

STATE OF MICHIGAN  
STATE BAR OF MICHIGAN

MEETING of the REPRESENTATIVE  
ASSEMBLY of the STATE BAR OF  
MICHIGAN

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ORIGINAL

Proceedings had by the Representative Assembly of the  
State Bar of Michigan at East Lansing Marriott, University  
Ballroom, East Lansing, Michigan, on Saturday, April 26,  
2003, at the hour of 10:00 a.m.

AT HEADTABLE:

THOMAS C. ROMBACH, Chairperson  
DANIEL M. LEVY, Vice-Chairperson  
ELIZABETH JAMIESON, Clerk  
JOHN T. BERRY, Executive Director  
HON. ARCHIE C. BROWN, Parliamentarian  
GLENN PETERS, Staff Member

1	CALENDAR ITEMS	PAGE
2	Call to order	3
3	Certification of quorum	3
4	Adoption of proposed calendar	4
5	Summary of 2-22-03 proceedings approved	4
6	Filling of vacancies	4
7	Remarks by Thomas C. Rombach	5-9
8	Remarks by John T. Berry	9-15
9	Programs and Services report	15-24
10	Representative Assembly liaison reports	24-38
11	Assembly Committee reports	39-55
12	Consideration of proposed amendments to the	55-78
13	Michigan Court Rules regarding Challenges	
14	to Medical Malpractice Notices of Intent to	
15	Sue, Affidavits and Expert Witness Qualifications	
16	Consideration of proposed resolution -	78-86
17	Blueprint for Cost-Effective Pretrial	
18	Detention, Sentencing and Corrections	
19	Systems	
20	Consideration of proposed resolution in	86-95
21	support of increasing federal judicial	
22	compensation as recommended by the	
23	National Commission on the Public Service	
24	Presentation regarding ABA's New Model Rules	95-128
25	of Professional Conduct	
	Motion to adjourn	129

1 East Lansing, Michigan

2 Saturday, April 26, 2003

3 10:10 a.m.

4 R E C O R D

5 CHAIRPERSON ROMBACH: I would like to call  
6 the meeting to order. Thank you very much for your  
7 rapt attention. At this point we will turn to  
8 Elizabeth Jamieson to certify that we have at least 50  
9 members in order to proceed with items of business.  
10 Ms. Jamieson.

11 CLERK JAMIESON: We do.

12 CHAIRPERSON ROMBACH: She says that we do. I  
13 will take her word on it.

14 At this point we will move to the adoption of  
15 the proposed calendar. I have one suggestion to make  
16 before a motion would be in order. It has been  
17 recommended by the Rules and Calendar Committee that  
18 instead of doing the agenda as it is printed, Lori  
19 Buiteweg's committee has suggested perhaps that we  
20 could eat lunch during the presentation of the ABA New  
21 Model Rules of Professional Conduct. The guests that  
22 are coming in from Chicago and Boston have concurred  
23 with our willingness to eat. They have a plane to  
24 catch as well. So I will turn to --

25 MR. CHIOINI: So moved.

1 CHAIRPERSON ROMBACH: -- to Mr. Chioini to  
2 make such a motion.

3 MR. CHIOINI: So moved. Carl Chioini, 16th  
4 circuit.

5 CHAIRPERSON ROMBACH: Carl Chioini, and you  
6 are from where?

7 MR. CHIOINI: Macomb County, Michigan.

8 CHAIRPERSON ROMBACH: 16th circuit. And your  
9 colleague, Mr. Piatt, is seconding that?

10 MR. CHIOINI: That's correct.

11 CHAIRPERSON ROMBACH: So acknowledged. Is  
12 there any discussion on this particular matter? All  
13 right. Hearing none, we will move that to a vote.

14 All in favor of that change in the agenda  
15 please say yes.

16 Anybody opposed?

17 Hearing none, that passes unanimously.

18 We have had no objections received to the  
19 summary of proceedings as identified in your packets  
20 from February 22nd, 2003 and, therefore, we will say  
21 that that summary is deemed approved.

22 We have no vacancies to be filled at this  
23 point, but we do have a report from the Nominating  
24 Committee that will fill us in as to where that  
25 stands.

1                   We will move to item three, those are remarks  
2                   by myself. I would like to update the body on a  
3                   couple of matters that we had discussed last time.  
4                   First of all, the strategic plan with an unanimous  
5                   Representative Assembly approval that is now in the  
6                   course of being implemented. Anybody that wants to  
7                   know precisely where that stands can ask one of our  
8                   elected leaders. I know Ms. Diehl is here,  
9                   Mr. Brinkmeyer is here, Ms. Cahill is here, and they  
10                  can tell you more precisely at greater lengths, as  
11                  well as our executive director, John Berry, who is  
12                  very proud of that document that took over two years  
13                  to draft and to pass.

14                  Secondly, the update on the dues proposal.  
15                  Right now the Michigan Supreme Court has published our  
16                  dues proposal passed by the Representative Assembly  
17                  for comment, and they have also published their own  
18                  draft. I believe that Linda Rhodus is here from the  
19                  Michigan Supreme Court. She could answer any  
20                  questions as to where they are proceeding at this  
21                  juncture.

22                  The comment period closes on June 1st. In  
23                  some form or another the State Bar will be present to  
24                  comment at the Supreme Court's administrative hearing  
25                  in Lansing on June 19th, so you need to stay posted on

1 that.

2 Just so you know, the Supreme Court in  
3 publishing their own proposal is not saying they are  
4 going to accept or reject any of the particular  
5 components, but there are some differences, and with  
6 the help of Janet Welch, our general counsel, I will  
7 just tell you a few of those items.

8 First of all, our proposal as passed by the  
9 Assembly envisions an age exemption of 75 years old as  
10 opposed to the current 70, and there is a grandfather  
11 clause for those people that are currently exempt  
12 would remain exempt from paying dues. The Supreme  
13 Court proposal is actually in the alternative. One  
14 provides no exemption whatsoever, the other one  
15 provides an exemption at 45 years of service as  
16 opposed to an age-based resolution of that issue.

17 Secondly, there is a dues amount actually in  
18 our proposal identified by a number also that's tied  
19 to the Consumer Price Index. The midwest component of  
20 that is identified in the proposal. The Supreme  
21 Court's published item has no explicit amount at this  
22 juncture. I know they are taking hearings in order to  
23 come up with that number, and it's not tied, there is  
24 no inflationary or deflationary component in their  
25 proposal.

1 Thirdly, there is a resignation provision  
2 with certain consequences in ours after three years.  
3 The Michigan Supreme Court has identified a withdrawal  
4 provision that is similar, but it is without pay and  
5 without the same dire consequences. Three years,  
6 there is a different type of reinstatement mechanism.  
7 So, again, those are all in the Supreme Court  
8 website. If anybody wants to know more details you  
9 can either inquire with myself or you can inquire to  
10 Ms. Rhodus. I know that she knows far more than any  
11 other living, breathing human being about these  
12 proposals.

13 Thirdly, the client protection fund proposal  
14 has previously been published by the Michigan Supreme  
15 Court and is subject to the same administrative review  
16 and hearings, so that is going along with the rest of  
17 the format, and Mr. Byerley I know can answer any of  
18 your questions, our regulation counsel from the State  
19 Bar.

20 For your information, the Michigan Supreme  
21 Court also published for comment a disciplinary dues  
22 increase of \$20 in October 2003, and that also has a  
23 \$5 escalator provision for each year thereafter until  
24 October 2007. So they envisioned potentially the dues  
25 portion of our dues, the disciplinary dues provision

1 going up a total of \$40. Again, that's subject to  
2 comment by the Bar up to June 1st and a public hearing  
3 on June 19th. Am I correct so far, Linda?

4 MS. RHODUS: Yes.

5 CHAIRPERSON ROMBACH: Okay. Not that I was  
6 going to give you the podium anyway.

7 Then additionally I would just like to point  
8 out that we still have several liaison positions.  
9 Because of how the Bar has contracted their committees  
10 from last year, that we had about a third of the  
11 committees that were done away with because the  
12 leadership felt they were duplicative, and, therefore,  
13 we are still trying to put a representative from the  
14 Representative Assembly in each of those committees.  
15 If you are interested in anything, please come up to  
16 see me afterwards. I had worked closely with Reggie  
17 Turner in doing that, and I know that Dan Levy is  
18 looking forward to working with our president-elect,  
19 the eminent Scott Brinkmeyer from Grand Rapids.

