovery only deposition. And that would - it's discretionary and it would be based on whatever particular judge I happened to be in front of.

CHIEF JUSTICE YOUNG: True.

MR. WHITELAW: So you're right. My concern is that there will be circumstances where - first of all, I'd have to file a motion because the other side would not ordinarily agree to stipulate to this. And, second, I'd have to rely on my ability to -

CHIEF JUSTICE YOUNG: How does it work now? Don't you - don't you simply - don't you essentially have the concurrence of the other side on the informal practice?

MR. WHITELAW: I've been doing this for 31 years and we've taken probably 500 discovery only depositions of opposing experts.

CHIEF JUSTICE YOUNG: And nobody's ever objected that that process is not permitted by the rules is what you're saying.

MR. WHITELAW: Well, they do object in two ways. They either file a motion for protective order and ask the court to let them use my dep for their trial testimony or they will just put a statement on the record at the time of the deposition saying they reserve that objection then I cite the *Pettow* case and then we take the deposition. So my concern is that there would be an avenue by which my client would be prevented from discovering the opinions of the medical expert, the facts known, the bases for those opinions -

CHIEF JUSTICE YOUNG: Not prevented; you're just concerned that you'll discovery things that would be advantageous to the other side.

MR. WHITELAW: Not at all, your honor.

CHIEF JUSTICE YOUNG: No, absolutely. You're saying I have protection when I take a discovery only deposition because I can find all of the stuff I need and the other side can't use it at trial. So the only thing you're losing under the rule is the fact that if you take a deposition the other side might be able to use favorable parts of it at trial, correct?

MR. WHITELAW: Correct. Then I won't have an opportunity to cross-examine. If he's a medical expert and I take his testimony and he says these are my opinions and this the medical and scientific evidence that supports it, and that is used at trial I can't then go back to my experts and ask them is this sound, is it rational, what evidence - what scientific evidence can you provide me that would show that his opinion is inaccurate, so that I can prepare to cross-examine him for trial purposes. If my discover deposition is used instead of his appearance at trial, I've been deprived of that opportunity.

JUSTICE MARY BETH KELLY: What impact would it have on the settlement of cases?

MR. WHITELAW: Well -

JUSTICE MARY BETH KELLY: You've talked about trial, but how does it impact settlement of cases?

MR. WHITELAW: If - if I'm not able to get a discovery only deposition of an expert and if I'm afraid that if I take his testimony because a judge may have denied my motion, then I will not know his opinions in enough detail. Either I won't take the deposition or I will take it with such circumscribed questions I won't find his opinions out in full detail. And if I don't know his opinions in full detail I can't go back to my carrier and say you know what the guy's got a point and there are cases where they do have a point and that the testimony of the expert explored in detail provides the rationale for the insurance carrier to authorize settlement.

CHIEF JUSTICE YOUNG: Thank you.

MR. WHITELAW: Thank you.

CHIEF JUSTICE YOUNG: The next speaker is Randy Juip - did I pronounce your last name correctly?

MR. JUIP: It's Juip, your honor.

CHIEF JUSTICE YOUNG: Oh, I'm sorry.

MR. WHITELAW: No one is expected to know that.

CHIEF JUSTICE YOUNG: Ah, ah, like Young with a "J".

MR. JUIP: Like Young, yes, with a "J".

CHIEF JUSTICE YOUNG: All right.

MR. JUIP: Thank you for the opportunity to address this panel. I'm quite excited; this is my first appearance. Like my colleague, Mr. Whitelaw, I've spent my entire career defending physicians and discovery only depositions are a tool that we use frequently.

CHIEF JUSTICE YOUNG: I just -

MR. JUIP: Not to gain an unfair advantage -

CHIEF JUSTICE YOUNG: I still don't understand. I really do not understand why it is impossible to do a thorough examination to discover the basis and opinion of an expert and why that compromises you at trial.

MR. JUIP: In a discovery only deposition, I ask questions about everything I can conceive that may or may not be relevant at the time of trial.

CHIEF JUSTICE YOUNG: Um hmm.

MR. JUIP: I would ask questions in a way that I wouldn't ask them at trial because the examination of an expert at trial is focused on the (inaudible) and the takeaway that a jury will have from both that question and that answer. I need, with respect, these medical malpractice cases are exceedingly complex. With the tort reform rules they're only becoming more and more and more complex. And in these cases the devil truly is in the details. And the details of the expert witness's qualifications under 600.2169 and the details of whether or not they precisely match the specialty provided you know with the guidance that this Court has provided to us and the details of their theories, the specific nature of their theory of liability and causation and the connection with damages in any event. And without having the ability to freely explore those topics I'm hamstrung because I'm concerned that I may ask a question that's inarticulate, that doesn't make the right point, that isn't as clear as it should be.

CHIEF JUSTICE YOUNG: That's the risk of any deposition. That's the risk of any deposition. What makes the med/mal bar so very different from any other practice area where experts are used?

MR. JUIP: I would say two things in particular. The first piece is the complexity of a medical malpractice case.

CHIEF JUSTICE YOUNG: Oh, come on. I mean look there are other complex areas that require experts -

MR. JUIP: There absolutely are.

CHIEF JUSTICE YOUNG: this is the only practice section that has raised a concern that the elimination of this informal practice of discovery only depositions is somehow injurious.

MR. JUIP: There absolutely are other areas, but in a medical malpractice case I am questioning a physician who's been practicing in some cases twice as long as I've been alive. I'm gonna take a discovery deposition to take back to my experts that the experts can teach me the right questions to ask, the right issues to drill down on. The other piece that I think -

CHIEF JUSTICE YOUNG: You mean you don't talk to your expert - your own expert before you interview - depose other experts?

MR. JUIP: I do, but the devils in the details and I don't know those details before I'm in the room with that expert for the very first time. And no interrogatory can ever give me the proper information - no interrogatory can give me the depth of understanding the what if, what if, what if - it's often the currency of a discovery only deposition. A discovery only deposition allows me to educate my client in advance of a trial cross-examination, educate my carrier in advance of a trial cross-examination, educate myself via consultation with my experts -

CHIEF JUSTICE YOUNG: I think we understand your point.

MR. JUIP: and to clarify. May I make one more point about the difference of a med/mal piece -

CHIEF JUSTICE YOUNG: Sure.

