MICHIGAN SUPREME COURT

March 29, 2001 Public Hearing

JUSTICE CORRIGAN: Good Morning. Be seated please. I welcome all of you to our public hearing and I want to indicate for everyone who is hear that the Court will give you a 3-minute free fire zone where no questions will be asked of you at all, but I would appreciate it also if you would limit your remarks to 3 minutes. If there are any questions by the Justices, they'll proceed after your 3 minutes are up. And so without further ado I'll call Item 1 which is proposed Amendment of Rule 2.625(F)(2) of the Michigan Court Rules. Is anyone here on that item. If not, we'll proceed to Item 2, no. 00-09, proposed amendment of Rule 7 of the rules concerning the State Bar of Michigan.

Item 2 - 00-09 State Bar Rule 7

MR. RYAN: Good morning, Chief Justice Corrigan, Justices. My name is Tom Ryan. I'm the current president of the State Bar of Michigan. It's a pleasure to be here with you this morning to discuss this important rule. Parenthetically I am say that we're very pleased with the leadership we have in the building at the State Bar offices. We have John T. Berry, our new executive director, and Janet Welsh, general counsel. An excellent management team in the offices of our State Bar building. We're asking you to change this rule to allow our vice president to be exempted from the vagrancies of the electoral process, if you will. Right now you protect not only the president but the president elect in their position. And we feel in our team in a consensus group approach to bar leadership that it's important that once a person makes a decision to become vice president of the State Bar of Michigan, they have invested considerable time and energy in reaching that position and we will lose valuable leadership opportunities and experience if that person defeated in an election is lost from our leadership team. By consensus and team approach I mean we're developing a consensus agenda amongst the officers and the Board of Commissioners to work for the betterment of the profession and the justice system and we believe that by changing this rule to exempt the vice president, it would be beneficial to our mission to provide the best possible leadership to the profession in this state as possible. So we would encourage you to approve this rule expeditiously if possible. Our current vice president who I'm sure will be re-elected if he has to sit, Reginald Turner Jr., is up for election this May and he would be affected by this and we would appreciate you moving down the officer position one spot. If I may just also add, in my travels around the state if I have a minute, anyway to speak, I would just like to say two things. First of all that the bench and bar are very interested in your next rule relative to a uniform date for all the court rules to be effective. I've got great support for that throughout the state from the bench and the bar, although Janet Welsh, our general counsel, will speak very ably to that issue. And lastly I

will say that I'm getting a great response, a very positive response when I go up in my speaking engagements. I tell the membership, the bench and bar, of the evolution of our relationship, that is the evolution of the relationship between the State Bar and the Court. Everyone is very pleased about us working together in areas of professionalism, practice procedure and the justice system in the state. So I just want you to know we give you the appropriate credit when we're out there in the stump speaking about this evolution because it has been a process that has proceeded us and will continue after us. But it is going to benefit the profession and the practice of law in this state.

JUSTICE CORRIGAN: Thank you Mr. Ryan. Any questions? Justice Markman.

JUSTICE MARKMAN: Mr. Ryan, I recall there was very little commentary on this proposed change in the rules of bar governance. There was letter, though, as I recall, from a member of the bar who basically suggested that what you're calling the vagaries of the selection process really are fairly core democratic values in terms of the selection of individuals who are going to succeed to leadership in the bar. Have these vargaries have ever been borne out in such a way that the vice president was not in turn moved up to the presidency at some juncture.

MR. RYAN: In my experience, Justice Markman, it has not. I can't speak for the past history. One of the reasons I said earlier about the consensus. We are building a team approach from the secretary on up and while people may not choose to sit for vice president after they have been secretary and treasurer, by keeping them in the group and keeping a common agenda, it is beneficial, we believe, for us. So we're not trying to be not democratic, with a small "d". People do stand for election. We just believe that it's important, since we are volunteers, we are giving our time to this endeavor, that we need to have some certainty if you will, and predictability, once a person makes a decision to be vice president.

JUSTICE YOUNG: Mr. Ryan, one of the concerns I've had in watching the bar for a number of years is that by virtue of the one-year terms, the bar has tacked from one policy direction to another because each succeeding president has his or her own pet project or policy. Is this proposal going to create more stability in policy direction.

MR. RYAN: Yes, Your Honor. If I may, under the leadership started by President Al Butzba, my predecessor, we're going from a president's agenda, Your Honor, to a bar agenda. To an organizational agenda. We're building consensus amongst our various constituent groups. The local and special purpose bars, our committees and sections. Working with the Court and working with the Board of Commissioners and the officers and we're coming to it with a group agenda so that we don't go from one end to the other or

from side to the other. We are going to have no longer a presidential agenda but a bar agenda. And that is going to be developed with the leadership of the Bar through the Board of Commissioners and the groups I've mentioned, Your Honor.

JUSTICE MARKMAN: Mr. Ryan, I don't mean to sound harsh in this question. If it sounds harsh I apologize, that's not it's intent but. I can certainly understand why the leadership of the bar would favor this course of action but do you have any sense of the membership. Any sense of the rank and file, that they are comfortable in being denied, even in this fairly small way, what hitherto has been their democratic rights in terms of selecting the leadership of the bar.

MR. RYAN: Your Honor, I don't believe this is a problem because as I've said we already provide the exemption for the president-elect. We're asking to move it down one officer position only. In other words, the secretary and treasurer still have to stand for election but I can tell you from the time period this has affected me that once a person makes a decision to move up into vice president, they've invested, a considerable time and effort has been expended and to lose that, I think, would be unfortunate.

JUSTICE MARKMAN: So you have no sense that your thoughts here are not reflective of the membership of the bar generally.

MR. RYAN: Yes, Your Honor, that's true.

JUSTICE TAYLOR: Mr. Ryan, in a hypothetical case, what would a member of the bar do, or perhaps a group of people who were in the bar, if the bar leadership went off in a direction they thought was inappropriate. If in fact all these folks are locked in, they really wouldn't have much chance to affect it would they.

MR. RYAN: Well Yes they would Your Honor. First of all, as I said, we're not an insulated, isolated group. We're working with the constituent groups I've mentioned before.

JUSTICE TAYLOR: I'm assuming a situation of bad faith.

MR. RYAN: In bad faith, there is probably no way to protect, I mean even right now if you have a bad faith president elect or president, then I guess the membership is stuck with whoever that person is.

JUSTICE TAYLOR: Membership could rise up and pitch out the third person in line, couldn't they.

MR. RYAN: If they believed that person to be a problem, yes they could, Your Honor.

JUSTICE TAYLOR: All I'm asking is what is the safeguard that, you know as time goes by, it's hard to imagine this, but if you had rogue leadership, what can the bar membership do about that.

MR. RYAN: Well I would suspect that the rogue leadership would be determined at either the secretary or treasurer's level prior to getting into the team, if you will. The secretary and treasurer are part of this team of the five officers and they are involved in the group collective agenda consensus building setting and if those people don't perform well as secretary and treasurer or feel like we're going in a different direction

JUSTICE TAYLOR: But let me pose a hypothetical to you. Suppose the bar leadership that is locked in three years out, as I understand this proposal, suppose that bar leadership decided to take a position on integration of the bar that was very different than the majority of the members. What would the majority of the members be able to do at that point.

MR. RYAN: Well they would certainly be able to contact the Board of Commissioners who sets policy for the bar and to address their constituent commissioners in the way the direction of the bar is going and cry out about that and ask for action. There are 31 commissioners, Your Honor, and to think that three people are going to control the agenda is not going to happen.

JUSTICE TAYLOR: Well can the Commissioners overrule the three.

MR. RYAN: Yes, it's a consensus agenda. That's the whole point. It's no longer a president's agenda.

JUSTICE TAYLOR: I understand that's the plan. But I'm just saying in the nitty gritty when things get unpleasant and you have rogue leadership can the 31 in fact control the 3.

MR. RYAN: Absolutely. The Board of Commissioners sets policy.

JUSTICE TAYLOR: How do they do that. Are they able to impeach, so to speak, the officers.

MR. RYAN: I don't know if they can impeach them, Your Honor, but they can certainly affect policy in the direction the bar is going.

JUSTICE TAYLOR: I'm just proposing a hypothetical, I don't think anybody is suggesting this but let's suppose that there was a movement to make the bar be non-integrated. And let's suppose the three folks who are locked in don't agree with that but the Commissioners do. What would they do in that circumstance.

MR. RYAN: The president speaks for the bar but again the Board of Commissioners is a governance body with a representative assembly and if the rep assembly has taken a position, they're the highest policy making body of the bar. If they take a position which is attempted to be acted against by the highest three officers, then that would be an invalid position and they would not be able to carry through on that because, again I'm not trying to mix apples and oranges but understand that in our governing system we have a rep assembly that sets the–-they're the highest policy making body of the bar so that's another control, if you will, on a rogue officer because a rogue officer cannot go against what the highest policy of the bar is and that's by another entity, the rep assembly. So I think that's another safeguard.

JUSTICE TAYLOR: If I understand that there is no formal mechanism to pitch one of these people out.

MR. RYAN: I honestly don't–-I don't believe there is because it has never been a

JUSTICE CORRIGAN: If you could look into it, perhaps you do have some regulations on that and you could let us know.

JUSTICE YOUNG: Maybe your general counsel knows.

MR. RYAN: Yeah, maybe she does.

JUSTICE CORRIGAN: Just to point out though, I think it is somewhat indicative of sentiment on this that the Court published this for notice and hearing to the 33,000 members of the Bar who had an opportunity to participate and yet we heard from only one opponent of this change in the process. So that must be somewhat indicative that it's viewed as non-controversial among the membership.

MR. RYAN: I would think so, Your Honor, and further that when it went to the rep assembly for comment, there was no opposition at the representative assembly. They understood the intent of the rule.

JUSTICE TAYLOR: That's sort of unheard of that there's no opposition of

the representative assembly isn't it.

JUSTICE YOUNG: 30 lawyers you said.

MR. RYAN: No, the representative assembly, Your Honor, 150 lawyers.

JUSTICE YOUNG: Oh dear.

JUSTICE CORRIGAN: We appreciate your appearance here this morning and wish you good luck in your leadership of the bar.

MR. RYAN: Thank you very much. Appreciate it.

JUSTICE CORRIGAN: Let me mention before I call the next item. Justice Weaver was unable to be present with us here today but she has informed me that she will be reviewing the video of the hearing this morning at the earliest possible opportunity. I know she will do that.

Item 3 - 00-10 Proposed amendment of MCR 9.112(B)

JUSTICE CORRIGAN: The next item before us is Item No. 3. Proposed amendment of MCR 9.112(B) and that direct issue is whether to add a requirement that request for investigation of lawyers be verified under oath or by declaration of the complainant. And I understand Robert Agacinski is here on that matter.

MR. AGACINSKI: Good morning. I want to first go on the record as thanking the Court for the opportunity to serve as grievance administrator. I have so far found it a very fascinating and

JUSTICE CORRIGAN: Would you identify yourself for the record too.