20 Also, the RA is also filling liaison  
21 positions to sections, particularly for those -- there  
22 are already liaisons in place generally. Some of our  
23 eminent folks, however, are graduating or term  
24 limited, as the case may be, and we need to replace  
25 some of those folks. So if you are interested, and we



1 can always have co-liaisons, in a lot of instances  
2 that's what's occurred in the committees, please step  
3 forward, see me after the meeting, e-mail, see Dan,  
4 see Elizabeth, see somebody who cares.

5 And then the Representative Assembly  
6 committee assignments, it's never too early to talk to  
7 Dan, Elizabeth, or even myself. In fact, three of our  
8 chairs I know are leaving us, so that we are going to  
9 have a leadership vacuum, and I hope that anyone  
10 that's interested can fill the void.

11 At that point, I am done with my remarks, and  
12 I would like to move on to John T. Berry, our  
13 executive director, for his insights. John.

14 MR. BERRY: Hi, Tom. Good morning, everyone.  
15 As we speak, the flowers are blooming and the buds are  
16 coming out on the trees and every second I speak keeps  
17 you delayed from going out there and seeing them, so I  
18 will try to be as concise as I can be. Applause has  
19 already begun in the far corner of the 6th circuit.  
20 So I will keep you updated on a couple things with the  
21 Bar.

22 The first thing is the Strategic Plan is an  
23 action in motion, not only for the fact that the  
24 Representative Assembly has acted and we are going  
25 forward with the court to try to get that approved,

1 but in the interim we continue to follow your  
2 directions and the Board's direction on the areas that  
3 we need to be emphasizing. And a couple areas that I  
4 want to talk to you about.

5 The first thing is the ethics school that I  
6 reported to you before, the diversion program from the  
7 discipline system. The materials have been prepared.  
8 We are having a day long training session on Monday,  
9 and on May 8th we are having our first session with  
10 over 20 people that originally had complaints filed  
11 against them.

12 This is an exciting project. It's an  
13 opportunity to help lawyers that get low, minor  
14 complaints filed against them in which they have no  
15 bad heart but they may have law office management  
16 problems, communication problems, and the recidivism  
17 rate for complaints being filed for people who go  
18 through schools like this has been reduced from 25  
19 percent to less than five percent.

20 It's an opportunity to really reach out and  
21 be able to help our profession, help our clients.  
22 Better yet, it's paid for by the participants, so it  
23 doesn't come out of your Bar dues. It's a win/win for  
24 everyone, and we are extraordinarily proud. I want to  
25 recognize Tom Byerley, who will be up here later in

1 our ethics, for the tremendous work he has put in and  
2 everyone has put in to this program.

3 Also, we are continuing to go forward to work  
4 with our law schools. Cooley Law School has developed  
5 an entirely new professionalism effort, hiring three  
6 people to try to infuse into every aspect of the  
7 student's life, not only what needs to be up in the  
8 brain but what maybe needs to be done in the heart,  
9 and also in the practical skills to be able to serve  
10 people. Other deans have shown similar interest. We  
11 continue to be meeting with them to work more closely  
12 with them. So I think that's an improvement in our  
13 ability to deal with the things within our Strategic  
14 Plan as well.

15 Another area which probably got the greatest  
16 amount of interest when I reported to you one time was  
17 the issue of defining the practice of law and  
18 enforcing it, UPL. I remember when I came here and  
19 talked to you about the Strategic Plan, at one time I  
20 said how many people were interested, and most of you  
21 jumped, not only raised your hand but jumped up on top  
22 of the tables and raised your hand, to say it is  
23 important to define our profession, protect the  
24 public, and to go forward with the changes in our  
25 society. That is heating up and will continue to heat

1 up and is a major part of our Strategic Plan.

2 Right now there are issues in front of the  
3 Supreme Court, a case in front of the Supreme Court,  
4 about what bankers can do versus lawyers can do.  
5 There are issues within our own agencies within this  
6 state as what nonlawyers can do and representation  
7 before those agencies. There is issues concerning  
8 notarials. There is issues about whose jurisdiction  
9 it will be, the Court or the Legislature's. There are  
10 issues throughout, and these are important issues that  
11 you told us are important to you. The Board and the  
12 Representative Assembly leadership as well are working  
13 on these issues and will continue to report back to  
14 you on them.

15 In relationship to that, just to give you an  
16 idea, I have been lucky enough to work with the ABA on  
17 a task force which is engaged in making a  
18 recommendation to states as to defining the practice  
19 of law and how you go about that. I have never been  
20 involved with anything more controversial in my life.  
21 We had public hearings in which we had everyone from  
22 some folks who said don't change anything, lawyers  
23 should have not only the power they have now but  
24 tremendously more. We had consumers coming in and the  
25 FTC saying we should probably move closer to a free

1 market, and we had everything in between.

2 Obviously I don't believe in the FTC's  
3 position in reference to this, nor does our Board, nor  
4 does our Representative Assembly. However, the report  
5 that we did put out, you can see on your ABA  
6 materials, it will come in front of the House of  
7 Delegates in August, and it basically made three  
8 recommendations.

9 One is that every state should engage in  
10 defining the practice of law as it deems appropriate.  
11 Number two, that the basic premise of that definition  
12 should be that the practice of law is the application  
13 of legal principles and judgment to the circumstances  
14 or objectives of another person or entity, and the  
15 most important part, the most important part is that  
16 each jurisdiction should determine who should provide  
17 those services and what should be included within the  
18 jurisdiction's definition of the practice of law and  
19 under what circumstances based upon the potential harm  
20 and benefit to the public.

21 The determination should include  
22 consideration of minimum qualifications, competence,  
23 and accountability. It should be a balance of  
24 protecting the public as well as providing services to  
25 the public.

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1                   So I think the combination of all of these  
2 items are coming together to show, again, the wisdom of  
3 Alan Kantor's committee and of our deliberations  
4 concerning the appropriate issues to spend our time in  
5 the upcoming years.

6                   Final two comments. One is that this  
7 afternoon I will have the privilege of introducing a  
8 panel of people talking to you concerning the ABA 2000  
9 recommendation on the Model Rules for Ethics and also  
10 our rules. This is really an important topic. The  
11 people that are here I have had the great opportunity  
12 to work with and I respect tremendously. It's going  
13 to be during the lunch hour. It's going to be later  
14 on in the process. I know what my tendency will be  
15 and maybe yours, but I really ask you to spend some  
16 time listening to them. They are incredible resources  
17 for you to help you in your deliberations at the next  
18 meeting.

19                   And for somebody that loves this stuff, we  
20 were talking yesterday about Rule 1.6 and paragraph  
21 this, that, and the other, we are going to be talking  
22 more about the substance of what it is, and I thought  
23 last night, it reminded me that when I was thinking  
24 about updating you about UPL and defining the practice  
25 of law, these rules and their regulation are truly

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1 what separates us from others. It's what we are  
2 about. It's not just a rule. It's who we are as  
3 lawyers, how we relate to each other, how we relate to  
4 the public, how we are held accountable, and how that  
5 accountability is enforced.

6 So I really look forward to the opportunity  
7 to hear from them, and with my premise to begin with  
8 that I would be as short as I could, I am now done.  
9 Thank you very much.

10 (Applause.)

11 CHAIRPERSON ROMBACH: Thank you, John. At  
12 this point we will turn to Nancy Diehl, and Nancy has  
13 always looked forward to an opportunity to address the  
14 Assembly, and we have something within her competence  
15 here and eminent prestige in order to talk to us about  
16 programs and services of the State Bar. Nancy.

17 MS. DIEHL: Good morning, everyone. Can  
18 anybody hear me? Can anybody hear me?

19 VOICE: Yes.

20 MS. DIEHL: Yes. Can anybody not hear me?  
21 Don't you love that question, can anybody not hear me.  
22 Expect people to raise their hands if they can't hear  
23 you.

24 All right. He has finally found something  
25 that I am competent on to speak about. I have only

1           been on the Assembly, let's see, about 12 years, so I  
2           guess that's not so bad. Any of you -- never mind. I  
3           was going to ask how many of you have been on longer  
4           and haven't been invited up here.

5                       But I am very happy to be here this morning  
6           as chair of the Programs and Services Committee. Get  
7           to highlight for you this morning just a few areas,  
8           and so I am going to divide my comments into four  
9           parts -- the good news, the not so good news, some  
10          future good news, and then time for questions about  
11          either the good news or not so good news. So I think  
12          we should start with the good news, right? All right,  
13          as everybody is nodding.