MR. JUIP: and that's this. Since the '90s, even earlier than that, this Court has held that the plaintiffs have the burden of proof on medical malpractice cases. There are certain procedural requirements such as the notice of intent and the affidavit of merit. And so this is a situation - that being an expert on the plaintiff's side having an opinion - that is not in process the moment I request a deposition. They have reviewed the records in the pre-suit, they have formed an opinion based on an affidavit that admittedly is cursory, but the process is ongoing. I - there has to be a midpoint in these cases between finding out in five pages what an expert's opinion is in an affidavit of merit and cross-examining that expert at trial to the level expected by our clients and our carriers and by juries and I can't do that.

CHIEF JUSTICE YOUNG: Thank you.

MR. JUIP: Thank you your honor. I appreciate your time. Thank you.

CHIEF JUSTICE YOUNG: Questions? Thank you. The next item on which there are endorsed speakers is Item 5 which is a proposed amendment Rule 9.221 it concerns whether the Judicial Tenure Commission should notify a court's chief judge if a referee or magistrate is subject to corrective action that does not arise - that does not rise to a level of a formal complaint. And on that we have two endorsed speakers - Paul Jacokes - Jockes - okay. I'm not doing so well on these names this morning. The next one's pretty troubling too.

ITEM 5: 2012-06 - MCR 9.221

MR. JACOKES: Good morning. I am Paul Jacokes. I am speaking on behalf of the Referees Association; I'm the immediate past president. The proposed amendment - it is my position that the proposed amendment is unconstitutional. The Supreme Court under the Constitution, art 6, §30, is authorized to censor, suspend, or remove judges who violate the ethics code. This would add an additional item of discipline inasmuch as the chief judge could obviously discipline the referee or magistrate in any way that they see fit.

CHIEF JUSTICE YOUNG: I'm sorry I don't understand the constitutional linkage to the - any action of the chief judge.

MR. JACOKES: Since you're informing the chief judge of the existence of the grievance the chief judge I assume can do whatever he wants with it, there's no restriction here. It is -

CHIEF JUSTICE YOUNG: It's an employment matter.

MR. JACOKES: Pardon me?

CHIEF JUSTICE YOUNG: It would be an employment matter.

MR. JACOKES: Correct. So he could issue some other kind of discipline other than that authorized by the Constitution.

CHIEF JUSTICE YOUNG: Suppose the referee was acting inappropriately?

MR. JACOKES: If a referee was acting inappropriately, then the Judicial Tenure Commission would take appropriate action because of that.

CHIEF JUSTICE YOUNG: No, I'm talking - let's talk at the employment level.

MR. JACOKES: Okay.

CHIEF JUSTICE YOUNG: If the referee is acting inappropriately for any reason, as an employee can be disciplined for that purpose, correct?

MR. JACOKES: That would be correct, but -

CHIEF JUSTICE YOUNG: All right. So if the chief happens to find out that there is inappropriate conduct, you're saying that the fact that it is - that inappropriate conduct is communicated from the JTC inoculates the referee from any employment action.

MR. JACOKES: I believe that the fact that -

CHIEF JUSTICE YOUNG: As a matter of constitutional law.

MR. JACOKES: I think the Constitution prohibits the chief judge from disciplining for a grievance that is - that does not - especially one that does not rise to the level of an investigation. The Constitution spells out -

CHIEF JUSTICE YOUNG: What's your best case on - what's your best authority on that?

MR. JACOKES: It would be Justice Corrigan's opinion on the 2005 amendment of 9.205 which added the assessment of costs and fees which said that - in which she said that that was not new discipline because new discipline would be inappropriate, but that was a procedural rule matter. I would also cite your opinion on the 2007 amendment of 9.207 wherein you voiced your opposition to §(b)2-5 altogether and this goes beyond that and authorizes more consequences for (b)2-5. I would also point out that because there are no confidentiality provisions for the chief judge in the rules once the chief judge has this information the chief judge is free to do whatever he wants with that - he or she wants with that information and the Constitution clearly calls for there to be some kind of confidentiality. And you already have rules - this is a rule regarding confidentiality except that you're gonna give this information to one more person who has not - no rule regarding confidentiality.

CHIEF JUSTICE YOUNG: Any questions? Thank you very much.

MR. JACOKES: Thank you.

CHIEF JUSTICE YOUNG: Kathy Oemke. Did I get your name right?

MS. OEMKE: Good morning your honors. I'm also here on behalf of the Referees Association of Michigan. I was a referee for 15 years. And we are employees of the court; we serve at the pleasure of the chief judge. We also - referees and magistrates also have other persons in charge of our employment however. We have the friends of the court; we have judicial administrators of the court that watch over our actions as hearing officers. These people make sure that the referee's actions are in accordance with what the court expects giving the chief judge feedback regarding the employment status. The other employees of the court that are attorneys are not subject to this scrutiny - those are attorneys, they could be friends of the court, administrators -

CHIEF JUSTICE YOUNG: They don't issue any - they don't have any authority that the magistrates or referees have, do they?

MS. OEMKE: Your honor?

CHIEF JUSTICE YOUNG: Referees and magistrates have greater authority to affect other people's lives than staff attorneys in the court, don't they, they're authorized by statute.

MS. OEMKE: They are authorized by statute your honor and if they are - if their recommendations are approved by -

CHIEF JUSTICE YOUNG: You think they are similarly -

MS. OEMKE: the court -

CHIEF JUSTICE YOUNG: You think the work of referees and magistrates makes them similarly situated to staff attorneys in a court?

MS. OEMKE: In some respects, yes, but in other respects I understand the distinction of why they would be subject to the Judicial Tenure Commission rules and regulations. However,

within the regulations it allows for private censures if you will -

CHIEF JUSTICE YOUNG: Let me raise a question that I was trying to raise with the prior speaker. If the chief is aware of misconduct by a referee that is simultaneously communicated to the JTC, is it your position that the chief is unable to act on that information of misconduct in the employment context?

MS. OEMKE: No, your honor.

CHIEF JUSTICE YOUNG: So why then would - if the information was communicated first to the JTC and then communicated to the chief, is the chief unable to act on what is communicated to be misconduct of the referee.