MR. AGACINSKI: Yes. My name is Robert Agacinski and I am now the grievance administrator for the State of Michigan as of August 1 of last year. And I am here on my own behalf as well as that of the Grievance Commission who all had the same position on this and we do ask the Court to reject this proposed amendment to 9.112(B)(3) for a number of reasons. First of all, as far as our duties to protect the public we think it might be undermining to some extent, that responsibility. Certainly protect the public through disciplining the wayward attorney. And we strengthen the weak attorney but we also protect the public by giving them a chance to articulate their frustrations with the system through their letters to us. And we think this type of process which imposes technicalities and formalities where we don't get a chance to review what they have to say,

even if we reject it after careful consideration, undermines the confidence in the system. It's another technicality that lawyers are using to protect themselves and to simply insulate themselves from review and from criticism. So that is a fundamental conceptual problem. The American Bar Association reviewed this whole change back in the early '70s and the late '60s and in their Clark Commission Report specifically recommended the abolition of requirements that complaints must be verified, and also the minimization of other formalities as well. And they found that although the attempt is to eliminate the scurrilous complaints, the bad faith complaints, those complaints continue on even though there is this requirement for an (inaudible) affirmation. What's actually deterred are the good faith legitimate confused individuals, those who don't know what happened to them, who are wanting to get some answers, didn't get it from their attorneys, but are afraid by alter affirmation to make some complaints because they're not sure if this violates the law and they don't want to be committed to that and so those are the ones that the ABA found are most deterred and not the scurrilous ones. One third of our individuals are in jail when they write to us so would an oath or an affirmation of some kind deter them. Reluctantly I don't think that's the case. And so we ask the Court, even though it might provide some inconvenience to the attorneys to have to answer these responses, to some extent we think it also helps the bar that when the case is done we back them up and tell the complainant that what you have to say is not disciplinary. Nothing the attorney did was wrong. And so, although they will never believe it, I think our closing a case really affirms the bar and should really back up the attorneys. So I would ask the Court to reject it for those reasons. For a practical reason, about a third of our 3,000-4,000 requests for investigation come through letters that are simply sent, not on our forms but through letters and right now we process those. If we have that rule in effect, we're going to have to send them all back and say do it right this time with the proper forms and the proper verifications. And that's a lot of time and money. And since we have no enforcement mechanism this immunity, what we really have is a bluff here. There is nothing else that can be done to enforce this recommendation as well, so we ask the Court to reject this amendment.

JUSTICE CORRIGAN: Thank you Mr. Agacinski. Any questions.

JUSTICE TAYLOR: What is that again, I don't understand it.

MR. AGACINSKI: That there's immunity. That a complainant is immune from any kind of court action as a result of his complaint.

JUSTICE YOUNG: MCR 9.125 gives immunity.

MR. AGACINSKI: And so if they attest to it and they're lying, we can't do anything. And so it's really

JUSTICE TAYLOR: Okay, I understand.

JUSTICE CORRIGAN: Any other questions. Thank you Mr. Agacinski. And we also have Paul Fischer listed as a witness this morning.

MR. FISCHER: Good morning, Your Honors of the Court, good morning Justice Weaver. I'm Paul Fischer, executive director, general counsel of the Judicial Tenure Commission. I'm not really here to be a witness to offer testimony of one side or the other. We have that provision in place, and perhaps I can share some of our experience how it works with us. It turns out, and this I didn't realize, is that the requirement for verification in judicial tenure organizations, judicial discipline organizations, Michigan is in the minority in requiring them. Only 15 states do. Which means 35 don't. And the 15 that do are broken up basically into four different categories when they require the verification. California and Florida, Ohio, Texas and I think Connecticut require verification but only after an initial investigation has taken place. In Alabama, New York and Vermont, New York is the important one there, no offense to Alabama and Vermont, they are required only if the Commission requests it. And the same thing goes on in Mississippi and Washington. Arizona, Idaho, Indiana, Michigan and Rhode Island are the only ones that require verification up front. Now I just heard what Mr. Agacinski said and I can just give perhaps a little bit of insight how it works with us because we do send things back to grievance. We also get, I'm just going with last year's numbers. It was actually a very low year for us. We had 556 grievances filed. Beyond that there were 181 that were received that were not notarized that we had to send back to the grievant. And of those, 90 came back. And that 90 is included in the 556. So 181 people sent things it that weren't notarized. We had to send them back, we did get it back. And I heard also there too they get 1,000 letters a year or so that aren't on their forms. We also get, I don't know the exact number because I didn't look that up, but we get a high number of people sending the letters. We hold them in a separate retaining file and send them a copy of our form saying please sign here, we've saved your paperwork. Sign, get it notarized, and the overwhelming majority, probably 90% of those actually come back. So we haven't had that kind of problem, but we don't have their kind of numbers. And I also heard about prisoners. Prisoners somehow have access to everything in the world and we get all kinds of prisoners and send something back to them, it comes back notarized. We don't see any major drop off in things from prisoners. And I should also say that I'm here as Paul Fischer. The Commission knows that I'm here but they have no interest in what happens either way. I was here just to share the experiences that we've had. If you have any questions I'd be happy to answer them.

JUSTICE YOUNG: Is there immunity for someone filing a complaint against a judge.

MR. FISCHER: I don't know if there is immunity for the grievant. There is

for the executive director and for the staff.

JUSTICE YOUNG: So there is absolute immunity for someone filing a grievance against an attorney. That kind of makes the oath requirement a chimera, doesn't it.

MR. FISCHER: It would. As Mr. Agacinski said, which doesn't make any difference, so what are you going to do. I just don't know that our grievants are immune too.

JUSTICE KELLY: So what is your recommendation to us.

MR. FISCHER: I'm not making a recommendation as to them. We like having the verification and if the Court sees fit not to go ahead and require the grievance administrator require verification, I'd like to see that we at least keep ours.

JUSTICE YOUNG: He's here to protect his turf.

JUSTICE CORRIGAN: Any other questions? Thank you for coming Mr. Fischer.

Item 4 - 00-11 Proposed Amendment of MCR 1.201

JUSTICE CORRIGAN: Next item on the agenda is item 4, proposed amendment of Rule 1.201 of the Michigan Court Rules and the issue involved here is whether to establish uniform effective dates for court rule amendments. Listed this morning to speak is Scott Bassett.

MR. BASSETT: Good morning. I'm Scott Bassett. On this issue I'm representing the Appellate Practice Section of the State Bar. I've been requested to be here on behalf of Gary Field, our section chairperson. The Appellate Practice Section was founded at the State Bar Annual Meeting in 1995 and in the six years nearly since then a number of issues have repeatedly come up. This happens to be one of them. We have had obviously experience with various effective dates for some very significant court rule amendments over the years, really culminating in the West Publishing fiasco of a year ago where the bound West volume came out representing itself to be current with all court rule amendments through a certain date and in fact that was not the case and you may have noticed receiving in your own mail the little pocket part to go in the back, so even the people who are paid to keep up with amendments that this Court adopts have not been able to do so because of the lack of a uniform effective date. Because of the West Publishing fiasco, the Appellate Practice Section proposed to this Court having a uniform effective

date. Our proposal was for an April 1 effective date, that date being roughly consistent with the effective date of new statutory enactments and also being a good time, and not that the tail should wag the dog, but we all do rely upon the printed press still more than online resources for our information. It's consistent with the publishing schedules of the major law publishes to have an April 1 effective date. The proposal published by the Court puts in a second effective date of October 1st. The Section is not in favor of having two uniform effective dates. So long as you have in the proposed rule, as you do, the ability to make a rule effective more quickly if the circumstances require, then I think that would eliminate the need to have both an October 1 and an April 1 effective date. Since the 1963 Constitution the Legislature has managed to get by with a single effective date, or I should say time frame, 90 days after the close of the session, which roughly corresponds with April 1 of each year and they have the authority, obviously by a super majority vote, to make a law immediately effective. You have that authority under this proposed rule if need be. One of the balancing tests you need to engage in is, is it more damaging to the effective administration of justice to allow what you may believe to be an ineffective court rule to remain in effect until the next April 1st, or is it actually more damaging to change the effective date, put it in place, and then have confusion on both the bench and the bar relying on the written publications of not knowing what the rules are at any given time. So again we're supportive of the Court's proposal. We would, however, prefer a single April 1st effective date with the right of the Court to accelerate the effective date if a particular rule is so important that it needs to be placed into effect other than April 1st.

JUSTICE KELLY: I'm sympathetic with the need to have a quick and dependable way of determining whether a rule has been changed, but I'm troubled with several things. One is, it seems to me that there will always be a need for some method of, on an emergency basis changing a rule so that you would never, as a practitioner, you would never be absolutely sure that an emergency hadn't required a rule change. And secondly, now with increased ability to community through technology it occurs to me, and I'd like you just to give me your opinion of this, it might not be just as effective, given that a practitioner would have to look somewhere for those April 1st rule changes, that we might have them all on, for example, our Supreme Court website and someone could look in a given location there and find every rule change that had taken place in the last 12 months and in that way be just as sure as they would be looking it up in a book that they knew everything that had happened.

MR. BASSETT: Justice Kelly, I think that you're right, or at least you will be right five years from now. I don't think we're quite there yet in terms of lawyers' reliance upon that type of technology. I do a great deal of technology lecturing for both the State Bar and for ICLE. I think I have a pretty clear sense of where the bar is. A lot of lawyers do not have Internet access at all the places that they currently work. Those who do often rely up slower dial-up services that may not be 100% reliable all the time. And I do

think that a vast majority of members of the bar and members of the public, they are still looking at the written materials either at a bar-sponsored library, a public library, or in their own offices. Even I think myself as being technologically sophisticated but I'm working on an appeal brief right now. The first thing I did when I had a question is I flipped around in my chair and I pulled my West Michigan Court Rules volume off of the bookshelf to check on the rule amendment. I didn't go to the Web. If I'm not likely to do it, I would think there's a fairly small percentage of lawyers who are likely to go to the Web first.

JUSTICE YOUNG: Well that's the change of expectations that Justice Kelly is referring to. If the Court communicates this is the authoritative source for you to determine what rules are in effect or modified, then the expectation is that you'll check there at least ultimately to determine what the status of the rules are.

MR. BASSETT: Although, again, although we will be there at some point, we don't have access to the Web when, I mean the pressures on the practicing lawyer are enormous financially. We go to Court, we take our bound court rule volume with us. An issue comes up that we may not have anticipated, we need to know what the rule is. The ability to access that rule or any changes online in that context at almost any courthouse in this state are simply non-existent. Those of us, and I'm not one of them yet, who are lucky enough to have one of the new Blackberry units, that's fine. And both Lexis and Westlaw are pioneering the ability to have wireless access but that's still only for a very small minority of more likely large firm lawyers. Most of us are going to rely upon the paper that we carry in our briefcase to get the answer and that's where the uniform effective date really helps us. Because we have a reason to believe that that paper will in fact give us the accurate statement of the court rules.

JUSTICE YOUNG: I have a question about the second date. We have on my tenure on the Court had occasion in a case to consider the efficacy of a rule, how it is working. Whether it's working as intended or some other way. And as a result of having considered the rule in a particular case, determined the rule needed to be changed. What, from the perspective of those you represent, how would you treat a rule change, and when should that rule change become effective if the case has said this rule does not work as published. Another rule is therefore substituted. When does that rule become effective. You want us to hold off until the next April 1st, whenever it is that case comes out in relationship to the notice date, or do you want us to publish a new rule.

MR. BASSETT: That's the balancing test that I was referring to.

JUSTICE YOUNG: That's not an emergency is it.