14                      Good news, we are rolling out a new program  
15          through the State Bar with OfficeMax. That's an  
16          office supply store, and some of you may now, you  
17          might like Office Depot, Staples, K-Mart, Wal-Mart.  
18          You are going to like OfficeMax, because they have  
19          prepared an exclusive deal with the State Bar, and it  
20          is going to involve major discounts on supplies,  
21          printing, and office furniture, anything you need for  
22          work, as well as school supplies for your kids. And  
23          the program, of course, is going to help you and your  
24          families, and if you spend enough money it's going to  
25          help the Bar too.



1           The program is going to involve a 20 percent  
2           discount to members regarding printing. Office  
3           supplies, you are going to get somewhere between 30  
4           and 70 percent. You will be able to order online, by  
5           fax, or by phone. You will be getting soon -- you  
6           want to know how you do this. You are going to be  
7           getting notified in the very near future from the  
8           State Bar with a way to get involved.

9           We have had this on a pilot basis with a very  
10          few people just to work out all the kinks, and we  
11          believe it's in pretty good working order right now.

12          What you will do is go to the Michigan Bar  
13          website. You probably all have that memorized, right,  
14          www.michbar.org, and you go to member services, you  
15          click on there, and you will be able to get the  
16          information that you need.

17          It includes, again, not only your office  
18          supplies, your school supplies, but printing, and  
19          those of you who need to have copying services done,  
20          you can certainly call your local copying place and  
21          set that up. You can also call a location in another  
22          city. There are 40 OfficeMax locations around the  
23          state of Michigan, but there is also a thousand around  
24          the country. What you can do with documents that you  
25          need copied, you can e-mail them directly to

1 OfficeMax. They will copy them, and they can have  
2 them delivered directly to where you are going, and  
3 you don't have to carry those with you. Again, 20  
4 percent off that. So that's the good news.

5 Again, what you are going to do, you can get  
6 all the information you need off the State Bar. You  
7 will call an 800 number through OfficeMax, they will  
8 give you your membership number, you will be able to  
9 use that and get your discount. Like I say, the  
10 discounts will vary depending on what you are buying,  
11 but upwards anywhere from 30 to 70 percent. Good  
12 news. All right.

13 So now we get to the not as good news, health  
14 insurance. You know, health insurance. Everybody is  
15 hurting with health insurance, right? People -- I  
16 mean, costs are skyrocketing everywhere. People say  
17 why? Well, we are an aging population, increased  
18 prescription costs, technology costs, health care  
19 bureaucracy, whatever.

20 We know there is a problem, and, of course,  
21 it's hit us right here at home. In terms of increases  
22 in Michigan, anywhere from 15 to 30 percent. And  
23 what's happened with small businesses in Michigan  
24 through Blue Cross/Blue Shield is they have seen  
25 increases anywhere between 10 and 30 percent.

1                   And people wonder why, you know, why are  
2                   these rates so high, why do we pay so much? The  
3                   insurance commissioner -- this is the information I  
4                   received. I don't make this up. The insurance  
5                   commissioner said that, in fact, Blue Cross didn't raise  
6                   their rates sufficiently. They really should have  
7                   been raised higher, but didn't he just leave his job?  
8                   We have a new insurance commissioner.

9                   But anyways, that's how bad the health care  
10                  costs are. They have been skyrocketing, and everybody  
11                  has been seeing an increase, but people seem to think  
12                  why is Michigan so much higher and why is Blue Cross,  
13                  why have the rates gone up 16 percent last year, and  
14                  why are you about to see an increase? You know,  
15                  people say why is it so high?

16                 And part of the problem is how Michigan  
17                 regulates insurance. And there are commercial  
18                 insurance carriers who are allowed to pick and choose  
19                 who they insure, right? They get the young, healthy  
20                 people, and they can give them the low rates. And of  
21                 course someone older who has issues, they can have  
22                 them pay a higher insurance rate. It makes some  
23                 sense, right? Sure. You are young and healthy, you  
24                 pay less; you are older, not so healthy, you pay more.

25                 Well, Blue Cross is the insurance of last

1 resort. They are required to insure everyone, and  
2 what happens is everybody then gets into that group,  
3 whether you are young and healthy and older and not as  
4 healthy, and then everyone is required to pay the same  
5 amount, and it's this community group of everybody  
6 with all the health risks included, which ends up  
7 meaning the rates are higher.

8 Again people say, well, can't we do something  
9 better though as a group in terms of the Bar? I mean,  
10 we are such a large group, right? We are 35,000  
11 lawyers. Why can't we do something better?

12 Well, we are a group of 35,000 lawyers, but  
13 only 5,000 of our members insure through the Bar Blue  
14 Cross/Blue Shield, so we really are not such a large  
15 group.

16 So we have tried on our own to deal with it,  
17 but what we have also done in terms of having more  
18 clout is to join with 140 other smaller businesses and  
19 associations to try to use our collective clout to do  
20 a little bit better. We are hopeful this year in 2003  
21 that health care and rising health care costs will be  
22 a legislative priority. I think everyone recognizes  
23 that it's a problem, continues to go up, we need to do  
24 something about it.

25 We are doing the best we can, but we have

1 very limited ability to make major changes. I know  
2 when you see that increase it's very difficult. We  
3 are going to do the best we can. We will bring you  
4 updates as we get them. All I can say is the more  
5 office supplies you buy from OfficeMax, the more money  
6 you save, put that into your insurance. Okay?

7 You know, it's interesting. I think Blue  
8 Cross decided to tell us all they are even hurting,  
9 right, because they are, in fact, decreasing health  
10 insurance benefits for 4,000 of their salaried  
11 employees. They are reducing their benefits, and just  
12 like most businesses have had to do, right, the rates  
13 go up, we can't afford it, so we have to reduce  
14 benefits.

15 So everybody is hurting. Let's just hope  
16 that in the future it will get a little better.

17 All right. Got through the not so good news.  
18 Everybody still with me?

19 Now some hopefully future good news,  
20 e-filing, electronic filing. I know members are  
21 anxious for that to come about, and we certainly  
22 believe that that's a good thing, and we have had an  
23 electronic filing task force who have been working  
24 diligently, and the Supreme Court requested comments  
25 regarding electronic filing, and the task force worked

1 and reviewed the national standards, and what they  
2 have done and what they have submitted to the Supreme  
3 Court is, they have submitted support for the adoption  
4 of a national center for state court's electronic  
5 filing standards with a few adjustments, but basically  
6 what they are encouraging the court to do is to adopt  
7 those standards. The task force is also presently  
8 working with the Court of Appeals and other groups in  
9 Michigan to help bring this about.

10 Certainly we have an interest in promoting  
11 electronic filing. We also have to be concerned  
12 certainly about the confidentiality of the documents.  
13 It's important for us, the public, and the courts, so  
14 it's going to take a little time, I think, to work that  
15 all out. But it looks good, it looks like it's going  
16 to happen, and the Bar's task force is there to work  
17 with all the groups involved. Hopefully in the future  
18 we will be able to bring you more good news about  
19 electronic filing.

20 Okay. And the chair of the Electronic Filing  
21 Task Force is Jim Erhart from the State Bar Board of  
22 Commission, and if you have any more specific  
23 questions, he would be happy to answer them. Jim --  
24 well, you can find him up north probably somewhere  
25 today. But he is available and would be happy to do

1 it.

2 How am I doing there on time, Chief? Good?

3 All right, part four then, questions. Lisa  
4 Allen-Kost, of course, who is the Bar's Programs and  
5 Services manager, is here to answer any tough  
6 questions. Yes.

7 MR. GREEN: Yes, just a quick question just  
8 for informational purposes. Is there some type of  
9 booklet or pamphlet that details all the programs and  
10 services that the State Bar offers?

11 MS. DIEHL: I know we do have a pamphlet, but  
12 I am going to have Lisa --

13 CHAIRPERSON ROMBACH: Rodrick, could you come  
14 up to the microphone just so we could all hear.

15 MR. GREEN: I am Rod Green of the  
16 3rd circuit. Is there a pamphlet or some type of  
17 booklet that details all the programs and services  
18 available by the State Bar?

19 MS. DIEHL: Wonderful question, and Lisa is  
20 going to tell you how to get that pamphlet.

21 MS. ALLEN-KOST: We actually have or we are  
22 in the process of working on a finalized pamphlet. We  
23 have had new services added, as Nancy alluded to, so  
24 we are going to be adding those and revising the  
25 pamphlet and getting that out this summer. Our hope

1 is to send that with the dues statement this summer,  
2 if that works out.

