MICHIGAN SUPREME COURT

PUBLIC HEARING

September 20, 2023

CHIEF JUSTICE ELIZABETH CLEMENT: Okay, we are all set to begin. Welcome to our September 20th, 2023, public hearing. Our first item is the proposed amendment of MRPC 1.8 that would allow attorneys to provide certain assistance to indigent clients they are serving on a pro bono basis. And our first speaker is Angela Tripp from the Michigan State Planning Body. Is Angela here?

ANGELA TRIPP: Yes, I'm here. Hello.

CHIEF JUSTICE ELIZABETH CLEMENT: Hi there, Angela.

ANGELA TRIPP: Good morning. Good morning, Chief and Justices. My name is Angela Tripp and I'm here to speak on behalf of the State Planning Body, an association of legal aid and public defender organizations from across the state. Thank you for allowing us to speak on this important change to MRPC 1.8, the humanitarian exception to the general prohibition against attorneys providing financial assistance to clients in connection with pending or contemplated litigation. The proposed rule has a bit of history that I'd like to reiterate in the hope it will help you understand why we filed this comment asking the court to adopt the State Bar's April 22 proposal instead of the one published for comment. The language changes may seem minor, but they are very important to us [cough], excuse me. In 2020, the American Bar Association proposed changes to model rule 1.8e with the intention of greatly expanding the ability of attorneys who are helping clients on a pro bono or unpaid basis for them to give a loan, money to any existing litigation client in a financial emergency for basic necessities so that the client can withstand litigation. The State Bar of Michigan proposed a similar amendment to Michigan's Rule 1.8 and there was disagreement from the legal aid and public defender communities about the proper scope of this exception. Members of the planning body, including those that you will hear from later, are the advocates most impacted by the change to this rule. Our staff are among the lowest paid in the legal profession and every one of our clients is poor and in desperate need. Every one of them are experiencing financial emergencies and would benefit from receiving money for basic necessities. However, we cannot afford to do this and we cannot afford to create the expectation that we will do so. Unlike pro bono attorneys or law students in a clinic, this is not the occasional client who needs help but every single client, day in and day out. Further, it's bad public policy to expect legal aid and public defender staff to

be part of the social financial safety net for our clients. There are other organizations with that mission. In response to the Bar's proposal, we requested that that the acceptable expenses be limited to things that are directly related to ongoing litigation. Things like travel to a hearing but not gas money for parenting time exchange during a contentious divorce. Yes, to paying for a client's lunch during a long—a day-long hearing or mediation, but no, to paying the last hundred dollars a client needs for rent in order to avoid an eviction. We needed a rule that was more limited and more specific. In response, the Bar-organized meetings between those with dissenting views to try to reach consensus and we were able to do so, together crafting the language that was submitted to this Court in April of 22. This language represents what the Bar's Representative Assembly and the Planning Body, among others, believes is the best solution to this very complex problem. We ask that the original language be restored as outlined in our written comment and described by others here today because this will best enable the advocates serving desperate clients to provide them with the assistance they need to access the courts while allowing us to maintain professional relationships with our clients and not unduly burden our staff or overwhelm our budgets. Thank you for your time and consideration.

CHIEF JUSTICE ELIZABETH CLEMENT: Thank you very much. Any questions? Okay, our next speaker is Karen Tjapkes from Legal Services Association of Michigan.

KAREN TJAPKES: Yes, thank you Your Honor. Good morning. My name is Karen Tjapkes. I am the director of litigation at Legal Aid of Western Michigan, and I am here today on behalf of the Legal Services Association of Michigan, commonly referred to as LSAM. LSAM's member programs include the 11 largest civil legal aid programs in Michigan, including the five regional programs funded by the Legal Services Corporation. As indicated in our written comments, while we support the concept of a humanitarian exception, LSAM does not support the proposed amendment of MRPC 1.8 in its current form. This morning I'd like to highlight one of those specific concerns that we raised in our written comments that is very specific to legal services organizations and their staff. The amendment proposed by this Court includes language that states "funds raised for any legal services or public interest organization for purposes of providing legal services will not be considered usable for providing assistance to indigent clients." This language is incredibly problematic for legal services organizations and their staff. Legal services organizations represent the types of clients that are meant to benefit from this rule: low-income families and individuals who often struggle with the expenses associated with court costs, such as parking to attend hearings or meetings with their lawyer. However, legal services attorneys are among the lowest paid in the legal profession. Our attorneys do this work because they have a passion for helping others and often want to assist every client with their needs, which sometimes

includes a cup of coffee during a break from court or a bus fare so that client can have a ride home. As many as our staff—most of our staff attorneys close about 100 cases per year on average and that means that our attorneys have many clients who could use that cup of coffee or other assistance contemplated by the rule, and those costs can add up quickly for our staff. However, the language of the proposed rule blocks our staff—our organizations rather from providing those funds from our budgets. Instead, it shifts those acts of kindness to our individual attorneys to pay out-of-pocket, out of their not very lucrative salaries. Our programs raise funds from a wide variety of sources in our work. Many resources these resources are willing to fund these kind of costs to facilitate our clients' access to the courts and our services. So, allowing the leadership of our organizations to determine our budget, the availability of funds for this purpose, and then making the reports and disclosures to the funders, as we need to, would be what we would prefer versus this broad and strict prohibition proposed by this language. Accordingly, we would recommend that this Court instead adopt the State Bar of Michigan's April 2022 proposal for the amendment of MRPC 1.8 instead of this more restrictive language. Thank you.