MR. BASSETT: I would think that if it's not an emergency you run a real

risk of doing greater damage to the effective administration of justice in rushing the effective date of a rule, even to eliminate a rule you don't think is working properly.

JUSTICE YOUNG: So we have a published decision that says the rule is not as published is no longer effective, but no published rule until April 1st, no matter when that case comes out in relationship to the April 1st deadline. In other words, April 2 we publish the opinion. We now have a rule that is no longer effective per our decision, what's the preference of the Bar now.

MR. BASSETT: The Appellate Practice Section has not discussed that precise issue

JUSTICE YOUNG: Well you're here so I'm plumbing your considerable experience. Would you rather us wait until the next April 1st to publish the rule or rely on people to check it out in the case law.

MR. BASSETT: In my view, absent an emergency, if you're not going to create a void that's going to have real problems

JUSTICE YOUNG: The rule as published is no longer effective. It has been changed by a decision of the Court on April 2nd.

MR. BASSETT: I guess that is, in effect, publishing a new rule.

JUSTICE YOUNG: Okay, so you want a hard rule that even on April 2nd there's no new court rule out there but we've got a decision saying that the rule in the books is no longer effective as written.

MR. BASSETT: I'd hate to see a void that would leave people struggling as to what the rule ought to be. I mean, I will admit that's a tough, tough question.

JUSTICE YOUNG: It happens, though. And it has happened certainly in my 2 ½ years or so on this Court, it's happened more than once.

MR. BASSETT: Again, maybe the Court in issuing it's opinion can take a look at the impact upon the practice in deciding when to simply vacate that rule. I guess I've never looked at it as an issue of jurisprudence, but when you issue an opinion that vacates a rule, is it possible to say that vacating that rule will not take effect until blank date because number one, it's not an emergency, and number two, the confusion to the administration of justice would be too great. I think those would be the two things you would want to look at.

JUSTICE YOUNG: Well if it weren't so serious that we change the rule, we wouldn't change the rule in the opinion.

JUSTICE TAYLOR: Let me ask you. The problem with the position I think you're advancing is that you would give greater life after death to a court rule than you do to a case.

MR. BASSETT: I guess it's a question of divining the time of death of the Court rule. I think it's fine to decide as a matter of procedural policy that a court rule is no longer effective and we need to change it. I think it's another level, however, to decide that it is so ineffective that we need to advance the

JUSTICE TAYLOR: Well let me tell you an area where this might very well come up. In areas concerning mediation and that type of thing. Those aren't emergencies but it would seem to be quite remarkable that a court rule would have post death life greater than a case.

MR. BASSETT: Although again you have the problem of are you creating a greater difficulty for the practicing bar, the trial bench and ultimately yourselves in fostering confusion about what the rules are on any given date. That's the concern.

JUSTICE TAYLOR: Well it would seem that any time, given that lawyers are assumed to know the law and that lawyers are assumed to be at least roughly conversant with our cases, wouldn't an exception to the general April 1st rule be sensible that if we change it in a decision, that we assume that someone working in the area of mediation might indeed read the case on mediation.

MR. BASSETT: We're not arguing against an exception. The Section's position is that you should try to stick to a single uniform effective date, being April 1st, and to the extent that you find exceptions apply them, but obviously use discretion in deviating from the April 1st date.

JUSTICE YOUNG: Let me give you a concrete example. We clarified what the standards were under (C)(10) motions and we didn't do it in relationship to a fixed date. Are you suggesting motion practice should continue under the old rule until some months after such a decision to clarify the standard of motion practice. Every day we have motions and it's important to everyone that the standards of the parties to operate under be uniform in this state.

MR. BASSETT: That's true. I'm at some disadvantage since the line of work I'm in almost never involves summary disposition issues.

JUSTICE TAYLOR: Let's suppose we change the rule with regard to family practice. Perhaps the rule that has to do with accepting the referee's recommendation.

JUSTICE KELLY: Or better yet

MR. BASSETT: Well that's a statute, it's not a court rule. Well actually they're both.

JUSTICE KELLY: How about the court rule that has to do with when a domestic relations decision is final. Let's say in the first week of April we decided we were wrong and we were going to change the rule back and not accept domestic relations–do you want to wait for 11 months before you can bring a case by right.

MR. BASSETT: As much as I would, I think support that, given that that is a significant change in the way that family law practitioners look at their cases and evaluate appellate issues, that is exactly the kind of rule that should in fact wait for a uniform April 1st effective date because it really does fundamentally change the rules.

JUSTICE KELLY: So is that what you want.

MR. BASSETT: That's what I would prefer.

JUSTICE YOUNG: So we have a case out there that says the rule is substantially changed, but no court rule for let's say, nine months. Do you think that adds to clarity of how to practice in this state.

MR. BASSETT: I think in some ways it does. We deal with that in statutes all the time. We know sometimes, well for example the family court legislation, we knew 18 months in advance that there was going to be a major sea change in how my field of law was going to be practiced. The procedures, where the cases went. And it was, although to me a critical reform, not the kind of emergency that obviously should have been implemented immediately. I think in general that's going to be true. I think in the vast majority of cases you will want to signal those kinds of significant changes sufficiently in advance even if it means that what you believe is an inadequate rule says in effective from October 1st, or whatever, July 1st or even May 1st to the following April 1st. That is probably better for the overall administration of justice than having continual questions about what the rules are at any given date. That's the concern that we have.

JUSTICE KELLY: Is the real problem here that appellate practitioners

might prefer to have some lag time in which they can prepare for a change and not have it dropped on them quickly and without notice.

MR. BASSETT: That's always an issue, but that really is not the issue here. The issue here was just being able to keep up with the changes. Not so much knowing in advance and being able to respond substantively to proposals but simply avoiding the problem that not even West could keep up with, which was thinking that they had a current set of the court rules, publishing a volume and then finding that it wasn't current.

JUSTICE TAYLOR: Let me ask you, how much of a problem is this. Are hundreds of lawyers every day being caught up by this.

MR. BASSETT: I think there are. Again, because lawyers don't know to look at a particular

JUSTICE TAYLOR: Yeah, but isn't that part of being a profession. I mean, if you're talking about informing the general public like, for example, when taxes have to be in. I mean they don't check websites or anything. They know April 15th, okay we're all tuned in, we have to file them by April 15. But this is a profession. Isn't that what you're supposed to be doing is looking a tricky stuff. That's why you get paid lots of dollars per hour.

JUSTICE CORRIGAN: But the actual practice, for example, at the Court of Appeals when we had the huge set of changes showed an enormous number of defect letters. The reality is that while we hold a standard of the professional being attuned to it, in fact an awful lot of lawyers get caught up and aren't aware and so there is this education process that needs to take place.

MR. BASSETT: I think you're right, Chief Justice Corrigan. The problem we have, and I remember a particular series of amendments that hit my family law area very hard in February of '95, I believe. And it took a long time for practitioners in my field to catch up with that. They hadn't expected it, number one, at that particular time frame. I believe they were February 1st effective dates. And again, I mean I practice in an area dealing mostly with solo and small firm practitioners under enormous pressures. They're running their offices as a small business. Most family law attorneys, according to ABA surveys, actually collect between 65% and 70% of the time that they bill for. We're dealing with people who are struggling to survive. It would be nice to say that yes, we're a profession, we get paid to do it. We should always strive to meet the standard that you're setting for us. We, however, as a practical matter are not always able to do it.

JUSTICE TAYLOR: Well why should we not apply this rule to case law.

All changes in case law go into effect on a single date. What's the difference.

MR. BASSETT: I think there are huge differences. The rules are intended to apply across the board. The cases, at least again I'm limited to my field of practice, are so fact specific

JUSTICE TAYLOR: Well the cases apply across the board.

JUSTICE YOUNG: Not the legal principles at the Supreme Court level I hope. If we're taking a case because of a single case, we probably don't grant leave on it.

JUSTICE CORRIGAN: But if you say, for example, it's a fee increase, then that means every clerk's office in the entire State of Michigan has to be educated on that fee increase and it's going to apply across the board to all those people. That's a huge education job that has to occur if we take just that one example. It isn't just the practitioners, but it's also the court staff, it's the 10,000 court personnel who serve the courts of Michigan that have to be educated, or the probate courts, whatever we're talking about. There are implications beyond perhaps the utility of that individual case you're deciding.

MR. BASSETT: There are, and we're still trying to bring, for example, Friend of the Court and trial court personnel up on some of the family law changes as well.

JUSTICE CORRIGAN: We're still struggling now with court rules in the family court area in reaction to, I think it's the '96 changes, right. We still don't have a complete set of rules there.

MR. BASSETT: That is absolutely correct. It is simply a question of trying to, it's almost a consumer protection device. You're really trying to set the bar and the trial court bench, you're trying to avoid setting them up to fail.

JUSTICE KELLY: The trouble is, if we know there will be emergencies when we're going to feel we have to pass a rule change out of date, so to speak then, the trouble is if the Bar has come to rely on a date or two dates when rule changes will take effect, isn't it even a worse potential trap for the practitioner.

MR. BASSETT: I don't think so because then, if it really truly is an emergency, and I trust that the Court would use its discretion in determining an emergency very cautiously, but if it truly is, then that will become the exception and I think it will be easier for the Bar and the trial court bench to pick that out.

JUSTICE YOUNG: Why, because there will be less expectation of it.

MR. BASSETT: Well again if it's something that is so critical, I think that the word is going to get out. But again where we get caught up are the multitude of amendments throughout the calendar year and trying to keep up with them.

JUSTICE TAYLOR: Mr. Bassett, what if you had quarterly announcements of new rules.

MR. BASSETT: Again, probably an improvement but how often is a court rule so dramatically ineffective or harmful that you really need to accelerate its effectiveness to a date more than a standard annual effective date. I would think that that comes up fairly infrequently.

JUSTICE TAYLOR: Well I think the hypothetical that Justice Young posits is a very interesting one where you have this court ruling of a case that a court rule has to be changed. I think it really creates very bizarre circumstances where everything has changed but the court rule.

JUSTICE YOUNG: If you're knowledgeable about the decision of the law, you know the rule no longer applies as written.

JUSTICE TAYLOR: Imagine the argument that goes on in front of a trial judge. Judge, the rule is going to be, but it isn't now, although the case law is as the new rule will be.

MR. BASSETT: But Justice Taylor, is that any different than what we've always dealt with with statutory amendments. We know there have been dramatic changes in substantive rights and we know, we've all seen the lineups at the clerks' offices to file things before deadlines. Is that any more an affront to the sense of justice than what you're talking about. I'm not so sure. We evolve. Our system evolves, and we should try to let it evolve in an orderly way.

JUSTICE CORRIGAN: Any other further questions for Mr. Bassett? Thank you for appearing this morning but don't sit down, because you are next on the hit parade.

MS. WELSH: Thank you, Chief Justice Corrigan. I apologize if I was responsible for any of the confusion about not being on the list. I am Janet Welsh still, general counsel to the State Bar.

JUSTICE CORRIGAN: We welcome you here in your new capacity.