3 In the meantime, we do have some materials  
4 available to you, and we would be happy to send those  
5 along with the materials we send next week on  
6 OfficeMax if you would like for us to do that. Does  
7 that sound --

8 MR. GREEN: That's great.

9 MS. ALLEN-KOST: We will plan on it.

10 MS. DIEHL: Thanks, Lisa. Thanks, Rodrick.  
11 All right, thank you all very much.

12 (Applause.)

13 CHAIRPERSON ROMBACH: Since Nancy has been  
14 here 12 years and she did such a fine job with the  
15 insurance and electronic filing, we are going to ask  
16 her back for our next meeting to explain to you the  
17 idiosyncrasies of quantum physics. So thank you very  
18 much, Nancy. We'll have you back soon.

19 The next item we will turn to is the  
20 Representative Assembly liaison reports. The ones  
21 that we are going to do this morning are actually  
22 going to be, the first one is going to be from Mike  
23 Blau. He is going to explain to us the pro bono  
24 project for domestic violence victims, Mike being from  
25 the 30th circuit in Lansing. Michael.



1 MR. BLAU: Good morning. In front of you on  
2 the table you will see there is a little blue handout.  
3 If you could direct your attention to that.

4 This basically gives you information on  
5 Thursday, May 15th there is going to be a statewide  
6 training on issues of domestic violence, representing  
7 victims of domestic violence. And this is sponsored  
8 by the State Bar's Open Justice Commission and  
9 Michigan Coalition Against Domestic and Sexual  
10 Violence.

11 Basically it will be a primer on issues  
12 regarding divorce, custody, personal protection order,  
13 and it's taught by -- it's a live video presentation  
14 throughout the morning through experts in the field,  
15 and then it breaks in the afternoon at various  
16 locations for panel discussions throughout the state.

17 This training was done two years ago. It was  
18 very successful and really gives you an opportunity to  
19 help victims of domestic violence. It's good for new  
20 attorneys, for seasoned domestic practitioners. There  
21 are a lot of ways that you can become involved. If  
22 you are an attorney with a lot of experience in family  
23 law matters, come in and lend your services in a  
24 mentoring role.

25 The training is free, and I would point out

1 that the materials that are passed out are excellent.  
2 There is a comprehensive training manual in these  
3 areas, there is a CD ROM that is basically free and  
4 distributed if you register for the training, and we  
5 would ask that you would get involved and also pass  
6 the word along to other attorneys in your communities.

7 The feedback that we had a couple years ago,  
8 that it was very informative and helpful, and there is  
9 an enormous need out there. If you are looking to  
10 make a pro bono contribution, we would ask that you do  
11 it in this area of domestic violence. Legal services  
12 programs in the state are basically overrun with  
13 requests for service for representation in this area,  
14 and this would be a great help to your community. So  
15 thank you.

16 (Applause.)

17 CHAIRPERSON ROMBACH: Thanks, Michael. I  
18 appreciate your help on that matter, and I hope you  
19 all volunteer.

20 Next we are going to hear from -- actually  
21 Chief Judge William Whitbeck is here, and before we  
22 get to Judge Whitbeck, I just want to make a couple  
23 prefatory remarks.

24 This has come to our attention through the  
25 Appellate Practice Section. Tim Morris from

1 Port Huron is our appointed liaison to that committee.  
2 Tim is waving and having just competed in the  
3 personality contest of the local pageant, so Tim can  
4 answer any of these questions in more detail. He has  
5 given us a great deal of study.

6 Additionally, we have with us the  
7 chair-elect, Victor Valenti from Southfield, of the  
8 Appellate Practice Section, and he is here in lieu of  
9 Don Fulkerson, the chair from Westland, who is  
10 actually out of town. They have all expressed an  
11 interest in hearing from Judge Whitbeck so that the  
12 Assembly knows how this issue is coming forward.

13 Chief Judge had expressed to the Board of  
14 Commissioners, as well to the Executive Committee of  
15 that board, some severe concerns with the delay in the  
16 appellate system, and he had not only addressed us,  
17 but he had also formulated a proposal, including  
18 increased spending from the Legislature in fiscal year  
19 2004, as well as certain changes of the Michigan Court  
20 Rules. In fact, he has taken steps already in order  
21 to implement some steps within his judiciary itself in  
22 order to kick out the opinions more quickly, and he  
23 has been able to commit to doing away with some of the  
24 delay.

25 At this point the State Bar President, Bruce

1 Neckers, had appointed a delay reduction task force.  
2 Recently they had completed their work and had  
3 submitted a report, with Professor Evelyn Tombers from  
4 Cooley Law School being the reporter of that report,  
5 and that is available for any member that would like  
6 to review it.

7 The Michigan Supreme Court also published  
8 Judge Whitbeck's proposal for comments, and those  
9 comments are to end, I believe, June 1st, with  
10 administrative hearing being on the same day as our  
11 dues proposal, that being June 19th.

12 There had been a number of concerns that had  
13 been raised by Judge Whitbeck for one and his  
14 judiciary, as well as some of our membership, and that  
15 the judge is now working with a select group of  
16 members of the State Bar that had been appointed by  
17 Reggie Turner and Scott Brinkmeyer in order to head  
18 off some of these delays, and, in fact, were trying to  
19 reach a consensus proposal. In that light, I know the  
20 Chief Judge has committed and would ask the Supreme  
21 Court to extend the comment period to, I believe,  
22 September 25th, at which point that there will be a  
23 public hearing conducted on these proposals.

24 At this juncture the judge, in working with  
25 this, I certainly wanted to extend the time to him,

1 and our State Bar is then going to defer action on  
2 this topic certainly by the Representative Assembly  
3 until this work group has furnished its proposal, and  
4 then you will have that in your hands before we have  
5 to do anything further.

6 So at this juncture I will let Judge Whitbeck  
7 fill you in on the details of precisely where this  
8 stands, and he can answer any questions that you might  
9 have at actually a later date, because we will be  
10 taking this up.

11 Judge Whitbeck, thank you very much for  
12 coming to address our organization this morning.

13 JUDGE WHITBECK: Good morning. Tom has given  
14 me 15 minutes and warned me that after five attention  
15 tends to scatter a bit, so I am going to try to keep  
16 this very, very brief.

17 The Supreme Court appointed me as Chief Judge  
18 of the Court of Appeals back in December of 2001. And  
19 at that time, then Chief Judge Bandstra and I were  
20 looking carefully at the problem of delay in our  
21 court.

22 We formed a working group which met  
23 continuously, and I do mean that. We met every week  
24 for about three months, and we looked at our situation  
25 from every angle that we possibly could. To make a

1 long story fairly short, we divided the cases that we  
2 decided are according to two categories. Those of you  
3 who practice before the court will recognize these  
4 immediately.

5 The first category is cases we decide by  
6 order. We do all right with those cases. Our orders  
7 are two or three sentences maximum, so it's not that  
8 there is a lot of time in preparing those orders.  
9 Those orders we decide fairly promptly. We are  
10 reasonably satisfied. We could probably cut the time  
11 down somewhat, but we are in fairly good shape there.

12 The area in which we have a problem in is the  
13 area in which most people view the Court of Appeals,  
14 and that is cases we decide by opinion. That's about  
15 half of our caseload. Of the 7100 cases we decided in  
16 2001, roughly half were by opinion, half by order.

17 We were not doing very well at all with cases  
18 that we decide by opinion. Our statistics show that  
19 it took us, on average, 556 days from the time a claim  
20 of appeal was filed until the time the opinion went  
21 out. When I was practicing, the rule of thumb was two  
22 years, and the rule of thumb was roughly correct.

23 We decided that that simply was not  
24 acceptable. To wait two years for a decision by  
25 opinion out of our court is simply too long.

1                   You all are practitioners. You know the  
2                   pernicious effects of delay on your clients, on the  
3                   public at large. The best example I can use is  
4                   situations involving dispositions of custody or  
5                   terminations of parental rights where a child is  
6                   involved and that child is simply waiting. He or she  
7                   is waiting to get on with their life, and if we wait  
8                   too long it isn't going to be much of a life. That  
9                   period of time that elapses there, if that time gets  
10                  too long, we are dooming these children, and there is  
11                  no other way of putting it. That simply was  
12                  happening.

13                  I happen to have written over the past three  
14                  weeks 20 opinions dealing with what we call TPRs,  
15                  termination of parental rights, among the more  
16                  depressing three months of my life, because I just  
17                  went through these cases, about 20 or 30 of them, one by  
18                  one, and it's not a pleasant experience. That's the  
19                  crispest example I can use on this is situations  
20                  involving custody and termination of parental rights.