MS. OEMKE: I'm not saying that the chief would be unable to act on the misconduct of the referee. I'm just saying that to have the referee's privacy invaded by having that information from the JTC. If the information outside of the JTC is the same, then the judge has the information and can act on that.

CHIEF JUSTICE YOUNG: So it's a privacy concern.

MS. OEMKE: Yes. So we would urge you in conjunction with the State Bar to not adopt 9.221(i). Thank you.

CHIEF JUSTICE YOUNG: Thank you. Any questions?

JUSTICE MARKMAN: You know I - I mean I hope that not all referees would look upon this as somehow being simply an additional burden being imposed upon them, but rather as an expression of our regard for the professionalism of the practice and the essentially quasi-judicial decisions that you often have to make. This is an expression of regard I think for referees, it's not an effort to put an onerous burden upon them and simply impose obligations that are unnecessary. It's an effort to communicate a sense of respect and regard for what it is they do and the distinctiveness of what they do compared to many other people who have law licenses.

MS. OEMKE: Thank you very much and I will send those regards along to the Referees Association. Thank you.

CHIEF JUSTICE YOUNG: All right. Thank you very much. Item 6 is proposed amendments to Rules 2.621 and 2.622 concerning whether to expand and update the rules regarding

receivership proceedings and we have one endorsed speaker, Mr. Gregory Krause.

ITEM 6: 2012-30 - MCR 2.621, 2.622

MR. KRAUSE: Good morning. Thank you very much for the opportunity to comment in opposition to the proposed change to MCR 2.622(c)(1). So I'm specifically speaking just about that one portion of the proposed amendment. The rest of the proposed amendments we - our firm favors the adoption of, but we want to specifically focus on 622(c)(1). As the Court is well aware, a number of attorneys and judges have submitted written opposition positions with respect to this rule. And in large comments - in large number these comments focus on the impact that the proposed change would have on the discretion of the trial court and the potential erosion of the receiver as an independent officer of the court. We concur with those and for those reasons alone we think that 2.622(c)(1) should be struck or modified. What I'm here to also address are some other unintended consequences that have not been as fully articulated. One is is that there's a concern that the adoption of this rule - because it would require the court to defer to the moving party's choice of receiver - that this would then instill a sort of or almost codify a race to the courthouse mentality. The first party to get in and file their motion would at least from their you know position have this sort of presumptive feeling that their choice of receiver would be - would be chosen. And I think that it is important that our rules reward deliberative and thoughtful action and not simply you know the hasty filing of motions which I think we've all seen happen too often. Another issue that could create an unintended consequence is just an increase - a slew of additional applications for leave for interlocutory appeal before the Court of Appeals. One can only imagine with almost every receivership motion somebody going to the Court of Appeals and saying well the court failed to find good cause to disqualify this receiver or when they found the receiver that their finding of good cause was erroneous and this would only delay the process. Often the receivership estate requires attention promptly from a duly appointed receiver and receivers would be unable to act awaiting a decision from the Court of Appeals. And as had been noted today, the timetable for decisions at the Court of Appeals has become very lengthy. And - and finally another point is is that receivers - duly appointed independent court appointed receivers - are often utilized by the parties to help facilitate issues within the receivership proceedings. It may be as simple as resolving a

discovery dispute, it may be as complex as trying to help the parties resolve the underlying case from which the receivership estate was formulated. However, if one party doesn't have faith in the other party's - I'm sorry - in the receiver because the other party nominated that receiver or you know maybe at worst views the receiver as a de facto agent of the party, then that opportunity for facilitation is lost. And those are the reasons that we encourage the Court to strike 2.622(c)(1) from the proposed rules.

CHIEF JUSTICE YOUNG: Thank you very much. Any questions? Thank you.

MR. KRAUSE: Thank you.

CHIEF JUSTICE YOUNG: The next item for which there is an endorsed speaker is Item 9 concerning administrative order - an administrative order concerning amendments of Rules 3.210, 215, and 6.104 and a rescission of Rule 6.006, all of which concern video-conferencing standards. We have one endorsed speaker, Mr. Sacks.

ITEM 9: 2013-18 - MCR 8.124 (video-conferencing)

MR. SACKS: Good morning. Jonathan Sacks from the State Appellate Defender Office to speak on behalf of this rule. So this is a challenging one because the technology really is very impressive and, of course, there's a lot of cost saving, there's a lot of streamlining as this technology is used. We're in a very good position to talk about it at the State Appellate Defender. We use video conference technology to meet with a lot of our clients in the Department of Corrections, generally not for initial meetings, but that's why it's a good example, it's there. Very useful for conversations, very useful technology to give information to talk about what's going on, but not successful technology for building a long term relationship with the clients and for that the way to do it is a visit in person to talk things through especially many of our relationships last for years and years. This is relevant to this rule because we talk about two concerns of implementation - we talk about a presence concern of our clients and we talk about a confrontation clause concern and that's where you see these issues. As to the presence, our comment talks about the federal case law which talks about how federal rules of evidence are implicated and of course, we draw an analogy to the right to be present in Michigan Constitution and U.S. Constitution. But the issue is easy to see when you have things like allocution at

sentencing where - if our client is speaking about the offense hopefully expressing remorse for the offense - if it's just their image on the screen and not actually the judge in the courtroom - and not actually them in the courtroom to communicate with the judge, it's a very different message and a very different way of imposing a sentence. As to our second concern which is the confrontation clause, sure, obviously, during a trial if there's a witness speaking there can be a full cross-examination and good questions and answers, but what's lacking is the real connection between that witness - between the accuser and the accused that the right to confrontation implicates. And it's that sort of physical presence and physical connection that hopefully results in the truth during the trial process. And that's why you see that although there's a split in the circuits that the majority of federal and state court decisions do find that video conferencing during trial implicates the confrontation clause and do find that there needs to be a public policy or state interest. I'd conclude by requesting that the Court adopt the State Bar's suggestions on this issue. Obviously, we do need regulations for how video conferencing is gonna work much like the ones listed in the court rule. The State Bar recommendation goes through both of the concerns I've just highlighted. As to the confrontation clause, language is added about how witnesses need to be physically present at trial unless the parties stipulate which would be I would expect a very common thing for lab analysts, certain experts, certain types of witnesses. And then there's also language added that for criminal proceedings evidence - where evidence is taken or punishment imposed somebody - the defendant should be physically present - something -

CHIEF JUSTICE YOUNG: Don't our current rules permit video conferencing for misdemeanors?