MS. WELSH: Thank you. I'm pleased to be here. First of all I wanted to thank you for consideration of the proposed rule change on the publication of court rule amendment. There is really great enthusiasm out in the general world of practice among lawyers for this change. But what I have not detected is the same enthusiasm for a rigid application of the rule that may have been conveyed by Mr. Bassett is a pretty concept. That for garden variety court rule changes that do not require an immediate change, that it would be helpful to the Bar as an organizational tool to rely on a specific date and to have that become sort of the pattern and the rhythm of the way changes are communicated and take effect. The other component of the rule that you published that hasn't been spoken too much is the two-month delay that you would commit to, and that is also a very helpful rule. It's helpful to prepare for form changes. It's helpful to prepare mentally for what's coming, and it's helpful for the courts to get ready for it. So in some ways I think we were diverted by the extreme exceptions in the conversation that was occurring. I had a different reaction than Mr. Bassett to the proposal of delaying the implementation of a court rule that is anticipated in an opinion. I would expect that that would increase confusion if you attempted to delay that once you had spoken on that issue. What it comes down to, I think, is the lawyers in this state are your audience and we are professionally obligated to hang on your every word and we do and there are different mechanisms for us to accomplish that. The words concerning practice and procedure are the words that are of the most significance to the most practitioners on a regular basis so it would be helpful to have an expected time for those rules to take place. There are mechanisms for us to learn the exceptions, for rule changes that would be adopted out of the regular cycle. And there are increasingly more mechanisms for doing that. I think the electric medium is an important tool that we can use. The e-journal, the website. So rather than having us rely to our detriment on a cycle that has the normal rules being published at a specific time if you adopt this proposal, I would say the avenues of learning about the exceptions will allow both the advantages of a regular publication date to help the Bar, and no disadvantage in terms of false reliance on that date because lawyers will still be obligated to follow changes that you adopt in the interim. So I would just not make too much, I wouldn't be too rigid about the application but consider it sort of a sensible, common sense proposal.

JUSTICE YOUNG: Do you have any ideas how to address the reliance issue that Justice Kelly raised that we run the risk that if we go to a, in this proposal at least, two uniform dates for the application of rules, we run the risk of increasing the likelihood that the Bar becoming reliant on those two dates will miss the odd rule that is published out of cycle. Do you have any ideas on how we can reduce the likelihood that those rules published out of cycle will be missed.

MS. WELSH: We will still have all the mechanisms for getting notice of the rule changes that now exist. Lawyers Weekly is one obvious mechanism. Your own website is another mechanism. The Bar has both the e-journal and it has a newsletter that comes

across as an e-mail that could be a very effective tool. Right now it has news stories relevant to lawyers but it could also post on a daily basis whenever a rule was adopted to that effect. And I don't think it increases the burden that already exists on lawyers. The concern about there being sort of a psychological reliance on everything happening at once, I think we already would tell lawyers that they couldn't do that. There will always be some exceptions and you always have to be alert, but in terms of knowing when most rules are going to take effect, that's just a helpful situation.

JUSTICE TAYLOR: Ms. Welsh, help me here. Is there some reason why a lawyer can't, when he's relying on a court rule, check that right now.

MS. WELSH: No, there isn't.

JUSTICE TAYLOR: So why should a court rule get different treatment than some other area of authority like a statute or decisions of this Court or decisions of foreign courts, decisions of federal agencies. I mean, isn't this the warp and woof of what you do as a lawyer is to make sure that the information you have is in fact still accurate and if that is true, which I think it is, why should court rules get a special treatment.

MS. WELSH: Well it's not a special treatment different than statute. The statues as well have a presumptive effective date that is an organizational tool.

JUSTICE TAYLOR: But it's not all the same date.

MS. WELSH: Absent immediate effect being given to

JUSTICE TAYLOR: Well it's 90 days after signing but the point is there are many things that trigger in the law unexpectedly. That's why this is a profession it just seems to me.

JUSTICE CORRIGAN: But isn't there some room for the humanity of it. Suppose we had statutes that were effective the very day that they were passed. That's akin to what we do now. Or there is no rhyme or necessary reason to how it's done other than that it is done and it will be release done. I mean, the Legislature does already have that organizing tool and we really haven't had it before, and it's not that much more organized.

MS. WELSH: And we're not here to argue that we are going to rely entirely on that organizational tool. It will not change in any way the lawyer's obligation to check on the status.

JUSTICE TAYLOR: I can see these problems arising where the rule has

been changed but it isn't changed until April 1st. March 28 the judge has the motion at the trial level to decide something. He can delay it by putting it over two days and then having it go under the new rule. Gives a lot of sort of arbitrary authority to individual judges and creates a huge uncertainty, it would seem to me, for litigants. But I'm not necessarily opposed to this thing, I just can't figure out why we've selected out this area to a rule of lawyers from their obligation to know the law.

MS. WELSH: And that's the point that I would have a different point of view on and that is that it doesn't remove the lawyer's obligation to know the law, it just organizes the time in which the law is likely to change.

JUSTICE TAYLOR: But the reason we're doing it as I understand it is because this is just too hard to figure out what the rules are.

MS. WELSH: It's not too hard for lawyers to figure out what the rules are, it's too hard for West Publication to catch up. That's one argument. That the tools of discovering in hard copy what the changes are are out of sync with

JUSTICE TAYLOR: But cannot a person shepardize these rules and find this out.

MS. WELSH: If you're using West, and West hasn't caught it then you're not going to catch it.

JUSTICE CORRIGAN: The fact is that not every lawyer has the degree of legal erudition that Justice Taylor does. For example, in the Court of Appeals my recollection

JUSTICE YOUNG: They can't use Shepards.

JUSTICE CORRIGAN: No, my recollection in the final order rule, for example, that was changed over and over by this Court, was that we would be dismissing 500 cases a year because lawyers were unable to comprehend the arcane definitions of final order and their changing meaning. Now we could sit down with our resources and figure this out, but we were still dismissing an enormous number of cases because of errors every year. And if you have one start date at least I think it would improve that situation somewhat. Maybe not. Three years later, after the final order rules were changed, we were still having trouble with that at the Court of Appeals, just that one little court rule. But who is the average practitioner who comes to the Court of Appeals–I don't mean to be giving a long speech–but they aren't people who necessarily practice appellate law every single day and you look at final order and it's just sort of geek territory, let's face it. Who's really

interested in what a final order is. I mean, all right, you have a professional obligation to do it, I understand that, but who is the ordinary lawyer. What does the ordinary lawyer do and what is it that we should be expecting of ordinary lawyers. So I think there needs to be some compromise with the education.

MS. WELSH: I think you for letting us speak again on this issue. I would just say it's a modest proposal that we think would be helpful but it does not remove our obligation to continue to do what we always need to do as lawyers, which is pay attention to you.

MR. RYAN: I don't want to beat this to death. If I may say just a couple of things. As I said, I've been from Sault Ste. Marie to St. Joe's and not only do lawyers like this rule, but judges like this rule. The bench is very enthusiastic about this rule. And the reason why we all that are out there practicing are enthusiastic about this rule is we do have a professional obligation, Justice Taylor, to know the law, but is there a problem with making it easier to practice law than more difficult to practice law. That's basically what this comes down to and I disagree with Mr. Bassett's discussion, and I understand your concern about the emergency or the change in the court rule through case law. If you have a published case from the Michigan Supreme Court then that is the law and the lawyers read published cases. Lawyers Weekly, the e-journal. We have a monthly Bar Journal that comes out. We can facilitate. We want to raise the standards of practice in the state also and we can facilitate information if there's an emergency. And we all know as adults there are very few emergencies in life. There are some that are legitimate emergencies but they are very few and far between. So you still have the discretion to issue an emergency order if you feel the need, and we will work with you as an organized Bar to get that information out to our members so that the reliance rule that you're worried about Justice Kelly, people will not go to sleep. We will inform them that there still are emergencies that crop up in the practice and procedure in the state and we will deal with that issue and we will work together on this. And if I may say, on the larger issue, what I'm excited about is a group agenda, working with the court is perhaps, in the future we can look at areas where the court rules are defective and deficient and work with our sections and committees in a proactive fashion to take on on a yearly basis maybe 3 or 4 or 5 court rules and work together through administrative process to correct those issues and put it out there for the public domain for comment and procedure and work with the, this is our domain, practice and procedure. We want to work with you to make it better, to make our practice and profession better. But I submit that there is, if you pass this rule and have one day and try this, the practice of law in this state will improve. The profession in this state will applaud you. It only makes sense and let's try it. And I suggest go with one date, and if there's an emergency or if there is a reason why you must change it, we'll get the information out to our lawyers. We will not let them get sand-bagged and we will work with you through our mechanisms to get the word out to our lawyers so they don't get trapped. But please, let's make it easier to practice law

for everyone, and it will be better for us, if I may say. Thank you, and thank you for your time.

JUSTICE CORRIGAN: Thank you. I'm sorry that you were omitted from the list of witnesses.

Item 5, 00-15, proposed amendment of MCR 3.210(C) and 2.119(E)

JUSTICE CORRIGAN: Item 5, 00-15, proposed amendment of MCR 3.210(C) and 2.119(E) and the issue there is whether to require trial courts to determine before directing an evidentiary hearing, whether there are contested factual issues that must be resolved in order for the court to make an informed decision. You're listed as a witness on that.

MR. BASSETT: That's right. This one I want effective immediately. I'm now in my 20th year of practice, all of it devoted to family law. Some at the trial court level, some at the appellate court level. And clearly the most difficult thing that I go through as a lawyer, the most difficult thing that my clients go through, the most difficult thing that the trial judges go through, and most importantly the children of my clients, is a contested child custody trial. One of the foundations of our Child Custody Act is a section of the statute that was quoted extensively by Justice Taylor when he was in the Court of Appeals in a case called Rossile v Aranda back in 1994. In the Rossile decision Justice Taylor in his opinion made it clear that the Legislature intended to erect a very strong and high barrier against disruption of a child's established custodial environment. What these proposed court rules, and as I understand it, they were proposed originally by the Michigan Judges Association, do is essentially codify Justice Taylor's opinion from Rossile v Aranda and add some procedure

JUSTICE YOUNG: You're losing ground here.

MR. BASSETT: What they do is they create a procedure in deciding when in a post-judgment, and this isn't pre-trial, this isn't the initial custody determination, this is a post-judgment modification. Whether the court needs to move to the step of a full evidentiary hearing, revisiting all the best interest factors, *in camera* interview with the child and possibly everything else that goes with that, which is time-consuming, expensive and most importantly, very difficult for the children. How this usually comes up, and I was in court in Macomb County Monday on a case almost identical to the Rossile v Aranda case from '94, a situation where the parties agreed to a custody arrangement as part of their divorce judgment. Some months later one of the parties comes back to court with a fairly bare bones motion saying I don't like it, I want to change it, let's go through the whole thing again. What should happen, what has increasingly happened since Rossile v Aranda was

decided is the trial court takes a look at that motion, looks for allegations that might, assuming they're true, constitute clear and convincing evidence to change custody, or some other compelling need for the interests of the child. Or might even send it to a referee for some kind of preliminary determination. That's what should happen. It doesn't uniformly happen today, however, because there is no court rule specified requirement that that be done. What these two amendments would do is change both the motion practice court rule and the domestic relations court rule on custody of children to require that preliminary finding. The trial court, the family court judge would have to take a look at that request for change of custody. Would have to, either by offer of proof or otherwise, and I think it's important to have that flexibility, decide whether there is enough there to turn this child's life upside down all over again and go through a full custody trial. I think this is absolutely critical to preserve for children who have already had their families disrupted by divorce or some other family breakdown, some sense of stability and permanence after a decision has been made. People can't keep coming back to court and throwing their childrens' lives in turmoil. This proposal helps eliminate that possibility. I took a look at the unpublished decisions that have come out since Rossile v Aranda. Thank goodness we have all of those electronically now, another advance that we're very happy for, at least going back I think to 1995. And in fact the trial courts and the Court of Appeals are applying Rossile v Aranda in a way that is almost identical to this proposed court rule. They are requiring this kind of preliminary review either by offer of proof or otherwise and it is working. The case I had Monday, the parties stipulated to a custody agreement back on December 1st for custody of a 2-year-old child. One of the parties wanted to come back and throw the whole thing open again, put the child through all of that again, put the parties through all of that again. The family court in Macomb Court took a look at it and said, what could have changed since December 1st, and correctly found nothing could have changed and dismissed the motion without having to go through all of that. This court rule provides the trial court with a clear procedural basis to do that. It's a good idea, it should be adopted as of April 1st of next year.