21                  We decided, therefore, at a meeting held at  
22                  our court in March of 2002 that we would drastically  
23                  reduce the time that it takes to get an opinion case  
24                  out of our court.

25                  There are a lot of moving parts to what we

1 are doing, and I will keep it very simple and very  
2 straightforward. We divided the process into four  
3 phases. I will start from the end. The judicial  
4 chambers; the time a case spends in research, because  
5 we have a centralized research division; the time a  
6 case spends in the warehouse, a term I will come back  
7 to; and the time that a case spends in intake where  
8 the lawyers are doing their work.

9 We really started at the back end at the  
10 judicial chambers. Our theory was that we could not  
11 go to the Bar, we could not go to the Legislature, we  
12 couldn't go to the public and say to them we really  
13 need to deal with this problem unless the judges  
14 demonstrated that they were willing to take the first  
15 step, as President Neckers then put it, to be the  
16 first ones in the water.

17 We have done a considerable amount in  
18 reducing the time in the judicial chambers. I am very  
19 proud of my judges in that regard. We have really  
20 made enormous strides in that area.

21 To give you an example, in 2001 the time for  
22 the judicial chambers to get an opinion out was 61  
23 days. In the first quarter of this year, 2003, it was  
24 28 days. We had cut the time in the judicial chambers  
25 by one half.



1                   Backing up, the time in research division,  
2                   the problem, which I will come back to, in the  
3                   research division is not productivity, although any  
4                   organization can run better. I am convinced, based on  
5                   my look at the situation, it's not that our research  
6                   lawyers aren't productive. They are. It's capacity.  
7                   We simply don't have enough of them to get the work  
8                   done on a first in/first out basis. The solution to  
9                   that is to add capacity, more lawyers.

10                   We are before the Legislature in the worst  
11                   budget year in 50 years asking for a, I believe,  
12                   modest increment in our staffing in that area, and,  
13                   candidly, coupled with the fee proposal that you all  
14                   have probably heard about and will probably hear a lot  
15                   more about, which proposes to raise fees throughout  
16                   the judicial system, including at the trial court  
17                   level, I believe we have a fair chance of increasing  
18                   our capacity in the research division.

19                   Behind that is an entity called the warehouse  
20                   that's a cutesy term for -- it's physically and  
21                   literally accurate. When a case leaves intake, when  
22                   you all have done your jobs, it migrates down the hall  
23                   and physically goes on a shelf, and in 2001 it sat on  
24                   that shelf for 271 days.

25                   The reason for that was simple, we didn't

1 have the capacity in the research division to take the  
2 cases out of the warehouse as fast as they came in, it  
3 just wasn't there, and so they sit, they sat for 271  
4 days.

5 Clearly we must eliminate that. That is our  
6 challenge, to eliminate that warehouse so that it no  
7 longer exists.

8 In front of that, however, is the phase that  
9 you are most concerned with, and that is the intake  
10 phase in which the transcripts are being obtained from  
11 the lower court, the lower court record is being  
12 obtained, the appellant is filing his or her brief,  
13 the appellee is filing a response. The appellant may  
14 file a reply brief. In 2001 that took 260 days in  
15 intake. That's a long time.

16 The best way to understand our proposal and  
17 to deal with the question that I always get asked, the  
18 question is if we cut down our time in intake, as your  
19 proposed rules would do, won't a case just simply go  
20 from intake and sit in the warehouse? The answer is  
21 yes, if that's all we do, but if we drain the  
22 warehouse, if we get that added capacity in our  
23 research division, then the answer is no. It will go  
24 to the research division, then to the judicial  
25 chambers.

1           Is that possible? I think so. It's possible  
2           for the following reason. I went through this  
3           yesterday. You have to kind of back into it.

4           Right at the moment our capacity in our  
5           research division is such that we are at what I would  
6           call equilibrium. We actually clear more cases than  
7           we get in. Our clearance rate, the number of cases  
8           submitted divided by the number of cases disposed of,  
9           has been for the last three years over 100 percent.

10          So at whatever level we achieve we can stay  
11          there without additional resources. The trick is to  
12          get to that level, and at a long-term where we must be  
13          in order to decide all of our cases, opinion and order  
14          cases within 18 months, or 95 percent of them within  
15          18 months, which is the old ABA standard, and it is  
16          the standard that the Legislature set for us in the  
17          mid 90s in boilerplate to their appropriations bill,  
18          in order to get there we have to decide all of our  
19          opinion cases, we have to decide our opinion cases,  
20          pardon me, on average of 300 days.

21          Once we get there, once we drain the  
22          warehouse, we can stay there. In fact, we will be  
23          able to tell the Legislature we won't need, in the  
24          following year, the additional seven to ten research  
25          attorneys we have asked for, because with our current

1 capacity we could stay there. The trick is to get  
2 there.

3 The only way I think we can get there if  
4 everybody does their part, the judges, the  
5 Legislature, our research division, is if we cut down  
6 the time in intake. We can't get there without doing  
7 that.

8 Now, fortunately, for reasons I candidly will  
9 say I cannot explain, the time in intake has reduced  
10 itself from 2001 to 2002 by about 20 days. For  
11 whatever reason, we have picked up 20 days at intake.  
12 It wasn't as a result of our efforts, because our  
13 efforts hadn't kicked in yet. It just happened. I  
14 wish I could explain why, but I can't. That gives us  
15 some flexibility.

16 What we need now is to clip about 66 days out  
17 of our intake phase. The proposals that we have  
18 submitted to the Supreme Court would clip 101 days, so  
19 we have some wiggle room, for lack of a better term,  
20 which is why Scott Brinkmeyer, Janet Welch, and I, and  
21 my staff met yesterday. We have set up a process by  
22 which hopefully both sides of the table, for lack of a  
23 better term, although I don't like that analogy, can  
24 look at this situation rationally and perhaps come up  
25 with a consensus proposal.

1                   In that regard, I have sent a letter, copies  
2                   of which -- copies of three things are available on  
3                   the back table, not enough of them unfortunately. One  
4                   of them is our progress report number four, which  
5                   shows our progress to date in the last quarter. The  
6                   second is a very brief synopsis of the rule proposals  
7                   at the time we spoke, and we are back again, and the  
8                   third is a letter that I sent yesterday to the Supreme  
9                   Court asking them to extend the comment period that  
10                  currently runs out June 1 to September 25th, to extend  
11                  or perhaps hold a second hearing, if they decide to  
12                  hold the first hearing as it's currently scheduled on  
13                  June 19th, to hold another on September 25th, and to  
14                  extend the effective date for the proposed rule  
15                  changes to January 1.

16                 That, I think, gives this body a chance to  
17                 think this over and gives the committee that we are  
18                 working on a chance to work our way through it, but it  
19                 does set some outside limits. If we don't reach  
20                 agreement, then the Supreme Court will have to make  
21                 its decision.

22                 I believe we can reach agreement, because I  
23                 think that, although there are a lot of moving parts  
24                 in this situation and it is complicated both for me to  
25                 explain and for people that don't deal with it every

1 day to understand, nonetheless, if you bring it down  
2 to its essence, we need to get 66 days out of the  
3 intake phase in our court. We need to cut the time  
4 from its current level down by 66 days.

5 I believe that is doable, and I believe it's  
6 doable without placing overly enormous pressure on the  
7 appellate practitioners who appear before us.

8 One way that we can look at this is by  
9 dividing cases into categories, differentiating case  
10 management is a cliché that deals with that one. We  
11 have it to some extent already, but one way of looking  
12 at our data, and we do look at it this way, is civil  
13 versus criminal. Should we have different tracks,  
14 different rules for civil cases versus criminal cases?  
15 Our proposals don't contemplate that, but they  
16 certainly could.

17 So that's my seven minutes on my watch. We  
18 will be meeting with this committee. I want to push  
19 this process forward. I believe it's possible to  
20 reach consensus on this, and I hope that the Bar will  
21 work with us on it.

22 (Applause.)

23 CHAIRPERSON ROMBACH: It's remarkable he  
24 explained such a complex topic. I have been at other  
25 presentations where he had a whole slide show and

1 Power Point presentation with a lot more detail. So  
2 if somebody wanted to know more, again, they can turn  
3 to -- I know Victor is here. Victor, you don't want  
4 to say anything more than the Chief Judge, right?

5 MR. VALENTI: Not at this time.

6 CHAIRPERSON ROMBACH: You are reserving your  
7 rebuttal for some future point.

8 MR. VALENTI: Hopefully we won't need it at  
9 that point.

10 CHAIRPERSON ROMBACH: Well, I can assure the  
11 Assembly that as we work through these issues that  
12 we will keep you posted, and this very well may result  
13 in yet another presentation to our calendar in  
14 September in order to be able to have some meaningful  
15 input to the Supreme Court before their administrative  
16 hearing.