MR. SACKS: That's correct.

CHIEF JUSTICE YOUNG: So don't the Bar's recommendations reduce what we are doing now?

MR. SACKS: Well -

CHIEF JUSTICE YOUNG: The answer is yes.

MR. SACKS: Although the rules -

CHIEF JUSTICE YOUNG: Yes, they do.

MR. SACKS: Although the rules permit it, they do in - certainly in theory, in practice, no. The rules permit it, but I would say especially for misdemeanors they would - it very, very rarely happens. These aren't the cases where generally folks are in custody and -

CHIEF JUSTICE YOUNG: But - you're making an argument about adopting the Bar's position on the revision of this rule.

MR. SACKS: That's correct.

CHIEF JUSTICE YOUNG: It strikes me, and I think you agreed, that that position would actually reduce what is now permitted in terms of videoconferencing. Are you suggesting that the existing rule is unconstitutional?

MR. SACKS: I don't believe - for misdemeanor sentencing potentially it is - potentially it might be. For misdemeanor trials, I'm not sure if they exist. I don't think the existing rule applies to misdemeanor trials so I don't think that's an issue. As to the confrontation clause, I'd have to check that. For misdemeanor sentencing, I think there could be an issue there. But I think it's a theory versus practice issue, and in theory the State Bar rules certainly on misdemeanors might be a bit more restrictive. In practice though the State Bar rules - the - this court rule proposal and the State Bar amendments say it's time for this to happen.

CHIEF JUSTICE YOUNG: Yes.

MR. SACKS: Right now the technology is there, but severely underutilized in the state courts.

CHIEF JUSTICE YOUNG: And that - but that's the whole issue. You're saying this is a new emerging and more effective communication system, but we want to retrench on what we even allow at this point. You're saying - it looks like you want to step on the accelerator and the brake at the same time. I don't quite understand the position unless you're saying what is permitted now is unconstitutional and therefore the Court must restrict to essentially the defense - defendant's consent to the use of the technology.

MR. SACKS: Well, two things there. First, the defendant's consent only at trials because that's where there's the confrontation issue for the technology for witnesses.

CHIEF JUSTICE YOUNG: No, you said at sentencing for misdemeanors - you just added that to the mix.

MR. SACKS: Well, for misdemeanor trials to the extent it's not in the rule already, but I'm not sure misdemeanor trials are permitted, but there's the distinction here between defendants and witnesses. For defendants, the defendant should have consent where evidence is taken and where - and at sentencing - and to the extent that may not happen now and may not happen under the rule, there is a constitutional problem. For witnesses the issue here from our end is confrontation rights at trial only. Obviously, there are no confrontation clause rights at a preliminary exam, at evidentiary hearings, at things of that nature. And I'm not sure there's an inconsistency here. In other words, the result of the implementation of these standards statewide and circuit court and district court wide is going to be the use - the increased use of this technology and that's a good thing. There's no question about that. But it also will be more thoughtful use of the technology as to the legal ramifications. It would be easy for me to get up here and say, guess what, status quo is fine, let's do nothing, and that would be a position that I think at SADO I would certainly be behind in terms of what it would mean to confrontation clause and what it would mean on the right to be present. But I think objectively and for the system as a whole it's time for proper regulations, it's time for this information to be disseminated within the court, we just need to be careful when that happens.

CHIEF JUSTICE YOUNG: Thank you.

MR. SACKS: And if that means restricting misdemeanors (inaudible), that's the right call.

CHIEF JUSTICE YOUNG: Thank you.

MR. SACKS: Thank you very much.

CHIEF JUSTICE YOUNG: Questions? Next item for which there are endorsed speakers is Item 10 which concerns e-filing and e-filing standards. We have several speakers endorsed. Mr. Davidson.

ITEM 10: 2013-18 - MCR 2E.001 et seq. (e-filing)

MR. DAVIDSON: Thank you Mr. Chief Justice and may it please the Court. Randy E. Davidson, from the State Appellate Defender Office. I've had a lot of experience doing e-filing in the

Court of Appeals using the Tyler and Odyssey system and I've also been directly involved in doing training with the Criminal Defense Attorneys of Michigan and also the Michigan Appellate Assigned Counsel system. So I've had an opportunity to speak with a lot of my colleagues and get their reactions about e-filing and how it's working, so that gives me a perspective that I'd like to share. And in particular, I want to talk about the midnight filing deadline. The proposed rule - the proposed standards would do away with the midnight filing deadline and adopt basically a 5 p.m. filing deadline. We think that this is not a good idea for basically three reasons. The first reason is that - and, again, I'm speaking personally, anecdotally, from doing the training - having that midnight filing deadline is a significant incentive to get people to try the new technology, to sign up and to pay the transaction fee because the trade-off is there's no more race to the courthouse at five o'clock in January in the middle of snow storm. The second point is the federal courts right now using the PACER ECF system. I've checked in both the eastern and western districts of our state have a midnight filing deadline. So for Michigan to adopt the same would basically further uniformity. The third point I want to make about -

CHIEF JUSTICE YOUNG: What about the asymmetry of those who are not able to use the electronic form of filing? You're saying those who are able to use electronic filing should be advantaged by having essentially another half of day to file.

MR. DAVIDSON: Well, the trade-off is you get people to participate and the other thing I want to point out is -

CHIEF JUSTICE YOUNG: I'm pointing out the asymmetry and the fairness of that. If - I mean should we - should we specifically advantage one segment of the population in this way when we permit two different means of filing?

MR. DAVIDSON: I think your concern can be mitigated to some extent because the availability of training, the availability of being able to e-file from anyplace that has an internet connection, which would include your home, a public library, anyplace that has internet, many libraries -

CHIEF JUSTICE YOUNG: Prisons.

MR. DAVIDSON: Pardon me?

CHIEF JUSTICE YOUNG: Prisons.

MR. DAVIDSON: Prisons right now don't permit inmates to have internet, but -

CHIEF JUSTICE YOUNG: Too bad for them.

MR. DAVIDSON: but for many other places in the state as the public gets trained, and, again, there is training available.