JUSTICE YOUNG: I have a couple questions. One, given what you have indicated about the apparently evolving clarify of the appellate decisional law, about the appropriateness of a preliminary evidentiary determination before a custody matter is reopened, why is the change of 3.201 required and second, assuming that the change of the rules specific to custody questions is appropriate, why should we deal with the general motion practice rule at all, particularly in light of the fact that this Court has recently published two opinions clarifying what the standards are under the motion practice rule, the general one.

MR. BASSETT: Well, again, though, Justice Young, this really isn't a summary disposition motion. We even have an unpublished decision saying that where a trial court applied summary disposition standards that was incorrect. I don't know that amending 2.119 is really necessary or critical to this.

JUSTICE YOUNG: Why is it even appropriate.

MR. BASSETT: I guess to the extent that domestic relations motions, family law motions, are still governed by 2.119.

JUSTICE YOUNG: But this is the specific rule governing custody, and under our rules, the specific rule in a specialized area takes precedence over the more generalized rule, correct.

MR. BASSETT: Although wouldn't you have to in a generalized rule at least open up the door tot his more specific one. Again, I don't pretend to be an expert on construction of court rules necessarily.

JUSTICE YOUNG: That's what the rules say, a more specific governs the general.

MR. BASSETT: Right. And I guess the question though is in the general rule don't you have to then, though, open the door to this more specific application in this particular practice area. And again I don't know why MJA proposed both to amend 2.119 and also to amend 3.210. I'm not sure why that was done.

JUSTICE YOUNG: 3.210 is the one that

MR. BASSETT: That's the one that I am concerned about, and that by itself does the trick unless the general motion practice court rule would somehow be construed contrary. I hope that would not be true.

JUSTICE YOUNG: But from your perspective, the relief you need for custody matters is addressed by 3.210.

MR. BASSETT: That's exactly right. It is.

JUSTICE CORRIGAN: Anything further? Thank you Mr. Bassett. I'm advised by our court clerk, Corbin Davis, that on Item 4, the amendment of rule 1.201, Janet Welsh and Thomas Ryan, were inadvertently omitted from the list of individuals who wish to speak.

[Go back to that item.]

JUSTICE CORRIGAN: Is any witness present here on Item 6, 00-23, amendment of subchapter 3.700? Any person here to speak on 00-28, interim amendment of Rule 3.208 of the Michigan Court Rules? All right, I understand we have a number of individuals present on Item 00-31, proposed amendment of subchapter 6.500 of the Michigan Court Rules. I would begin with Mr. Baughman out of order. The issue involved here is whether to impose a general one-year time limit on motions for relief from judgment.

Item 8 - 00-31 - Proposed Amendment of MCR 6.500

MR. BAUGHMAN: Good morning, Your Honors. Tim Baughman and I'm with the Wayne County Prosecutor's office. We handle a lot of these motions as you might imagine. The point I'd like to speak to very briefly and quickly this morning is the question of the Court's authority with regard to the proposal in light of MCL 770.1 and 2 which speak to motions for a new trial. First I'd say I'm not even sure that the motions for a new trial statute contemplate post-appeal motions for a new trial. I had always thought that that rule and its time limits and its exception for a late motion for a new trial always contemplated things that would occur before the appeal, but let's lay that aside and assume that it applies to a post-conviction motion if you want to use that, whenever, as to the appeal. This Court has already exercised authority in Rule G some 5, 6 years ago, to give meaning to phrases in the statute if you will. The statute says a judge can grant a new trial on any ground allowed by the law or if justice has not been done and the time limit can be excused on good cause. This Court said five years ago you can only file one motion for relief from judgment. You can't file a second. Now does that violate the statute, did the Court do that five years ago. I don't think so. What the Court is saying is, giving content to the rule, you can't meet the standard of showing either good cause or that justice wasn't done when you've had the appeals of right and have had one motion for relief from judgment except on certain grounds. You limited the field. You said time matters in determining good cause. Time matters in determining whether justice was not done. So once you've had one motion for relief from judgment, you didn't really bar a second one, you limited it to retroactive changes in the law that apply on collateral attack and newly discovered evidence. Those are open. You can file a second motion for relief from judgment. So what you're doing is, judges have to exercise discretion even under the statute. This Court has the ultimate authority to determine what good cause is, what the interest of justice is, and what grounds are under the law. And this Court has, for example, said that you can't grant a new trial because you disagree with the jury's determination on credibility. So you give content to those words and phrases. You've also said, laying aside Rule G on any motion for relief from judgment you've defined what the interests of justice are and what the grounds under the law are by talking about causing prejudice. You've given standards for prejudice that have to be met before a judge can grant, whether you want to call it a motion for a new trial after appeal or a motion for relief from judgment,

you've given content to terms that are used in the statute in terms of interest of justice and good cause that are yours to give. By narrowing the field to saying after one motion for relief from judgment we're limiting it to you can only show the interests of justice were served, you can only show good cause if you show a retroactive change in the law or newly discovered evidence. What this proposal does is the same thing but it says time matters on the first motion for relief from judgment. You have one year after your direct appeal is over, you have one year to file that motion for relief from judgment or we're again limiting the grounds. We're not excluding, we're not barring you, just like you didn't bar in G. People talk about it's one motion for relief from judgment but it bars certain grounds after a certain time, after you've filed one you're limited to two rounds. What I'm saying is if you sit on your rights for too long, you're limited to the same grounds. You're giving content to the statute, if you will, so if the statute does apply it is within this Court's authority, I don't have time to express the policy concerns right now unless the Court has questions, but in terms of the Court's authority, the Court has authority to do what the proposal suggests, just as it had the authority to do what it did in G. To say that the interests of justice and good cause take into account time and that the grounds on which a motion for a new trial, a motion for relief from judgment can be granted after one year are limited to newly discovered evidence and retroactive changes in the law.

JUSTICE CORRIGAN: Mr. Baughman, do you see a McDougall v Shance problem in the Court acting in this area, sir.

MR. BAUGHMAN: No I don't.

JUSTICE CORRIGAN: Any why would that be.

MR. BAUGHMAN: And I think the Court is probably aware, I am one in my regular practice that is very concerned about the Court saying within its bounds of authority and the Legislature staying within theirs. I think this Court has the authority, it is within this Court's realm to determine what, as the statute says, any cause for which by law a new trial may be granted and when justice has not been done. You give content to what those phrases are, not the Legislature, and you determine what good cause is. And you've done that in the entire framework with the motion for relief from judgment rule.

JUSTICE CORRIGAN: Is there an implicit or unstated premise in the statute that permits motions for new trial to be filed without any time limit, in your view.

MR. BAUGHMAN: I don't think so.

JUSTICE CORRIGAN: Has the Legislature imported that, perhaps not explicitly.

MR. BAUGHMAN: I think what the Legislature said is you can file untimely on good cause shown. Again I think they were contemplating this all being done before the appeal, but if we lay that aside because it doesn't directly say it, I think the Legislature leaves to this Court the determination as it does in many contexts, what good cause is, what the interests of justice are, what the grounds in law for a new trial are. They don't spell those out. They assume that you will decide those as you have on many occasions. As I mentioned, the rule that you can't grant the new trial on the ground that you disagree with the jury's credibility determinations. That's perfectly within this Court's rule.

JUSTICE CORRIGAN: Could you speak to a moment, because it isn't necessarily within the knowledge of this Court, what problem this is addressing.

JUSTICE YOUNG: And what order of magnitude is it.

MR. BAUGHMAN: To give you an example, I just checked the last two years before I came from my office, and we're the largest office and we probably get the most of these, but I know other offices get many. Just in the last two years I checked, we have had 60 motions for relief from judgment that we are ordered to respond to, and we only respond if we're ordered to by the court. Many judges after 10 years still don't understand that, but we're only required to respond if ordered by the court. We had 60 cases the last two years that the conviction was had in the '80s. So the conviction was 10-20 years old. We had 15 that the conviction was in the 70, so their conviction was 20-30 years old. But 60 motions for relief from judgment that the conviction is at least 10 years up to 20 years old, 15 where it was at least 20 up to 30, and 5 were more than 30 years old, including two from the 1950s. Those cases

JUSTICE KELLY: Over a period of two years.

MR. BAUGHMAN: Over a period of two years, and that doesn't include the ones that were in the '90s, so that might be 3, 4, 5, 6, 7, 8, 9 years old. There are a lot of those. I only looked at the ones that were at least 10 years old.

JUSTICE CORRIGAN: Okay. That's what you're ordered to respond to. Do we have any way to count the number of these that come through to the trial courts.

MR. BAUGHMAN: I don't keep track of those.

JUSTICE CORRIGAN: Is there any way to break those out or know those numbers.

MR. BAUGHMAN: There will be in the future if we keep track of them differently. Right now I can only count what I assign to people because that's what goes on our computer assignment. I don't assign the motions for relief from judgment if we don't get an order to respond so they never get on the computer docket. I don't know if the court itself can break them out or not but I can't.

JUSTICE KELLY: So are we talking about more than 50 here or more than 2 a month.

MR. BAUGHMAN: We're talking about in a two-year period that was 80, so we're talking 40 that were 10 years or more that we had to respond to in a year.

JUSTICE MARKMAN: What was your ability to respond to those.

MR. BAUGHMAN: We are able to respond but it makes much more difficult, even finding the records and transcripts is sometimes very difficult and beyond that, what's more important in the end is if a judge grants relief and it ultimately upheld, frequently we have concerns that judges in trial courts who are not appellate judges, they do not have a prehearing division or commissioners. They struggle with these as well. It is very difficult, as you saw the Judges Association supports the change. They struggle with these motions for relief from judgment when they're timely. When they're very old it is very difficult for them, it's not the judge who heard the case, who has a sense of the credibility. And I'm sure the Court is familiar with the many occasions where a motion can be brought and the judge will say oh, I remember this case very well. Well that's lost because they're not there, but trying to retry these cases if a judge does grant a motion 10, 15, 20 years down the line, 30 years down the line, is also a very difficult task.

JUSTICE MARKMAN: Mr. Baughman, let me ask a question. I'm asking this of you because I respect and regard your professionalism. Can you say to this Court that in those cases there were no instances in which some significant injustices were rectified.