17 Next we are going to hear from our Assembly  
18 committee reports, and we will start that with William  
19 Knight from the Assembly Review Committee. Bill.

20 MR. KNIGHT: Thanks, Tom. I am the chair of  
21 the Representative Assembly Review Committee, and we  
22 have a really cool Power Point presentation for you  
23 today to keep you awake on this.

24 The Representative Review Committee has been  
25 really active the past several years now, and I want

1 to go through today to give you kind of a past,  
2 present, future overview of what the Assembly Review  
3 Committee has been up to and where we intend to be  
4 going.

5 Last year we were meeting almost monthly in  
6 trying to get our arms around what the Representative  
7 Assembly was doing and what it should be doing and  
8 where it should be going, and almost a year ago to the  
9 day we had a similar presentation by the Review  
10 Committee chair, Elizabeth Jamieson, and we had stated  
11 then that we were going to be moving forward and were  
12 trying to get everybody's input into, especially from  
13 the Assembly, what it was we were trying to do as the  
14 Representative Assembly.

15 And at that time there was a lot of talk  
16 about whether the Assembly was even relevant with the  
17 planning for the Bar overall, and I think a lot of us  
18 looked to ourselves as to what were we doing here on  
19 these Saturdays and what were we accomplishing.

20 So we did kind of a self-assessment. We went  
21 to many sources for information and their ideas on  
22 this. We also did a survey both within the  
23 organization and without, within the Assembly and  
24 without, and several issues were identified. And the  
25 objectives of the Assembly were stated fairly clearly



1 in these surveys as to what they thought we should be  
2 doing as our role, what we were achieving, and what we  
3 should be achieving, and then also that we needed to  
4 enhance the communication, both internally and  
5 externally, within the Assembly and within the Bar and  
6 within the legal community as a whole.

7 Last September we spoke about what we were  
8 attempting to do and what we thought the Assembly  
9 should be doing to meet those issues that were  
10 identified. We talked about communications with the  
11 Assembly members with the list serve, a website,  
12 having our meetings more effective. We attempted  
13 several things that some of you may recall. We  
14 presented the survey results as to what the membership  
15 were thinking about the Assembly and what they were  
16 expecting from us, and we prepared a final report of  
17 all of our work, what we had found in our surveys, and  
18 we came up with four recommendations and proposed  
19 resolutions.

20 And, if you recall, those resolutions were  
21 presented to the Assembly, and each one was adopted by  
22 the Assembly, and we have been moving forward now from  
23 that base of those four resolutions.

24 From those four resolutions we can kind of  
25 narrow it down as to three issues that we were

1 addressing -- Assembly liaisons, improved  
2 communications, again both amongst the Assembly  
3 members and within the Bar and within the legal  
4 community as a whole, and then also notice of Board  
5 actions and policy issues, timely notice of those  
6 actions that the Bar is facing and which the Board has  
7 been addressing.

8 As I said, the Assembly adopted those four  
9 resolutions last September. The first one, Assembly  
10 liaisons for State Bar sections, and almost every  
11 section now has an Assembly liaison. These liaisons  
12 we have had for a period of time for several of the  
13 sections. Some of you may have been a liaison to a  
14 section and didn't even know that that was your  
15 purpose in being on that section.

16 I think we, with our leadership, we have  
17 gotten liaisons for most of the sections, if not all  
18 of them now, and the liaisons know why they are there,  
19 and they have a strong and effective function that  
20 they are performing.

21 We have incorporated into our Assembly  
22 meetings now permanent space on our agenda for reports  
23 from these section liaisons. Today we have the  
24 Appellate Section and then the Prisons and Corrections  
25 Section reporting. This is something that had not

1           been done in the past.

2                     The second resolution involved liaisons for  
3           the State Bar committees, and, again, almost every  
4           committee now has an Assembly liaison attending those  
5           meetings. Those liaisons, again, have a better  
6           understanding of their roles, and they are much more  
7           effective in what they are doing in their  
8           communications back and forth between the Assembly and  
9           these committees.

10                    At our last meeting we had a liaison report  
11           from the Ethics Committee, Judicial Qualifications  
12           Committee, and then an informational report from the  
13           Civil Procedure and Courts Committee.

14                    Today the presentation is more -- less  
15           informational and more direct as to the actions that  
16           are going on, and we had a report from the U.S.  
17           courts.

18                    The third resolution involved the interaction  
19           between the Assembly, the sections, and the  
20           committees, and, again, we have the permanent space on  
21           our agenda for these reports. We had reports at our  
22           last meeting on the Section Summit report from Kim  
23           Cahill, and also the annual meeting report from Scott.

24                    These are the kind of things that are  
25           bringing back to the Assembly an explanation as to how

1 we are all working together -- the sections, the  
2 committees, the Assembly, the Board -- how it's all  
3 working together now as a team and we are not out  
4 there sitting by ourselves. Today we'll have Programs  
5 and Services report from Nancy Diehl that she  
6 presented. These kind of things are not only  
7 informational to us, but it's something we take back  
8 to the membership that we are supposed to be  
9 representing.

10 And the improved communication regarding  
11 relevant issues, the sections and committees have been  
12 welcoming these liaisons into their meetings, and it  
13 has helped us a lot with becoming more relevant to the  
14 whole Bar, because these sections and these  
15 committees, they have been working very, very hard  
16 year in and year out, the members in those sections  
17 and committees are very committed to what they are  
18 doing and their missions, and they are pleased with  
19 the increased access that they now have to the general  
20 membership through the Assembly, that they have the  
21 support of the Assembly in the work that they are  
22 doing, and that they actually have some means of  
23 getting their work out to the public and getting it  
24 not only recognized but supported so that their work  
25 is being more effective in what they are trying to

1 accomplish.

2 The fourth resolution was the notice of Board  
3 actions and policy issues. Again, we have put  
4 permanent space on the Assembly agenda for updates  
5 from the Bar leadership, and these updates regard both  
6 pending Board activities and their future activities.  
7 These can be found on the website for the Bar if you  
8 want to find out ahead of time what's going on with  
9 the Board of Commissioners and also with the handouts.

10 Today we provided to you the minutes from the  
11 Board's meeting back in January, and then they met  
12 again yesterday, so we provided the agenda. We  
13 obviously don't have the minutes for that meeting yet.  
14 They haven't been approved. But you can see what work  
15 they have done and what work they are facing now,  
16 what's on their agenda.

17 We have been fast tracking some of these  
18 issues through the Assembly, some of these policy  
19 issues that is our job to be working with, and the  
20 most obvious and I think the best example of this was  
21 the adoption or support of the Strategic Plan and the  
22 dues proposal at our last meeting. That was something  
23 that clearly is a policy issue that the Representative  
24 Assembly members should be addressing and should be  
25 weighing in on, and that's something that actually was

1           happening fairly quickly.

2                       Once these things start to roll, they move  
3           pretty fast and action has to be taken, and we are not  
4           necessarily the one setting up the time frame on it,  
5           so we have to be able to react to that. We did very  
6           well. Most of our committees, I think, were involved in  
7           preparing for that so that it was presented to the  
8           Assembly properly and fully at our last meeting. We  
9           were able to address it as an Assembly where we felt  
10          we were well informed, where we could take serious  
11          action on it. That was not only appreciated by the  
12          rest of the Bar, but I think they felt that we took it  
13          seriously and addressed it in an appropriate manner,  
14          and it has, I think, increased our standing in the Bar  
15          community.

16                      And then the Assembly leadership included in  
17          periodic meetings with the Supreme Court. Our chair  
18          and our chair-elect have been invited to meet with the  
19          Supreme Court when they have their meetings. It's a  
20          great way for the Assembly to stay on top of what  
21          issues are going to be coming down the road, what  
22          policy issues the Supreme Court has been  
23          contemplating, what things we can expect to come to  
24          us, and so we get a little bit of a heads up there  
25          with having our leadership involved in the early

1 stages of what's happening at the highest level of  
2 these policy decisions.

3 The Assembly has really good representation  
4 on the Board now. We have four former Assembly  
5 chairs -- Brinkmeyer, Schnelz, Cahill and Ulrich.  
6 They are on the Board at this time. We have other  
7 Board members who have been deeply involved in  
8 Assembly work in the past, and the Board now has a  
9 membership composition that I think thinks of the  
10 Assembly when they are making their decisions. The  
11 Board is considering how they can use the Assembly and  
12 how the Assembly can use the Board to work together  
13 and serve our membership so much better now.