CHIEF JUSTICE YOUNG: Do you have any idea how many criminal filings there are in our system?

MR. DAVIDSON: Thousands.

CHIEF JUSTICE YOUNG: Do you know what percentage they are - probably over half.

MR. DAVIDSON: As far as this Court, I would say probably two-thirds.

CHIEF JUSTICE YOUNG: And in our system probably over half as well.

MR. DAVIDSON: Yes.

CHIEF JUSTICE YOUNG: Okay, what's your next point?

MR. DAVIDSON: But as the public becomes trained, and the training is there, I'm one of the trainers and there are other people and there are online courses you can take, that disadvantage is gonna disappear - it's gonna be greatly reduced because as more and more people become comfortable with it, and, again, you can do it from your home, from a public library, Starbucks, wherever, people will be able to take advantage of it.

CHIEF JUSTICE YOUNG: Do you have another point?

MR. DAVIDSON: The other point is that the midnight deadline really realistically accommodates -

CHIEF JUSTICE YOUNG: Other than the midnight deadline.

MR. DAVIDSON: it just - it accommodates the -

CHIEF JUSTICE YOUNG: Do you have a point other than addressing the midnight deadline about the rule?

MR. DAVIDSON: Well, the only other thing I would just very briefly say is that I've read through a number of the comments and they don't really talk so much about that as they talk about access to court files and documents. And just briefly my comment is ultimately I hope the Court will adopt a system that looks and works very much like PACER ECF does in federal court. It's a uniform portal which not only allows you to e-file but also access all publically available documents - I think the current charge is either 8 or 10 cents a page - from anywhere basically that you have a computer. And hopefully the Court will move toward that model.

CHIEF JUSTICE YOUNG: Thank you. The next speaker is Ms. Rosen.

MS. ROSEN: Good morning. My name is Marcy Rosen and I'm appearing -

CHIEF JUSTICE YOUNG: And you probably - if you want to be heard, you need to speak up.

MS. ROSEN: I've heard that before - appearing on behalf of the State Bar of Michigan Committee on Justice Initiatives. The CJI created an e-filing workgroup and we've submitted a memorandum which fully sets forth the recommendations of the workgroup, but I would just like to focus on several issues that are of key importance to the implementation of any electronic filing system from CJI's perspective. First, it is very important that under the new proposed e-filing rules any proposed fees fall under the current rules that allow for fee waivers. For the population that we are speaking for - we feel especially strongly with respect to low income litigants - they should not be subjected to additional filing fees. We also feel that it's very important that they have a simple way to have fees waived. There is potential here to make a very big impact on the courts of Michigan - really a once in a lifetime opportunity to improve access to justice across the entire state and we really welcome the opportunity. It's a great step forward. We think that some of these issues can be addressed from the beginning such as you know the waiver issues - making waivers uniform and more streamlined so that there's no delay in filings if someone is seeking a fee waiver. The second issue that I wanted to touch upon was the opportunity to opt out for those populations who may lack internet access, for example,

incarcerated persons that opt out should remain available so that it's - the mandatory e-filing is not a blanket restriction on people who that - who may not have internet access. Most of us do, but there are people that still don't. The benefits of the e-filing system are so great -

JUSTICE VIVIANO: Counsel, what about the in-between people - the people that are not in prison, maybe don't have internet access at home, but could go to a place like a public library or maybe to a portal at the court itself where it's made publically available to e-filing, in your view would that be an acceptable or a mandatory requirement if the folks like those have to e-file?

MS. ROSEN: If they are able to e-file using those facilities like a library, and we do touch upon that possibility in our comments, there wouldn't be a need - as strong of a need for that type of litigant to opt out, but there should still be an opt out provision available for those litigants who will not meaningfully be able to do that - to use a public library.

CHIEF JUSTICE YOUNG: So the people who would have to come physically to the court and file their documents are disadvantaged by going to the library and doing it by electronic means?

MS. ROSEN: No, your honor, no.

CHIEF JUSTICE YOUNG: I don't understand your position then.

MS. ROSEN: My position with respect to the opt-out?

CHIEF JUSTICE YOUNG: Yeah. I understand prisoners don't have the option of going to the local library, but everybody else, impecunious or not, has access presumably to a public facility like a library and then maybe in some courts a kiosk where they can - instead of handing the clerk the paper filing they can electronically input it in the kiosk. I don't understand the impediment for that group of people.

MS. ROSEN: For requiring a - maintaining an opt out provision?

CHIEF JUSTICE YOUNG: Yes.

MS. ROSEN: Well, your honor, there are some impediments even if someone physically could make it to a courthouse to use a kiosk -

CHIEF JUSTICE YOUNG: They have to otherwise. Unless they have the option of electronic filing, they must go to the court, right?

MS. ROSEN: Not necessarily. My understanding, at least under the PACER system, and I have a case now that involves a pro se litigant who mails his pleadings to the court. They get to the court and the court scans them and they end up on the docket. But for people that work full time, that don't have meaningful access to public transportation, getting to a kiosk at the courthouse is not gonna be helpful to them. I mean they - they have those impediments. The third point I wanted to touch upon was we feel it's important that there are reasonable alternatives to making payment. Not everyone has access to credit cards. Many low income and self-represented litigants do not and cannot obtain credit cards without having to pay an additional fee so we think that it's very important that there are multiple payment systems including debit cards, PayPal, other online payment systems, ability to pay, personal payment by mail, that should not delay docketing of pleadings while payment is pending.

CHIEF JUSTICE YOUNG: Thank you. Any questions? Thank you.

MS. ROSEN: Thank you.

CHIEF JUSTICE YOUNG: Mr. Schier.

MR. SCHIER: Good morning. My name is Carl Schier. I was gonna ask your permission to read - I've got my notes prepared and I'll speak from them. I think that the electronic data and information system is a tremendous opportunity. It is an opportunity to realize fully the unified court in Michigan - the one court of justice. If you think about having all of the data and information of all the courts of record in one in place, fully searchable, what a tremendous advantage that would be. I'm not certain currently from looking at this rule, other rules, and the fact that in March of this year you - there was a press release indicating that a filing platform offered by ImageSoft has been selected as the electronic filing manager for an e-filing initiative in Michigan. The rules -

CHIEF JUSTICE YOUNG: You shouldn't believe all that you read.