MR. BAUGHMAN: In my experience if I recall correctly, I think there have been one or two motions for relief from judgment that were 18 or 20 years or more old that were granted, one of which we ultimately did not prevail on appeal. My opinion is that was a mistake. That justice had been done. The ground for granting was one that didn't meet the cause and prejudice. The more stringent standard. It's supposed to be tougher the second time around. It's not just a second appeal as of right. I do not believe that any case I have seen, any of these old cases, that an innocent person was in prison or that a miscarriage of justice, applying the heightened prejudice standard, occurred in those cases.

JUSTICE KELLY: You're telling us you haven't seen any cases where a

relief from judgment has been appropriate.

MR. BAUGHMAN: I can't think of any that have occurred in terms of this order of magnitude in terms of lateness. The only ones I've seen that I think were justified, we've had some where a judge may have, and these have been timely ones, I mean after appeals of right, somebody missed that credit for time served wasn't accurately computed. Maybe a consecutive sentence was given that shouldn't have been. I can't think of any that went to the heart of whether the conviction was valid. Again understanding we're applying a heightened prejudice standard on motion for relief from judgment. It's not the second time through appeal applying the same standards. There ought to be very few cases when you've had an appeal as of right and you've had a motion for relief from judgment, if it has been heard, that you can go through again and find prejudice. And I think the safety valve is the newly discovered evidence and retroactive changes in the law. I think one year is reasonable. It's what they do in the federal system. If the Court believes that a longer period was appropriate, make it 18 months. I'm not that concerned about the time period but that there be a time period. I think you would also see that defendants would be more apt to get them in quicker. One thing I've noticed on the habeases, we, unlike anybody else in the state, do habeas work. We assist the Attorney General with doing habeases out of Wayne County. And I can tell you, when the AEDPA went into effect putting a one-year limitation, they're coming in faster.

JUSTICE CORRIGAN: What does that mean. AEDPA.

MR. BAUGHMAN: The AEDPA was the federal change in the law that put a one year time limit on federal habeases. There was no limit for a federal habeas either. You could file one from the 1970s today. Now federally once the state conviction is final, you have one year to file a habeas. And the time is tolled if you file like a motion for relief from judgment in state court.

JUSTICE CORRIGAN: Your proposal that you made doesn't contemplate cert petitions to the U.S. Supreme Court. It ends at Michigan. Why would that be?

MR. BAUGHMAN: I didn't contemplate that but I would have no objection if the Court altered the rule to include that. In other words, that the conviction was final consistent with the way it is viewed in the federal system which is when the time for filing a petition for certiorari expires or if a petition is filed, when it's ruled upon ultimately. I wouldn't have any objection to that. And that really, in most cases gives you three months because very few people do actually file the petitions. So it gives you at least three months because whether you file it or not you get the additional 90 days. That's the way they look at it, that's the way the AEDPA is construed for their one-year time limit. When the conviction is filed, it's one year and the conviction isn't final until the certiorari time runs. But it's

clear to me that the prisoners, whether with counsel or not, are filing the habeases within the year. They're getting them done and they're getting them in, and it actually has resulted in an increase in volume. Talk about the rule of unintended consequences. You're getting more of them, but they're coming in when everything is fresh and the records are there and they are much easier to deal with. So again I don't have a magic number. I think one year is fine. It's really 15 months if we go to the petition for certiorari. But I just think there needs to be a line somewhere which if you don't get it in by then, you can't file it 10 or 12 or 20 or 30 or 50 or 80 years unless it is newly discovered evidence or a retroactive change in the law applicable on collateral attack. Those safety valves are always there, they're there in your Rule G.

JUSTICE YOUNG: Mr. Baughman, I am concerned about the relationship between the MCL 770.2 and the scope of our ability to enact court rules. You suggest perhaps the statute doesn't even contemplate this area at all but if it does you assert that the proposed rule (H) is really an elaboration on the good cause that the statute contemplates can be the basis for a new trial after the expiration set forth in the statute. In what sense does the time requirement as proposed here really define good cause.

MR. BAUGHMAN: Well I think it does in the same sense your Rule G does. Your Rule G says you can't file a second motion for relief from judgment, a second motion for new trial. This statute doesn't say you can't unless you show newly discovered evidence or a retroactive change in the law. So you appear to in G have viewed good cause as meaning you have to show one of those two things when you've already had a motion for relief from judgment.

JUSTICE YOUNG: But you haven't modified G, you've added H.

MR. BAUGHMAN: I know, but I'm saying the suggesting you are making would apply equally to G. Why would you have the authority in G to say you can't come around a second time unless you're raising

JUSTICE TAYLOR: Well let's talk about that. Did they have the authority to do G, the old Court.

MR. BAUGHMAN: Obviously the other side of my argument is you ought to abolish G if I'm wrong. And I think that's true, if I'm wrong you ought to abolish G.

JUSTICE CORRIGAN: Well there are no motions for relief from judgment at all if you're not correct, isn't that true. What's our authority to adopt motions for relief from judgment.

MR. BAUGHMAN: Part of my initial remarks was the entire framework of the motion for relief from judgment assumes, and I think correctly, that this Court has authority to give content to these terms because you define in the first motion for relief from judgment what grounds have to be shown in terms of prejudice to grant the motion which means you're giving content to what the interest of justice is and what any grounds required by law is.

JUSTICE YOUNG: Shouldn't those rules be stated in terms of good cause means something different perhaps after the first go-around and after a year, rather than as they are currently stated.

MR. BAUGHMAN: That is really what this Court has done. You've said good cause means if you file a motion for relief from judgment the first time, good cause means essentially, I think most people understand, good cause 99% of the time means you're going to claim ineffective assistance of your appellate counsel. That's going to be your claim for good cause. If you come around a second time what the Court has said now, good cause for coming around a second time can only be that you're claiming two specific grounds. That a retroactive change in the law has now occurred, or that you have new evidence. Otherwise no other ground will be heard the second time around so say good cause means X if it's a first motion for relief from judgment. It means something else if it's a second motion for relief from judgment and I'm saying you have the authority to say if it's the first motion for relief from judgment and you take a certain amount of time, you can define good cause taking into account the delay in time.

JUSTICE YOUNG: Yeah, but this is an absolute barrier. It doesn't say you'll take time into consideration in terms of determining whether good cause is shown. This says you don't even consider good cause because absolutely you're out of luck if you do it after a certain time.

MR. BAUGHMAN: H says that? No, it says you're out of luck unless you show a retroactive change in the law or newly discovered evidence, so it's really not a barrier to filing a motion for relief from judgment. It's a barrier to relief on any ground from those two, just like G is a barrier to relief on any ground but those two. And I think this Court has the authority to say the Legislature didn't say what good cause means, it didn't say what the interests of justice are, and it didn't say what any ground required by law is. They expect you to supply that.

JUSTICE YOUNG: Shouldn't this be a part of G then.

MR. BAUGHMAN: It could be a part of G. It's a matter of how it's drafted it could be.

JUSTICE MARKMAN: Would your standards be at all different if in fact this was the first appeal that the individual had the opportunity to take.

MR. BAUGHMAN: If it was the first motion for relief from judgment? My point is they should have to file the first motion for relief from judgment within a specified time period. Again I think one year is fine. You could pick a different one, or if they don't file within one year then essentially what you've done is

JUSTICE MARKMAN: What if they have no appeal at all, no appeal by right.

MR. BAUGHMAN: Oh, if the first appeal of right has never occurred. I'm sorry, I thought you meant the first motion for relief from judgment. The way the law works now, you have 12 months to take your appeal by right. 42 days to file your claim and if you're not timely you have 12 months. If you don't go within the 12 months you have to file a motion for relief from judgment. And I would say then you have to file that within one year. That means you've got the initial one year when you've lost your appeals of right time and you've got another year to file your motion for relief from judgment which would allow you to raise any grounds, so you've got two years to get the first motion for relief from judgment.

JUSTICE MARKMAN: Is that clear from your language that there would be two years under that circumstance.

MR. BAUGHMAN: You might be able to put something that refers to the other rule but that's the way the law is right now. We have that happen now. A defendant will just not appeal. Won't file a claim, won't appeal, won't file a delayed appeal. And over a year passes he'll file a delayed application to the Court of Appeals and the Court of Appeals will send it back saying a year has passed, you must file a motion for relief from judgment. He would have to file that within a year of the expiration of his first year under this proposal so he would have essentially two years to get something in to the trial court.

JUSTICE KELLY: Did I understand you correctly to say that you don't feel you are required to respond to the long-delayed motions for relief from judgment unless you are ordered by the court.

MR. BAUGHMAN: We're not required to respond to any motion for relief from judgment unless we're ordered by the trial court.

JUSTICE KELLY: Okay, so the question is how many times has your office

felt it necessary to respond and responded to a delayed motion for relief from judgment over the last two years.

MR. BAUGHMAN: The ones that I cited were the ones that we had been ordered to respond to and did. That was 80. 80 times where it's been at least 10 year old or more in the last two years we've been ordered to respond. We've been ordered to respond to many more that were 1-10 years old, but 80 times where they were 10 years or more.

JUSTICE CORRIGAN: Is it possible for you to supply to the Court the number of motions you wouldn't have had to answer if this rule kicked in. In other words, you might say 80 or 85 but if we did a one-year cut-off say, going back the last two years

MR. BAUGHMAN: I could give you a fairly good idea because many of the ones I don't include in that 80 are ones that were beyond one year but they were under 10. I only went 10 and beyond. So I could add the ones that went beyond the year.

JUSTICE TAYLOR: Mr. Baughman, good cause or the interest of justice you feel that statute can be expatiated upon by this Court and delimited in that fashion that we have for the retroactive change in the law or the new evidence. Certainly though it would be the case that there could be good cause imaginable that doesn't get encompassed within those two categories, retroactive change in the law or new evidence. If indeed the Legislature has authority over this area because it's substantive, how do we have authority to give a limiting construction on that.

MR. BAUGHMAN: Any construction that you give I guess could be viewed as a limiting construction unless you want to say that trial court judges have unbridled discretion to decide what they think is the interest of justice and you can't tell them they're wrong. You've already said if the trial judge were to say I think the interests of justice are served by granting a new trial because I disagree with the jury, nothing in the rule says this Court has authority to say that's wrong. This Court has said it's wrong because I think it's its responsibility to make those kinds of decisions. You have defined what interest of justice is in that circumstance.

JUSTICE TAYLOR: But we have done it in a fashion that–rather than deal with a hypothetical, let's assume that there is something that is good cause or interest of justice which is not a retroactive change in the law or new evidence. Just assume if you will that there is something like that. Now we in limiting so as to cause that cause to not be considered, are we not encroaching on what the Legislature done improperly.

MR. BAUGHMAN: No, I think it's in this Court's purview to determine what the term means and my view is obviously in proposing this rule is you come to a time

where other than retroactive changes in the law and newly discovered evidence, no there is no good cause. I don't accept the hypothetical that you can show good cause outside your parameters at some point.

JUSTICE TAYLOR: Okay. Would it not normally be the case in the law though that you would do that on a case by case basis as opposed to, in other words we are taking the Legislature's statute and looking at it and given these facts that this prisoner has brought forward and saying well okay, this doesn't amount to good cause or interest of justice as opposed to having a court rule which would do it.