14 The successes that we have had, I have talked  
15 about the most recent one with the Strategic Plan and  
16 the dues proposal. We have been implementing our  
17 resolutions that we passed last September. I think  
18 that has paid off. I think it has been a benefit to  
19 both the Assembly members here but also to the  
20 membership that we are representing, and we have found  
21 that with this type of action where the Assembly is  
22 getting together, it's getting the reports from the  
23 committees, the committees are being called upon by  
24 the Assembly leadership to support what's going on  
25 prior to the Assembly meeting so that things are being

1 presented. This is something that I think we can  
2 relate back to what the Assembly Review Committee has  
3 been trying to implement over the past several years,  
4 and it's been paying off.

5 The Assembly leadership is actively seeking  
6 substantive policy issues for the Assembly. I talked  
7 about our leadership being in these meetings with the  
8 Supreme Court identifying some of these policies. The  
9 liaisons that we have to the sections and committees,  
10 those are the places these policy issues are first  
11 developed. The sections and committees are hearing  
12 this long before I am going to hear something if it's  
13 not in my area of practice.

14 For the future some of the things that we are  
15 doing now have been driven by the Representative  
16 Assembly and the Representative Assembly leadership,  
17 and what we are hoping to do is we are hoping to  
18 institutionalize some of these things.

19 The leadership is working to place these  
20 items on the agenda. It's a standard act that we are  
21 doing now, but it's our leadership driving that, and  
22 we wish to make sure that that's institutionalized so  
23 that these things will always be part of our agenda,  
24 we will always have liaisons on these sections and  
25 committees, all of these actions that we have found to



1 be successful actually become institutionalized within  
2 the Bar.

3 What we are hoping to do next as a  
4 Representative Review Committee is to define policy.  
5 We have as our charge as the Representative Assembly  
6 to be the final policy-making body for the State Bar,  
7 and we need to be proactive rather than reactive to  
8 these policy issues as they come down the road. We  
9 need to identify them early and take action on them as  
10 the Assembly deems appropriate.

11 The Michigan Court Rules state that we are  
12 the policy group who is to work on dues issues. We  
13 did that, but it was something that as an Assembly we  
14 saw coming down the road and we reacted to it quickly  
15 and we were flexible enough that we could get our  
16 committees together, have hearings on the matter and  
17 then present it to the full Assembly so that when we  
18 made our decision on that it was a well-informed  
19 decision.

20 The Keller permitted issues, those are the  
21 types of things that we have addressed in the past,  
22 that we are the proper forum to be addressing those  
23 types of issues, and we have listed here some of the  
24 things that we went back and reviewed what we have  
25 done in recent history as a Representative Assembly.

1 Some of the issues, policy issues that we have  
2 discussed here, some of these you will recall. We  
3 have had some very informed presentations, we have had  
4 some fairly dynamic speakers, both from the Assembly  
5 and from the podium on these things, and I think we  
6 have had some discussions that were at a higher plane  
7 than we have had at least in the distant past at the  
8 Representative Assembly. We have moved up quite a bit  
9 in the types of things that we are handling.

10 What we are hoping to do is to somehow come  
11 up with a definition of what these policies are. If  
12 you read these, these are kind of all over the board,  
13 but they are certainly the types of issues that our  
14 membership are discussing and need to have a consensus  
15 form somehow so that it can be stated to the public on  
16 some of these things, and this is the place to be  
17 doing that.

18 We are hoping to establish guidelines to  
19 ensure Assembly involvement within the Bar activities,  
20 to seek and identify policy issues, who will be  
21 seeking these issues and how will they be identified.  
22 We need to be able to move quickly on these things.  
23 Again, our most recent example is our Strategic Plan  
24 and Bar dues when we moved on that in our last  
25 meeting.

1 To redefine Assembly committee  
2 responsibilities. We have a lot of committees that  
3 are fairly active. Some have been fairly inactive,  
4 but when we have called on them they have pulled  
5 together and have worked really well with all the  
6 other committees.

7 We need to ensure Assembly committee  
8 coordination. Again, that was done by our leadership  
9 most recently. That's something that we would hope to  
10 be able to more institutionalize as to how it will be  
11 done for the future leaders that may be coming down  
12 the road years from now, and then to ensure the  
13 financial stability of the Assembly. The Assembly is  
14 an expensive component of our Bar, and the committees  
15 that we have are also expensive. The more we use  
16 them, the more expensive they become. We need to  
17 ensure that there is adequate financial support for  
18 the work that the Assembly is choosing to be doing  
19 now.

20 And then continue the Assembly Review efforts  
21 to ensure an effective and efficient Assembly. If I  
22 can, I would ask all of you to consider volunteering  
23 for the Representative Review -- Representative  
24 Assembly Review Committee for our work in the future.  
25 It's a really active committee. We have been very

1 involved. Last year we were meeting almost monthly.  
2 We have met twice so far this year. We are going to  
3 be scheduling a meeting right after our meeting today.  
4 We are going to compare calendars to make sure we have  
5 enough participation on that important question of  
6 defining policy at our next meeting.

7 So if I can, I will give you a little, use  
8 this a little as a commercial and ask you to try to  
9 get involved in that committee. We will take your  
10 input at any time, and if you wish to join the  
11 committee, we don't turn anyone away.

12 I would like to thank the members of the  
13 committee who are listed up there. Like I said, we  
14 have been very active. It takes a lot of time.  
15 Robert Feldman, Timothy Fusco, Claire Groen, Elizabeth  
16 Moehle Johnson, Lynn Moon, myself, Judy Lincoln,  
17 Robert Spada, Tom Rombach, Dan Levy, and Elizabeth  
18 Jamieson who are keeping the committee moving forward  
19 from their participation last year. Thank you very  
20 much.

21 (Applause.)

22 CHAIRPERSON ROMBACH: We actually have one  
23 other report. Unfortunately we had envisioned Chris  
24 Ninomiya being here from Iron Mountain. He has been  
25 delayed in a trial. I guess as elected prosecutor in

1 the great north you actually have to try some cases,  
2 and he is in the process of doing that, so between his  
3 transit here and back he thought it best that he stay  
4 close to file on this one. So in lieu of Chris being  
5 here I am going to give that report because it is  
6 fairly important.

7 I would like to note that right now this  
8 committee, the Nominating Committee, is focused on  
9 filling the vacancies in the Representative Assembly,  
10 both now and then recruiting lawyers to run for open  
11 seats in the elections that are being conducted from  
12 June 1st to June 15th.

13 To that end, if anybody wants to pick up a  
14 nominating petition and you currently sit in the  
15 Assembly and haven't done so, the deadline for that is  
16 actually coming up on April 30th. The petitions need  
17 to be postmarked, so if you are from a big circuit,  
18 say for instance Wayne County, you can probably get  
19 the necessary five signatures even at the Assembly  
20 over lunch and turn those in. So for those of you  
21 that have seats that are expiring.

22 For those of you that don't quite know what's  
23 going on, you can turn to the March Bar Journal that  
24 includes some details as to who is up and who isn't.  
25 Also included in there is a nominating petition as

1 well, so if you would like to submit the names of your  
2 friends, relatives, anyone you have a score to settle,  
3 you know, to be nominated, that would be a good idea.

4 I would note that our goal by September is to  
5 have every one of these seats filled by our next  
6 meeting, and also 39 of the judicial circuits are  
7 going to actually be voting on 61 of the spots, so  
8 considering the Assembly is 151 people, it's pretty  
9 historic that we have 61 availabilities, both the  
10 people that are sitting here and possible vacancies.

11 Secondly I want to point out that the Michael  
12 Franck award is, as usual, our highest award from the  
13 Assembly, and that's going to be awarded in September.  
14 We are seeking nominations at this juncture. The  
15 deadline is July 25th. We prefer those to be in  
16 writing so the committee would have a better rendition  
17 of the background of the individuals that merit this  
18 consideration. We have received two nominations  
19 already of eminently qualified people, but we can  
20 always use some more thoughts from the Assembly or  
21 however we amended the ones we already have in front  
22 of us.

23 And, thirdly, that we are also researching  
24 for Representative Assembly clerk, for those of you  
25 may be so inclined to sit up here and get the

1 attention of everyone else here, that would be a great  
2 idea. I encourage you to do so. It's been a very  
3 rewarding career that I have had so far.