MR. SCHIER: I'm sorry.

CHIEF JUSTICE YOUNG: That's an untrue -

MR. SCHIER: It's not true.

CHIEF JUSTICE YOUNG: No.

MR. SCHIER: I thought it was a press release from the Court.

CHIEF JUSTICE YOUNG: Not for a statewide system.

MR. SCHIER: Oh, no, I understand that and that's my point. I don't get the sense that we're at that point yet.

CHIEF JUSTICE YOUNG: No.

MR. SCHIER: And I think that the paradigm is there. I think that the pilot program is the CMECF system that the federal courts have used. I know that Mississippi has adopted something very similar to that. I've tried to talk to them and have not been able to do so yet, but I think that with that paradigm out there I think that the Court could say we're prepared to look at a unified statewide system. I selected -

CHIEF JUSTICE YOUNG: I think that's what we are doing.

MR. SCHIER: I'm sorry?

CHIEF JUSTICE YOUNG: I think we are looking at ways of having a statewide system.

MR. SCHIER: Do we know where we are in terms of making a decision?

CHIEF JUSTICE YOUNG: I do.

MR. SCHIER: Pardon?

CHIEF JUSTICE YOUNG: But we're not there yet.

MR. SCHIER: Okay. All right. In the event that you are getting close, I think a system should be - that should have

these characteristics. Should be intuitive, accessible, uniform, across all divisions of the entire one court of justice, reliable, secure and persistent in the sense that there will be changes to the system and data collected today should be accessible 20 to 30 years from now with whatever new system there is, but those in - to my mind are the characteristics that a system should have. I think that a point that I wanted to cover was the fees for access. I think currently that a fee system would withstand a constitutional challenge. I don't see of the cases that I tried to find - there aren't many of them - there's a very dogged lawyer in Texas that has sued the state and the court system and the county and there's another one in Fulton County in Georgia - they're not having much luck but the guy, the fellow in Texas is now going against the Reed firm and their fees there were twice what are fees are - and I think currently that you will not succeed in a constitutional challenge, but I think a well-organized request to change the law would succeed. I think it's important that you look carefully at the fees because I think that they will deny access. I see the red lights on.

CHIEF JUSTICE YOUNG: Any questions? Thank you very much.

MR. SCHIER: Thank you very much.

CHIEF JUSTICE YOUNG: Mr. Clawson.

MR. CLAWSON: Good morning. I'm Pat Clawson from Flint. I am concerned about the public interest impact of these rules and I don't believe that they go far enough to protect the public's right of access to judicial information. I believe a fundamental precept of any e-filing rules in this state should be that all case indexes, registers of actions, and formal judicial opinions, should be available for inspection and search by the public free of charge on any kind of online systems operated by the courts. Right now some of the pilot systems are putting up some pretty stiff fees to access information that discourage citizen access to the courts. In Ottawa County for instance, the circuit court right now is charging the public \$12.00 to conduct a search by name for any cases and then an additional \$2.50 per record to inspect any documents there. So for a citizen just to log in to check when a court hearing is scheduled for it costs them \$14.50 - that's ludicrous. These transactions have no financial basis to charge that kind of amount. I'm very familiar with the economics of online transactions - I once ran a company that developed e-commerce software - and I know that the actual cost of these transactions

is a fraction of a penny. The proposed rules also don't provide, in my view, any independent oversight or public accountability for the funds that are generated by the systems and what happens with them. In the state of Nevada for instance which has enacted very comprehensive e-filing rules that I've submitted a copy to to this Court, biannual audits are required of the systems and the monies that take place and the performance of the vendors that operate those systems. Your proposed rules don't have any of that. As a legal investigator and process server, I'm also very concerned about the impact of the privacy rules that the existing pilot systems are operating under. They are having adverse effect on the administrative of justice in this state. Specifically, the current e-filing privacy rules are having unintended effect of thwarting the prompt service of legal process and the ability to locate witnesses and defendants for court procedures because your e-filing rules prohibit addresses of the litigants from being a part of the public record. Also the dates of birth are truncated. I will tell you that just a few weeks ago in the state of Maryland the high court in that state amended their e-filing rules to require that full dates of birth be included in public e-filings because of problems that it was causing law enforcement and the judicial system in being able to identify specific people involved in specific court actions. I suggest that here in Michigan full dates of birth be restored to the public record and also the full addresses of the litigants. So I will tell you as a professional investigator it's causing me problems, but it also poses a national security risk - a very serious national security risk. Investigators use court records every day to determine the bona fides of individuals and to local them. If proper information is not available, it is impossible to do proper background investigations. And we just saw last week in Washington at the Navy Yard, a place that I'm personally quite familiar with, the consequences of inadequate background investigations. There's a dozen people dead now in part because of privacy restrictions that prevented access to proper records to be able to have a proper background investigation done on that individual. That information has surfaced in the press over the last few days. I'm also very concerned that the proposed court rules -

CHIEF JUSTICE YOUNG: You need to be concluding - you're at the end of your time, so concluded your remarks.

MR. CLAWSON: Okay. If I can - if I can make just one other comment. I'm also very concerned about the proposed court rules and their impact on service of process. You state in the

proposed rules that existing registrants of the system could be served with process electronically. However, there is nothing there that states that service of original documents - requiring original jurisdiction - like original summons and complaints or subpoenas and that sort of thing - to be served personally. I think that the intent of the proposed rule was that routine correspondence, routine services between attorneys could be done electronically. However, the way the rules are currently drafted in the proposal, if you are a registered user of the online system, I can serve original process on you electronically. I don't think we want to go down that road. I don't think it provides a proper mechanism for ensuring service of original process documents. I'd be happy to take any questions.

CHIEF JUSTICE YOUNG: Very good. Thank you.

MR. CLAWSON: Thank you, sir.

CHIEF JUSTICE YOUNG: Mr. Buckles.