MR. BAUGHMAN: Well, the Court hasn't received it I don't think, I've submitted a supplemental letter in response to some of the comments and it points out judges have to exercise discretion when they deal with these motions. This Court has already circumscribed the discretion and I would think your argument might mean that the entire motion for relief from judgment fails because you've defined what prejudice means and if they fall outside that and the Legislature didn't define prejudice and you've talked about good cause shown there

JUSTICE YOUNG: The question I think to put it in a focused way is if the legislative determination of good cause is controlling, then aren't we in the realm now of statutory interpretation rather than rule making. Ought we not be interpreting this statute in our decisions rather than our court rules.

MR. BAUGHMAN: Well again, if we want a system I think that works in a way, and you've heard some of this comment today, that everybody has a chance to understand it, then discretion as some of the cases say has to be exercised, disciplined by system.

JUSTICE YOUNG: I don't disagree.

MR. BAUGHMAN: And this gives a system that tells trial judges you can't do certain things after certain times. That will be considered by us to be an abuse of your discretion.

JUSTICE YOUNG: The question is our authority. We have decisional authority to interpret. The question is do we have court rule authority.

JUSTICE CORRIGAN: Yeah, it's how we define, and I want to know the constitutional root of this myself. In the rules of practice and procedure area because of McDougall and what McDougall has to say, are we in an area which is judicial dispatch of business. That is one question I have. The second question I have is do we have

independent authority under Art. 6, §13 which gives us some concurrent jurisdiction on rule making with regard to the circuit courts. Does that give us independent power in this area to be involved.

MR. BAUGHMAN: I think the Court does have concurrent authority with the Legislature now and there are rules I believe that this Court has enacted that if the Legislature were to step in and say no, we disagree, we're doing something else, you'd say well then yours supercedes it. That didn't mean you didn't have the authority in the first place, but they can trump you.

JUSTICE CORRIGAN: But let's say we have an application for leave to appeal process, we say it's due in 21 days, all right. If the Legislature passes a statute tomorrow and says all applications for leave to appeal will now be interminable. There will be no deadline for the filing of these other than a good cause deadline. Who wins.

MR. BAUGHMAN: I would have to give that some thought because I would be inclined to say the Court wins because that's the dispatch of the Court's business and reservation of powers and separation works both ways. While this Court is limited to not interfering with the Legislature, they are also limited to not interfering with you on things that are central to your dispatch of business. They can decide jurisdiction. They could draft it, I think, in a way that might compel you to consider it by doing it jurisdictionally but if they did it in a procedural manner then I think you'd probably trump. I mean, you do have authority too.

JUSTICE CORRIGAN: Is there any area of trumping that this Court has once a statute is passed in your view.

MR. BAUGHMAN: Well if the Legislature were to say you have to determine some substantive matter in a particular way, if a case comes before you, you must determine that it's prejudicial by our definition, not yours. In fact, the courts can do that. If the Legislature were to say that a constitutional error is harmless if you can't say by a preponderance it affected the verdict, the answer would be no. The Court says it has to be harmless beyond a reasonable doubt and you can't tell us to apply a different standard of harmless error or constitutional error over the Court (? somewhat inaudible). The United States Supreme Court has said that's the standard. It has to be harmless beyond a reasonable doubt and our Legislature can't change that. So you get the final say on that and I think if, at least in the absence of the court trying to tell you something different, when they use an open-ended term like good cause or interest of justice or any ground for which the law requires a new trial, they're expecting you to give content to those terms.

JUSTICE YOUNG: Is that a substantive rule of law or a procedural rule of

law in MCL 770.2. Under the McDougall analysis, are you suggesting to this Court that the statutory basis for a new trial after the statutory base limitations has been passed, good cause shown is a procedural or a substantive rule.

MR. BAUGHMAN: I can't really answer that right now.

JUSTICE YOUNG: Don't we have to answer that question.

MR. BAUGHMAN: You may have to, but I think you have to consider whether or not, I don't think the line is always that sharply drawn where that the Legislature can't talk about procedural matters and say in a procedural rule look, you can still file a motion for a new trial if you miss a time delay for good cause shown. Court you decide what that is. We don't have to give the definition and we're not violating any separation of powers either way. If we put the term in and leave it to you to say what it means.

JUSTICE CORRIGAN: Is there any construction of motion for new trial that makes it interminable in your view. In other words, is there any way to construe a motion for new trial that gives it a limit.

MR. BAUGHMAN: The law has always been that before the motion for relief from judgment that long-delayed motions for a new trial were disfavored so they were already looked upon askance and there was some case law prior to the motion for relief from judgment that also looked askance. It was called piecemeal litigation and talked about finality. The courts were not happy with it as it were and as I believe, I was on the rules committee at the time the motion for relief from judgment was enacted, that the purpose was to provide some systematic way to deal with motions for relief from judgment to supply rules that would apply across the board that judges would all be applying. This is what prejudice is, this is what cause is, instead of this judge having a rule and this judge having a rule. We could again systematize discipline discretion by systematizing it within, every case is different but you had at least general rules of what prejudice is for a trial, a sentence, a plea, that applied to everybody and I think time matters and you also have the authority to say time matters. And you've already said more than one matters. How many times you do it matters, and nothing in the statute says that.

JUSTICE YOUNG: Mr. Baughman, you've written rather extensively on McDougall. Have you provided the Court with your assessment of the McDougall issue here.

MR. BAUGHMAN: I have not, but I would certainly like the opportunity to do so.

JUSTICE YOUNG: I would be very interested in your analysis.

MR. BAUGHMAN: It is my view you have the authority, as you can tell, but I would like to, if I can have the opportunity to give you that in a little more thoughtful fashion because I do believe there's an overlap that needs to be addressed as well so I would appreciate the opportunity.

JUSTICE TAYLOR: Mr. Baughman, what do you think, if you happened to review it, a letter of January 15 from an attorney Craig Daley saying in particular part that Mr. Baughman's claim that the proposed amendment "would bring the Michigan rules into confirmance with the one-year limitation that applies in federal court" is simply not true or accurate. He then goes on to argue that there is a lot more latitude in the federal court than you would suggest to hear those things. What's your response to that.

MR. BAUGHMAN: The language of my proposal is slightly different because I think they use "you can't file it" and I use "relief can't be granted" because I think I've styled mine after Rule G, relief can't be granted after a first motion for relief from judgment except on the grounds. The only real difference is, and it's the difference between the two systems is if your conviction is final in the state system, your one year will start to run on your federal habeas. But the federal system recognizes that states have things like motions for relief from judgment. If you file a motion for relief from judgment in the state system, your one year tolls until that is over because they require you to file now only one habeas. You can't file a second habeas, just like you have Rule G. So they wanted to get all those issues at one time, so they'll toll the time so you can bring these other issues up through the state system and then restart your time when it's over. We're a separate state. They're reviewing state convictions. We don't review federal convictions so we don't need a tolling provision like that. I wouldn't necessarily have a problem, and I don't know if it needs to be in the rule, it might be something that awaits construction, if there was some kind of equitable tolling in the sense that if the defendant could say my conviction came down and it was final and I was in a coma in the hospital for the next year because I had been assaulted in the prison and I didn't have a chance to file, you might review that as an equitable tolling provision that tolls the time. Other than that, I'm not sure what Mr. Daley is talking about. I think he's referring to the equitable tolling that exists in the federal system and the fact that they toll during a state post-conviction proceeding. That's the only ways that I know they're different.

JUSTICE TAYLOR: What would you think about us suggesting that this is something to take care of through legislation.

MR. BAUGHMAN: I think the Legislature could do that by dealing with jurisdiction. They could simply deal with 770.1 and say after one year a trial court has no

jurisdiction to entertain a motion except for certain grounds. That's again an area where I think they could do that and I think you can do that. I'm not sure that's a separation of powers issue of either one does that. I think it is within this Court's authority and I think the Court should exercise its authority to set up an equitable and just system of how its work is done on its own, without looking to the Legislature but I think they probably could.

JUSTICE MARKMAN: Are there analogous limitations in the civil justice system that quickly come to mind, Mr. Baughman, where the Legislature say has created some kind of cause of action, yet our rules have limited access of perhaps the full realization of those causes of action in some respect. Res judicata maybe, things like that.

MR. BAUGHMAN: I suspect there are and res judicata is one, but I really am not familiar enough with the civil side to give you an answer to that. Obviously from what I've said and what I've written the federal system has gone this way. They have tightened up on you can't have multiple petitions anymore, just like we can't have multiple motions for relief from judgment. They have a one-year rule. The one-year rule that I'm talking about in my proposal or base it on is not their one-year rule on habeases from state convictions. They have a motion for relief from judgment practice like we do, like a federal habeas for a federal conviction and they have the one year rule on that. So that's what this proposal is based on.

JUSTICE MARKMAN: Would PAAM support this, or are you speaking for yourself.

MR. BAUGHMAN: No PAAM supports it. I think you have a letter one file. And as I said, there's a letter I notice from the Michigan Judges Association supporting it, and I think they make a good point. There was confusion when Rule G came out about whether or not it applied to people who had already had one motion for relief from judgment before the effective date of the new rule and Tom Robertson I know and the judges both said there might should be something directly in the rule rather than leaving it to construction as to its effective date and I would agree that if somebody's conviction is final and it's been more than one year, they would start a new year running on the effective date of the rule. That's the way the federal system worked their one-year rule. It began on April 6, 1996. If your one year had already run, you started a new year right then. It didn't go backwards, and I would agree that's fair. Thank you for your attention. I will put something together for you more on that constitutional issue. Thank you.

JUSTICE CORRIGAN: Thank you Mr. Baughman. I'm now going to call on James Lawrence.

MR. LAWRENCE: Good morning. I'm attorney James Lawrence. If 6.502

is amended as the prosecutor proposes, one day a prisoner is going to ask me, Mr. Lawrence can I file a motion for new trial. And I'm going to have to tell him the Michigan Legislature says you can but the Michigan Supreme Court says you cannot. All you have to do is look at these statutes. Is a bar on motions after one year what the Legislature said it wanted. Under the proposed rules, suppose a prosecutor knowingly puts on perjured testimony, the defense lawyer isn't diligent and it takes more than a year to discover. Under these rules no motion can be filed. Suppose incontrovertible evidence of innocence is missed by a non-diligent attorney and is not found for over a year. No motion can be filed. I'd like to call your attention to the case of Robert Farnsworth, Jr., manager of a Wendy's Restaurant in Jackson. A bag of money came up missing and he was convicted for stealing it. He said he deposited it in the bank night depository. The bank said he never did. A state police officer swore under oath that Mr. Farnsworth confessed to the theft. Six months later someone else lost money in that bank depository. They got it opened. They found their own bag and the Farnsworth's bag. It wasn't newly discovered evidence because Farnsworth's attorney could have gotten that mechanism opened the same way the second guy's attorney did. With the prosecutor's consent, Judge Nelson granted him release anyway. Under these new rules if the evidence were found a year later instead of six months later, Farnsworth could not file any motion at all, not even with the prosecutor's consent. With the 1989 court rule changes a person has the right to file a motion but not the right to have any of the legal issues raised in the motion be considered. Why do the court rules allow the motion for relief from judgment at all. It is to give the illusion that the legislative mandate to respect the right to file motions for new trial is being carried out when it is not. The court rules now are basically window dressing. Where the rules in form maintain the statutory right to challenge one's conviction by a motion for new trial, but in reality strip away that right as well as stripping away the statutory authority of trial court judges in these statutes. Convicted persons used to have a continuing right to petition the courts for a redress of their grievances by filing a motion for new trial. It was taken away by judges without any legislative action. I call on you to give it back.