CHIEF JUSTICE ELIZABETH CLEMENT: Thank you very much. Any questions? Our next speaker is Shannon Lucas with Michigan Advocacy Program.

SHANNON LUCAS: Good morning and thank you for your time. I just want—my name is Shannon Lucas. I am the director of advocacy at the Michigan Advocacy Program. Prior to that, I had been an attorney in our Monroe office for over 20 years and I've worked with, dare I say, thousands of clients in domestic violence and public benefits cases throughout that time. Now, as the director of advocacy, I work to guide our legal services attorneys and train them. Part of my job is to make sure that attorneys do not run afoul of our ethics rules, and so I want to support what both Angela and Karen said, but talk a little bit about the restrictions on assisting clients with transportation. MAP works in both rural and urban areas, like Lansing or Ann Arbor, but we also have offices in Monroe, where I worked, where there are no public transportation options available for our clients. We did struggle with the language that is being proposed at this time and support the language that the Michigan State Bar proposed in April of 2022. We would like to be able to help—you know part of what we are concerned about is that the language now restricts it to helping clients get to court hearings. But our clients also have to get to our offices, get to our partner agencies who support and make our clients more successful in their litigation, and also things like expungement fares where we bring our partners together, where it's a one-stop shop and people can get things like fingerprints, criminal records all in one place so our clients don't have the burden of trying to get to many different locations to pursue their legal actions. We also think about our housing agencies that support our work in

evictions. And so that language is, we feel, very restrictive and the language that the State Bar proposed in April of 2022 would allow our members and their staff the needed flexibility while providing guidance and examples and ensuring that the assistance be limited to that which facilitates court access to the justice system and all the pieces that support that access. Secondly, I second Karen's mention of the restriction on use of organizational funds. We feel that that really puts even more pressure on our staff to provide assistance out of their own pocket instead of using the resources that we've gathered for our clients. And so, in closing, I would just say legal services attorneys are some of the most generous people with their clients. We spend many hours with our clients and try to work through all of the issues, not just the legal ones, that will make them successful in their cases. And so, we want to make sure that these rules are serving the purpose that I think is behind them, that we don't want our attorneys to have to spend money out of their own pockets but at the same time want to provide them the flexibility to support their clients in any way they can. Thank you.

CHIEF JUSTICE ELIZABETH CLEMENT: Thank you, Shannon. Any questions? Thank you very much. Our next item is item number 3, ADM file 2021-10, proposed amendments of Michigan Rules of Evidence that would restyle and reorganize the rules to remain as consistent as possible with the Federal Rules of Evidence. And we have one speaker, Daniel Quick from the State Bar of Michigan.

DANIEL QUICK: Good morning, Justices. On behalf of the State Bar of Michigan, the State Bar, under cover letter of June 30, 2023, strongly supports the proposed amendment to the Federal [sic] Rules of Evidence that were advanced by the work group. I appear not only to reiterate that support but to make two brief additional comments. The first is that the Administrative Order, which established that committee, noted that the intent of the Michigan Rules of Evidence originally was to essentially mirror the federal rules and that the intent of this administrative group was to update the rules by comparing them to the federal rules. The deliberation among the various committees of the Bar was that we should make sure that that comment is included if this is passed so that it's clear to both the bench and the Bar that the changes here are meant to both mirror the rules but also not necessarily meant to create any substantive changes in the Rules of Evidence themselves. It was, I think the word used, a stylistic updating and we thought it may be valuable to stress that. Secondly, the State Bar, under cover letter of December 6, 2022, supplied to the Court a work group memorandum dealing with specifically Michigan Rule of Evidence 702 and 703. The Federal Rules of Evidence have, of course, been updated since 2011, which was the comparison point used by the work group that generated this current proposal. And 702 in particular is obviously both important but also going to be updated again as of December 2023, assuming the Supreme Court authorizes the amendment, which

everybody expects to happen. And for rules—for reasons that I won't get into and as are stated in the memo, we think that that's an important topic and that 702 should be further updated to reflect the state of the art in the federal rules, which really is the intent of the current proposal, albeit sort of drawing a line at 2011. Lastly, in the December 6, 2022 memo, the Bar also recommended that the Court consider re-establishing a standing committee on the Michigan Rules of Evidence. We think that the—there's a lot to be said obviously about current collaboration between bench and Bar on these sort of issues but, by the same token, having a standing committee with the imprimatur of the Court has some advantages—creates additional opportunities to liaise with the MJI, for example—and we think would be a good mechanism to make sure that the rules stay state-of-the-art. Thank you very much.