MR. BUCKLES: Good morning Chief Justice and Justices of the Supreme Court. My name is Michael H.R. Buckles and I'm the Government Affairs Director for the Michigan Creditors Bar Association. Creditors Bar and all of us here today agree that Michigan would greatly benefit from a single statewide e-filing system. Users would no longer have to learn multiple systems, the state would have the economies of scale, and it would end the multiple pilot programs and the issues they create. However, before we even approach developing a court rule there are three fundamental challenges that need to be addressed. Number one, the cost and financing. Number two, transparency and accountability. And number three, fairness to every Michigan court, its litigants, and the general public. To date, no one knows the cost to build and maintain a statewide e-filing system. To determine this cost good government and good business practices dictate that we should have a solicitation of qualified, independent consultants to ensure technical success and open bidding to guarantee fairness, public trust, and competitive pricing. Financing the system so that all Michigan courts can participate is challenging because other than judges' salaries, local political units are responsible for the cost of the court. As a result, courts in areas with reduced tax bases may be unable to migrate to a statewide system. However, the state Legislature has the authority and ability to raise revenues statewide for e-filing and to create a fund which could be used so all courts can participate.

CHIEF JUSTICE YOUNG: Are you prepared to go next door and collect those votes for -

MR. BUCKLES: I am your honor - with your - with you by my side, the State Bar, and the attorney general. Well, not necessarily -

CHIEF JUSTICE YOUNG: Well, you have an (inaudible) sense of capability then.

MR. BUCKLES: Well, let me propose something that I think might work for all of us because I'm here to help solve this problem. The Creditors Bar would support legislation to finance e-filing by marginally increasing filing fees if these special surcharges were first earmarked for deposit into the judicial technology improvement fund, used solely to finance a statewide system, provide local funding units the ability to apply for grants to implement the new e-filing system, and that it be subject to a sunset provision so that surcharges can be reevaluated by the Legislature in light of the expected reduction in labor costs which will happen as years go by.

CHIEF JUSTICE YOUNG: Now where does this go in the policy priorities - indigent counsel funding and this is above that.

MR. BUCKLES: It would be a surcharge; it would be added to fees.

CHIEF JUSTICE YOUNG: I understand, but - I only point -

MR. BUCKLES: It would be in addition to all those.

CHIEF JUSTICE YOUNG: I'm pointing out that this is a very important thing. You - unlike other speakers you seem to realize some of the complexity of the Michigan judicial system. It is a one court of justice, but every trial court is tied to its local funding unit.

MR. BUCKLES: Right.

CHIEF JUSTICE YOUNG: When it comes to technology, the federal government says we're gonna go north and everybody in that system is on - financially connected and they do it, that's why they have a PACER system. But how we fund this system is a very complicated matter because of the local funding issue.

MR. BUCKLES: Understood.

CHIEF JUSTICE YOUNG: And simply suggesting we go across the mall there and ask for more money is - it's easier to say let me suggest than it is to do.

MR. BUCKLES: I agree. And the reason why is because members of the Legislature and those of the far right and the far left for that matter are very concerned about not only the expenditure of the money, the waste of the money, and the cost that will be saved by that. None of that has been publically disseminated. This is what I suggest that this Court, the State Bar, the attorney general, and the judges of all the courts of this state urge the Legislature to pass a legislation which we would propose, which we will draft, and which we will seek a sponsor for, to first establish an electronic filing oversight committee. There's other committees that are out there right now in terms of worker's compensation, the agriculture committees, and so forth.

CHIEF JUSTICE YOUNG: So we need another committee -

MR. BUCKLES: Well -

CHIEF JUSTICE YOUNG: another governmental committee.

MR. BUCKLES: And number one the most important reason is that it would be subject to the Open Meetings Act and the Freedom of Information Act. We need to have all of this above board in what we're doing and that's one of the complaints that people have when we talk about taxes - they want to have information - they want to know what's going on. I understand it's one more committee, but let me suggest something, that this committee would be composed of members of the bench, the Bar, and the general public. It would submit requests for proposals from qualified consultants for this program. They would review options for migrating the systems. It would review budget expenditures. Secondly, we would suggest that the -

CHIEF JUSTICE YOUNG: Have you - if you have a proposal - you're beyond your time - you're free to make it in writing.

MR. BUCKLES: I will. Then if I could just close by saying the proposal that we would submit would guarantee public comment and input, it would provide complete disclosure and accountability - which the current fees that we are paying do not do - the e-filing fees -

CHIEF JUSTICE YOUNG: These are pilot projects you understand.

MR. BUCKLES: I'm sorry?

CHIEF JUSTICE YOUNG: These are pilot projects. We're trying to -

MR. BUCKLES: It's public money, your honor.

CHIEF JUSTICE YOUNG: We're trying to test whether the system can work in local communities.

MR. BUCKLES: I agree your honor.

CHIEF JUSTICE YOUNG: They're not necessarily the template for a statewide system.

MR. BUCKLES: Right. It's public money and under the Constitution public money should be accounted for publicly and that's not being done and I'm suggesting it be done.

CHIEF JUSTICE YOUNG: Thank you.

MR. BUCKLES: Thank you your honor.

CHIEF JUSTICE YOUNG: Ms. Speaker.

MS. SPEAKER: Good morning, again. The Appellate Practice Section I believe is well situated to comment on this rule proposal because ever since the Court of Appeals launched the e-filing program - I think it was in 2009 - the Appellate Section members have - a lot of them have been very ardent supporters of that and it's been a really I think great benefit to the practice of appellate law. Obviously, this system - the proposed amendments today are much more extensive than that and cover the whole state. But the Section has very narrow comments about the proposed amendments - or proposed rules. The one that I would like to comment on is the 5 p.m. filing deadline. First, the Appellate Section - Practice Section believes that it is important to have uniformity around the state. Right now the Court of Appeals filing system and the federal system all have an 11:59 p.m. deadline and that is working very well. And then to have a system where individual courts could have a 5 p.m. deadline or even earlier, according to the way the rule is drafted, would not have uniformity around the state. So I think one of the benefits of having these rules come forward from this

Court is to have uniformity in the state and why not do it with the filing deadlines too. Now as to the timing - 5 p.m. versus 11:59 p.m. - not only would that make it consistent with what practitioners are already becoming - have become used to in the appellate courts and any of the practitioners who have delved into federal practice, it's the same in the trial courts and in the appellate courts in the federal system. It also provides flexibility and that's one of the benefits of e-filing. When I am talking - right now it's a voluntary system and so when I call up opposing counsel and ask if they agree you know to be e-served you know one of the things I tell them is that you get my filing right away. And I also let them know if they decide to sign up for it themselves to do e-filing - and many of my opposing parties have including ones who maybe are doing their first appeal and are very infrequent practitioners - have surprisingly signed up to do their own e-filing. And the advantages that you don't have to worry about the press of business during the day, you can take that phone call from a client on another case because you know you can have until 5:05 to file because you don't have to worry about the 5:00 deadline. And anecdotally from my own experience you know as a mother of young children I have - a lot of attorneys are running out of the office at 4:45 or 4:30 because they have family obligations and after I put my kids to bed at 8:30 I can go and finish up the last 30 minutes that I needed to get my filing done. It's been a huge advantage for appellate practitioners and I think that it should be uniform across the state and that's the position of the Appellate Practice Section.