JUSTICE KELLY: What specifically would you like to see us do.

MR. LAWRENCE: Specifically, okay the very first step, don't adopt this new rule. The second step, I'd like you to set up a committee to revise these court rules and put me on it so that a voice will be heard other than the prosecutors. You know, Mr. Baughman makes a proposal, it gets up here on the docket. You know, I've got a lot of proposals but I don't have the same kind of access to the Court's ear that Mr. Baughman does.

JUSTICE CORRIGAN: Have you submitted proposals to us, Mr. Lawrence.

MR. LAWRENCE: No I have not.

JUSTICE CORRIGAN: How do you know you wouldn't get our ear then.

MR. LAWRENCE: I'll tell you this. On many, many, many occasions I have filed challenges to the application and legality of these 6.500 court rules, their retroactive application, a whole variety of things. On not one occasions has this Court ever granted leave to appeal in any of those. Yet when I win a motion for new trial, the Court of Appeals is very quick to reverse that on the grounds that the judge doesn't have the authority to grant it.

JUSTICE YOUNG: Counsel, you're here now. You're making an argument. I think it's important for the Court to understand first what its authority to act in this area is, and I think that's the whole issue that McDougall ushered in, that there isn't an assumed power. We have to explore what that power is. I think you could assist this Court in addressing its constitutional authority to make the proposed change, and I gather you even have question about our authority to have enacted subrule G.

MR. LAWRENCE: I question the Court's authority to have adopted subrule G. The new subrule H, as well as 6.508(D). Because the statute says that the judge of a court in which the trial of an offense is held may grant a new trial to the defendant for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done and on the terms or conditions as the court directs. I had a judge do that. The Michigan Court of Appeals reversed it on the ground that 6.508(D) barred the trial court judge from inquiring into the legality and fairness of the conviction, and I think that rule directly contradicts this statute.

JUSTICE TAYLOR: Back again, what would you like us to do sir. Certainly if we don't have authority to even do this, you wouldn't want to have a committee set up, would you.

MR. LAWRENCE: Well I think certainly if there is a long delay and the prosecutor can show prejudice arising out of that delay, then that should have an important effect. But the mere passage of time that's not prejudicial shouldn't have an effect.

JUSTICE TAYLOR: That's a different question. I'm trying to focus you a little bit, if I could. Isn't your point that this Court shouldn't be involved in any of these things and that this is a legislative matter.

MR. LAWRENCE: That is my point exactly.

JUSTICE TAYLOR: Well if that is the point, then what possible good would it do for us to set up a committee.

MR. LAWRENCE: Well I think that because we have to face the facts on the ground. If I'm correct and the Court didn't have the authority to do with they did in 1989 and 1995, then you've got a real mess on your hands and you've got to figure out a way of dealing with it because in my view this Court is up to its neck in statutory legislation and has violated this statute not once or twice but tens of thousands of times since 1989. And I think that at a minimum a mechanism needs to be set up to deal with that problem.

JUSTICE CORRIGAN: How do you see the constitutional provisions on this Court's authority over the rules of practice and procedure and Art. 6, §13 giving us some concurrent jurisdiction over the circuit courts and rule making areas then. How should one construe that, then, in your view.

MR. LAWRENCE: In my view you should distinguish between rules of procedure that are truly procedural and rules of procedure that end up having substantive effect. For example, this 6.508(D) provides essentially in most cases the prosecutor always wins without any reference to the actual merits of the underlying case. And it seems to me, just to give you an example. A court could say how many copies you're supposed to file. Clearly procedural, but suppose the Court said if you want to challenge a criminal sexual conduct conviction, instead of filing four copies or five copies, you have to file 5,000 copies. Now technically it looks just like a procedural rule but it isn't. It's a substantive rule designed to prevent people from having access to the courts. Access to the courts is a right. It's a substantive right, it's one the Legislature has the power to grant. And what are you going to do about this new DNA legislation. If this rule passes, of course that new DNA legislation is illegal because it gives the prisoners five years. What are you going to do about that.

JUSTICE TAYLOR: How big a problem do you think this is, the problem you perceive.

MR. LAWRENCE: The problem I perceive is an enormous problem because what you've got is it is certainly true that injustice exists and injustices have occurred. And I don't think you have a bunch of wild-eyed trial court judges that are running around looking to reverse every case. Quite the contrary. Trial court judges have to be pushed and prodded into reversing a case. I don't think that if you do something about this, that trial court judges are going to suddenly start reversing every case. That's not reasonable. But if Farnsworth comes along, a case where it doesn't fit into the court rules as it is set up, then I think he should still have that opportunity. The trial court judge's authority is clear. The trial court can grant it on the terms that justice has not been done.

Now this Court can review that for abuse of discretion certainly, but I don't think that you have the authority to create a blanket rule taking away the trial court's authority. I think that you can review for abuse of discretion of that authority.

JUSTICE MARKMAN: Mr. Lawrence, is there any procedural interest in finality.

MR. LAWRENCE: There is a procedural interest in finality which I believe could be adequately handled by a rule similar to the old rule of laches. In other words, you need to demonstrate that the prosecution has been prejudiced. Let me give you an example. There was a fellow who was convicted of felony firearm. Received a five-year sentence. He really should have gotten the two-year sentence under Michigan case law. Now this was not spotted by his first attorney. Now why should there be a limit on him coming back to court and saying give me my two years, get rid of this five years. What possible interest in finality could there be in maintaining a sentence that is contrary to law, more than the person should have gotten, simply because his lawyer missed it.

JUSTICE CORRIGAN: Why doesn't that fit under the current standards of good cause and prejudice the way they are articulated. He had ineffective assistance of counsel the first time around and he has obviously got a clear error and has been prejudiced and that he's being required to serve an additional amount of time. Why doesn't that satisfy it.

MR. LAWRENCE: Well unfortunately, under People v Reed, a lot of the trial court and Court of Appeals judges are taking the position that there is no such thing as ineffective assistance of counsel as long as any brief is filed, and I'd like to tell you about one specific case. The lawyer filed a brief raising two issues, three pages long. One issue was the trial judge never instructed on accident, but he did instruct on accident. The second issue claimed that the prosecutor violated the *res juste* witness rule based on a statute that was appealed 12 years before the brief was written. No court found that to be ineffective assistance of appellate counsel and this Court denied leave to appeal, so the protection that is supposedly contained in the rule is entirely without value. I can't tell you how many trial court judges, when they get a motion for relief from judgment, they just automatically say this is denied, no good cause, 6.508(D). But on several occasions I've raised newly discovered evidence that does apparently, or at least arguably meet the standards for newly discovered evidence. Yet it gets denied on the same ground. No good cause. The Court of Appeals denies leave to appeal, so does the Supreme Court, so the protection that is written into the rule is entirely without value because this Court, generally speaking, refuses to grant leave to appeal even though an issue of newly discovered evidence is raised which under the rule should get consideration but doesn't, and this Court has taken no steps to enforce those portions of the rule that are favorable to the defendants.

JUSTICE CORRIGAN: Mr. Lawrence, the first time I met you sir, or recall you, was in conjunction with a Dearborn murder case that you won by your vigorous representation in that case. Didn't that come up under this 6.500 chapter.

MR. LAWRENCE: Actually no, I filed it just before that. And the reason it took so long to get to you was because leave to appeal was denied a couple of times. The Supreme Court remanded it for a hearing. I had the hearing, the Court of Appeals denied leave to appeal again. The Michigan Supreme Court remanded it back to the Court of Appeals where it finally landed in your hands and you, with your other colleagues, granted a motion for new trial on the grounds that the prosecutor deliberately put perjured testimony on. Obviously if you have a situation where that could have been discovered, as in the case that you're referring to, because how did I discover it. I went to the witnesses court file and looked it up. The other lawyer could have done that but he didn't. So it wouldn't qualify as newly discovered evidence and under the rules today, that gentleman probably could not get any kind of hearing at all, and under the proposed rule, he certainly could not get any hearing at all.

JUSTICE CORRIGAN: Anything further? Thank you Mr. Lawrence. We have one final speaker this morning, Telesha Temple. Is she here?

MS. TEMPLE: Good morning. My name is Telesha Temple. I am a member of the public and have loved ones who have been incarcerated and obviously potentially affected by these changes. Over the course of the last 12 years of being affected, I have come to know many individuals who are currently serving second degree life sentences who at the time of their sentencing, as Mr. Baughman indicated, were 20, some of them 30 years ago, who at the time of sentencing the judges had the understanding of sentencing at that time of being a 10-year sentence and that they were obviously eligible for parole but they kept, even on the record would state, these are 10 years, honest 10 years. Please indulge me, I apologize, and I'm not an attorney so

JUSTICE CORRIGAN: You're doing fine.

MS. TEMPLE: If after these individuals have served that 10, 15 year mark and the parole board is looking at these individuals that your sentence is second degree life, period. They're not considering them, they figure that life is life no matter what degree of life it is, then how is it that this Court could address these issues with these individuals if they don't have an opportunity to file after the 20, 30 year time limit, because now all of a sudden these individuals are being faced with the facts that my trial judge told me one thing. The reality is I'm not being looked at. Therefore, they're going to want to bring it back to court. By changing this law or this proposed rule, would in effect make it so these

individuals could not come back, which is what I'm presuming, based on Mr. Baughman's testimony before us today, is an indication that these individuals who have served long indeterminate times are now coming into the courts and looking for some kind of relief. With this being reversed after a year, they're not going to be able to do this. Many times these individuals are indigent, may not have access to the courts. May take much of their time learning jailhouse law. Learning how to present a case to be able to present the issues. Maybe saving up some money. They don't get paid a lot there. It takes them time to be able to effectively come before the court and in the process year after year passes by. I know that emotions are not necessarily a criteria for offering argument, however emotions do quite often mandate change, and I would hate to think that our system is bent on just an emotional knee-jerk reaction to everything that comes before them. I have to tell you that I've testified at public hearings before the Michigan Department of Corrections on many proposed changes to their administrative rules. We seemingly go through the motions objecting to those changes and yet they institute them anyway. It is almost as if they are going through the motions of hearing what the public has to say, those who are affected have to say, and they don't listen, and do what they want to do anyway. And I hope, I pray, that that's not necessarily the case here. There are hundreds of individuals whose lives, whose families' lives are affected by the laws that we institute in this state, in this country, that are not taken into account. We understand that these individuals have caused harm. They have done, in some instances, serious harm. And we don't excuse them from that, but when these individuals have been before the courts, have had the opportunity to go through trial, what have you, if they don't have the access to come into these courts, to have someone speak up for them, to be given the opportunity or have time limits, then in effect we have closed the door for those individuals for a potential redress.

JUSTICE CORRIGAN: Ms. Temple, your time is expired, as the red light shows. One final sentence.

MS. TEMPLE: My understanding is that the state and federal courts are separate entities. Then why do we need to be in compliance with them as well. Thank you.

JUSTICE CORRIGAN: Thank you. That completes the matters that were scheduled for public hearing this morning and this Court stands adjourned.