CHIEF JUSTICE ELIZABETH CLEMENT: Thank you, Mr. Quick. Any questions? Okay, our next item is item number 4, ADM file 2022-11, proposed amendments of MCR 2.511 and 6.412 that would require the court to allow the attorneys or parties to conduct voir dire in civil and criminal proceedings if the court examines prospective jurors. And we have one speaker, Michael Nichols from the Nichols Law Firm.

MICHAEL NICHOLS: Good morning, Chief Justice, and may it please the Court. I reviewed the comments, in particular from the Board of Commissioners and the Negligence Law Section. I received them graciously and I think they are well taken. This started a few years ago with a proposed revision to the rules that was a little bit broader than this proposed rule, which mirrors the federal rule. And it was born of, you know, in different groups. Lawyers were complaining about when judges do all the voir dire because we get absolutely no opportunity to stand up in front of a jury and even get non-verbal feedback from the prospective jurors. And I would also add that in many district courts around the state, they practice what's called kind of "jury day," where one or two days a month are set aside and if there are two cases where a jury needs to be picked, those two jurors—jury panels will be picked. Sometimes there are three or four and the more jurors out there and the more juries to be picked, the more likely it is that a district court judge, who may otherwise allow attorney-conducted voir dire, will do all the voir dire himself or herself. I remember about five or six years ago, a district court judge made that decision and it really caught all the lawyers off guard. So, I think it's important to require that the judges have to at least let the advocate stand on her or his feet and engage with the prospective jurors. We just had two cases, one from this Court one from the Court of Appeals a couple of weeks ago, that reflect how important a jury that is not only a fair and impartial, but willing to receive the respective theories of the advocates are. So as I looked at the two comments from the Negligence Section and the Board of Commissioners and seeking to essentially remove those two subsections, I was wrestling last night and then this morning with some language if the Court thought,

you know, we have to give the trial court some mechanism or some language to be able to limit or constrain the questioning by the lawyers. And I, you know, I would be happy to propose something in the comments after our hearing that the court made—something along the lines of "the court may impose reasonable limits so long as the right of the advocate to exercise informed challenges are protected." Something along those lines. I haven't really thought it through, but it's—the problem is that first language in subsection C of 2.511 that says the court may conduct the voir dire or allow the parties to do so, which gives the trial court the ability to do all the voir dire. That's where the problem lies and that's where lawyers are really frustrated is when trial court judges do all the voir dire, and we have no opportunity to stand up and interact with the jurors who will decide the fates of our clients and their causes. So, thank you.

CHIEF JUSTICE ELIZABETH CLEMENT: Thank you. Any questions? Our next item is item number 5, ADM file 2020-13, proposed amendments of MCR 9.123 that would clarify that a disbarred attorney who was sentenced to incarceration following a felony conviction and who wants to be reinstated to the Bar must wait until six months after completing the sentence. And we have one speaker, Kimberly Uhuru from the Attorney Grievance Commission.

KIMBERLY UHURU: Good morning, Chief Justice Clement and Justices of the Court. The Commission supports the proposed amendment to correct an omission in the current rule, which does not address the situation of revoked lawyers who also happen to be sentenced to a term of incarceration. As the Court is probably aware, this omission recently led to a rather interesting disciplinary case where a revoked lawyer applied for reinstatement while he was still serving a federal criminal sentence. He was on house arrest under the Cares Act, and that was problematic for obvious reasons. The Commission believes that amending the language of the rule will provide needed clarity and bring the rule in alignment with the requirements that are already in place for suspended lawyers under subsection (D)(3). In the past, this issue has been addressed in disciplinary proceedings by applying the case of *In re [Reinstatement of] McWhorter*, a 1995 Supreme Court case which set a five-year waiting period after a period of incarceration or parole. However, the Commission acknowledges that a five-year waiting period may not be necessary for all applicants in order to protect the public. For applicants that petition for reinstatement fairly soon after a six-month waiting period, the reinstatement process provides a sufficient opportunity for attorney discipline hearing panels to assess the lawyer's rehabilitation and fitness for practice. And the hearing panel can deny a reinstatement, of course, when an applicant is deemed to be unfit to practice law at that time. And that applicant can come back and reapply. Again, the Commission expresses support for the amendment and urges the Court to approve the amendment. Thank you.

CHIEF JUSTICE ELIZABETH CLEMENT: Thank you, Kimberly. Any questions? Our last item is item number 7, ADM file 2023-6, amendment of MCR 6.001 and 8.119 and addition of MCR 6.451 that requires courts to restrict access to case records involving set-aside convictions, redact information regarding any conviction that has been set aside before that record is made available, and provide notice and an opportunity to be heard before reinstating a conviction for failure to make a good faith effort to pay restitution. We have one speaker signed up, GwanJun Kim. And it looks like that speaker has not joined so that concludes our public hearing for today. Thank you very much.