JUSTICE MARY BETH KELLY: But, of course, it's the position of the Appellate Practice Section because that's nature of their practice. How does that speak to the trial courts throughout the state?

MS. SPEAKER: Well, I think even in trial practice and you know maybe I'm not the best person to address it because I don't have a trial practice, but attorneys who are trial practitioners would want uniformity because an attorney in Oakland County -

JUSTICE MARY BETH KELLY: But the trial - trial courts close at I guess 4:30, but the day - the close of business is typically five o'clock, is it not?

MS. SPEAKER: Well, if you are not on an e-filing system, if the courthouse closes at 4:30 you have to have your physical filing by 4:30 and you know - I don't know if they still do it because of the e-filing, but the federal courts used to have a

box where you could stick it in the box and it would be deemed filed that day as long it was there by midnight. Maybe I'm confusing the -

JUSTICE MARY BETH KELLY: The concern I have with what you're proposing is basically the appellate practice - the appellate courts and the appellate practice was the first to make the e-filing work if you will for its group and now we're looking for a statewide system that will bring along if you will the trial courts so let's make what works for the appellate courts work for the trial courts notwithstanding the fact the trial courts work on an entirely different schedule, have an entirely different practice - they don't have this appellate - the nature of their work is entirely different.

CHIEF JUSTICE YOUNG: And its scale is different.

MS. SPEAKER: Well, I don't - Pardon -

CHIEF JUSTICE YOUNG: And the scale is different.

MS. SPEAKER: I don't dispute that the trial practice is different from the perspective of receiving a document on an unmanned computer whether that document arrives electronically at 4:30 -

JUSTICE MARY BETH KELLY: No, not even that just the preparing an appellate brief versus the busyness if you will of trial court practice. So when we're looking for a statewide system and the nature of the filings will vary so -

MS. SPEAKER: Right. I think the busyness of the trial practices makes it even more conducive to having electronic filing available until 11:59 because there's a lot of motions you might have to respond to and you have deadlines in the trial courts just like you do in the Court of Appeals - they're shorter time frames for sure - if you have a response you may only have three days to get a response in.

JUSTICE MARY BETH KELLY: Well, if, for example, a judge wants to prepare for the next day's filings and if the judge at 8 p.m. logs on to his or her computer and gets the e-filings or the day and is fairly confident that at 8 p.m. he or she can look at the filings and know that the TRO is ready to go for the next morning need he or she log on at 6 a.m. to see if anything came in by midnight?

MS. SPEAKER: So your honor when there's deadlines to file and parties perhaps file late because maybe they're for whatever it's some sort of situation that they are not only filing not the 3 or 5 or 9 days before the hearing like they're supposed to, but they're filing it at nine o'clock at night I think you do it at your own risk. And normally - I think a good practitioner would be contacting the court to notify the court - the clerk's office - before five o'clock that you should expect a filing coming in if it's an emergency situation and certainly -

JUSTICE MARY BETH KELLY: I'm just trying to highlight the difference between -

MS. SPEAKER: Right.

JUSTICE MARY BETH KELLY: appellate practice and trial courts.

MS. SPEAKER: And I think the context in which your question would come up mostly would be a last minute emergency-type filing because if it's a hearing, the parties should have -the court rules require motions to be filed within so many days before the hearing and responses to be filed before the hearing so it shouldn't be a last minute thing. And if somebody's waiting till the last day to file their response that was due several days earlier, I think they do it at their own risk even if they file it on the last day at 8 a.m. - or the day before the hearing at 8 a.m. So I think that's an issue. And as far as emergency-type situations which I believe you were referencing - the TROs for example - I know as an appellate practitioner even if I know I have an emergency filing that I'm not going to get to the courthouse until 4:55, you contact the court to give them the heads up as a courtesy to the court so somebody at the courthouse knows to expect it - whatever time it might be coming in - if it's 2 p.m. or whatever.

CHIEF JUSTICE YOUNG: I think we understand your position. Thank you.

MS. SPEAKER: So thank you very much.

CHIEF JUSTICE YOUNG: The last item for which there's an endorsed speaker is Item 12 involving caseflow guidelines. We have one endorsed speaker Ms. Ramsey-Heath

ITEM 12: 2013-24 - Caseflow Guidelines

MS. RAMSEY-HEATH: Thank you your honor. Good morning. May it please the Court. My name is Malika Ramsey-Heath and I'm appearing on behalf of the State Appellate Defenders Office. I'm appearing in support of the proposed administrative order. We believe that the change to the time guideline would allow more - for more adequate investigation in criminal cases. I have the experience of practicing at the circuit level for a couple of years doing criminal defense work and I can tell you that I've definitely had the experience where - one very clearly where I was dealing with an out-of-town client and out-of-town complainant and many out-of-town witnesses. It made preparation of that case in a timely manner very, very difficult and adjournments were denied. A client who was ultimately acquitted of all of the charges and so there was a lot at risk. We also have a number of cases where, again, anecdotally, there are very complex chemical and other types of analyses going on in terms of DNA testing, rape kits, and those things take time. I was reading a transcript just the other day where an officer in charge was questioned as to why the rape kit was not available at trial and he said he hasn't come back yet - there hasn't been time. And so there's some conflict going on between the time required to really adequately investigate and gather information and the time crunch that the courts are under. And I'll take any questions that you might have.

CHIEF JUSTICE YOUNG: There are none. Thank you.

MS. RAMSEY-HEATH: Thank you very much.

CHIEF JUSTICE YOUNG: That being the last speaker we are concluded. Thank you very much.