4 And I would acknowledge right now that we  
5 have a meeting upcoming of the members on the  
6 committee, Bob Gardella, Amy Gierhart, Mike Piatt,  
7 Mark Teicher, David Lady, and Francisco Villarruel,  
8 and hopefully we will get those details to you  
9 shortly, as soon as Chris comes with that information,  
10 but that will be this week so I will give you the  
11 heads up.

12 I appreciate your attention. That's the  
13 final report, and now we will get to the blood and  
14 gore of considering some of these proposals. Also, I  
15 want to make sure that our Assembly parliamentarian,  
16 our Chief Judge from Washtenaw County, Archie Brown,  
17 has something to do and some guidance to provide me  
18 with at this juncture.

19 I am going to call up Richard Bisio. He is  
20 the chair of the Civil Procedure and Courts Committee.  
21 He previously had a proposal in front of the Assembly  
22 that we had actually tabled, and his committee went  
23 back with the transcript of our comments for that  
24 matter and had reconsidered their proposal. The  
25 results therein are actually included in your packets.

1           Essentially I think this is going to be near the same  
2           submission, and he will give you some insight as to  
3           why his committee feels very strongly that the  
4           Assembly should act favorably on this legislation.  
5           Richard.

6                     MR. BISIO: Thank you, Tom. The purpose of  
7           this proposal is to encourage prompt resolution of  
8           threshold issues in cases and discourage holding back  
9           dispositive arguments until late in a case, and it was  
10          prompted by a number of recent decisions, mainly in  
11          the medical malpractice area, strictly construing the  
12          statutes about notice of intent to sue and affidavits  
13          of merit and affidavits of meritorious defense.

14                    Part of the proposal applies only to medical  
15          malpractice cases, part of it applies to all cases,  
16          and I will just review the highlights of the proposal  
17          which is in your material.

18                    First, the amendment to Rule 2.112 would set  
19          a deadline for parties to raise challenges to a notice  
20          of intent to sue or an affidavit of merit or affidavit  
21          of meritorious defense in a medical malpractice case.  
22          So that those should be raised early in the case when  
23          perhaps it is possible to correct any defects and when  
24          perhaps the statute of limitations has not yet run,  
25          but in any case so that those things are focused on at



1 the beginning of the case rather than at the end of  
2 the case, and hopefully that would encourage decision  
3 of cases on the merits rather than on a technicality  
4 of a defect in some of those documents.

5 Secondly, and along with that, the amendment  
6 to 2.118 would provide that an amendment of an  
7 affidavit of merit or affidavit of meritorious defense  
8 would relate back to the original filing date of the  
9 affidavit. That, again, parallels the provision for  
10 amendments of complaints and other pleadings, and we  
11 believe it's consistent with case law.

12 The other part of this proposal applies to  
13 all cases. It's not limited just to medical  
14 malpractice cases, and it is to also encourage early  
15 addressing of dispositive issues. The amendment to  
16 2.401 provides that the court can include in a  
17 scheduling order a deadline for filing summary  
18 disposition motions and a deadline for challenging the  
19 qualifications of expert witnesses.

20 There is a corollary change to 2.116 that  
21 also simply clarifies that rule. The rule as it  
22 presently stands can be read to prohibit a court from  
23 setting a motion cut-off date because it says certain  
24 summary disposition motions can be raised at any time.  
25 The amendment that we are proposing says unless the

1 court orders otherwise those grounds can be raised at  
2 any time.

3 So those are the proposals. I want to  
4 address some of the questions that came up at the last  
5 Assembly meeting. There were suggestions at that  
6 meeting that, first, there should be no deadline at all  
7 for making summary disposition motions because issues  
8 come up late and sometimes it's appropriate to raise a  
9 motion even on the eve of trial if that would avoid  
10 the expense and the time of going to trial.

11 There was another proposal that all summary  
12 disposition motions should be made before case  
13 evaluation so that people are not faced with an  
14 argument at case evaluation that a party is going to  
15 be filing a motion for summary disposition, the case  
16 is going to be thrown out so the case evaluator should  
17 take that into account.

18 The committee considered those proposals when  
19 you sent it back to us, and we think that the rule  
20 should not be limited in either way. The proposal we  
21 are making simply acknowledges what many judges  
22 already do, which is setting a motion cut-off.

23 If in a particular case it's important to  
24 have a motion heard early in the case or if it's  
25 important to have a motion heard after a motion

1 cut-off that's already been set or later on in the  
2 case, that's a matter we believe for the court's  
3 discretion in a particular case, and the practices  
4 vary from court to court and judge to judge as to when  
5 judges set motion cut-off dates. Sometimes they are  
6 before case evaluation, sometimes they are after,  
7 sometimes they are before discovery is completed and  
8 sometimes after, so we don't believe that it's  
9 appropriate to set a strict rule in the rules but  
10 rather to leave that for the discretion of the judges  
11 in a particular case. And our proposal is simply to  
12 acknowledge the court's authority to set a cut-off  
13 date for summary disposition motions.

14 That's pretty much what the proposal is, and  
15 if you have any questions I would be glad to respond  
16 to them.

17 CHAIRPERSON ROMBACH: At this point, before  
18 we make the motion, I would want to allow any section  
19 or committee that has comments to come forward at this  
20 moment and lend your two cents to the discussion.  
21 Seeing none present at this point and at that point  
22 then I will recognize Gary Peterson from Portage to  
23 make appropriate motion. Gary.

24 MR. PETERSON: Thank you. Gary Peterson from  
25 the 9th circuit. I am also a member of the Civil

1 Procedure and Courts Committee with Richard, and I  
2 would move that the Assembly approve the proposed  
3 changes to the Court Rules that have been recommended.

4 CHAIRPERSON ROMBACH: So it's been moved. Is  
5 there a second present to that motion?

6 MR. BRECK: Support.

7 CHAIRPERSON ROMBACH: Kevin Breck from the  
8 6th circuit, and Gary has noted he is our liaison to  
9 the committee, so any question you might have could be  
10 directed as well to Gary.

11 Is there any discussion from any members of  
12 the Assembly? Again, just state your name and number  
13 for the record. Mr. Andree I am sure can do that. He  
14 has been up here before.

15 MR. ANDREE: Gerard Andree, 6th circuit.  
16 Since I believe in truth in advertising, I will also  
17 tell you that I speak as a person who for the past 27  
18 years has been defending doctors and hospitals in  
19 medical malpractice litigation, and since I believe in  
20 truth in advertising I bring that up because obviously  
21 for those of you who do not do medical malpractice  
22 perhaps you don't appreciate the flavor of what's  
23 being proposed, but this is straight out of the MTLA  
24 without them having the courtesy to come and tell you  
25 it is. I think if this is going to be a plaintiff's

1 Bar motion, they at least in fairness ought to  
2 identify it as such.

3 I have a number of different objections to  
4 this proposal. First of all, on a technical matter,  
5 it talks about challenges to an affidavit or the  
6 challenges -- yes, the affidavit of merit being done  
7 within 63 days, and the comment is made in the  
8 proposal that this would, and I will quote, this  
9 would -- in most cases this should give the opposing  
10 party sufficient time to determine the qualifications  
11 of the person signing the affidavit.

12 Well, that's a very nice statement, but I  
13 would like to know how, especially since affidavits  
14 must be filed with the complaint. You have 91 days  
15 from the time the summons is issued, many times  
16 summons are not even served within 63 days, so if you  
17 are going to say that you have 63 days from the time  
18 that the affidavit is filed, the affidavit is filed  
19 with the complaint, at what point are you going to  
20 have 28 days even to answer the complaint much less  
21 initiate any discovery to find out the qualifications?

22 I would think that 63 days after the filing  
23 of an answer would even be oppressive, but this is  
24 from the time of the filing of the affidavit.

25 Another section of this proposal indicates

1 that, puts in these magic words, and I quote, unless  
2 the court orders otherwise. I mean, why don't we just  
3 accept this for what this is. Any time you have a  
4 court rule that sticks in this phrase unless the court  
5 orders otherwise, you have no court rule.

6 I am old enough to remember what I refer to  
7 as the bad old days when you couldn't tell from one  
8 circuit to the next how a judge was going to enforce a  
9 court rule or much less, for those of you who don't  
10 practice in a larger circuit like Oakland or Wayne,  
11 you didn't know from one floor to the next how a judge  
12 was going to enforce the court rule or sometimes how  
13 even one judge was going to enforce the court rule  
14 from one case to the next.

15 The reason that we have court rules is so  
16 that there is uniformity, and any time you have a  
17 phrase that says unless the court orders otherwise,  
18 you are inviting no court rule.

19 This one aspect of the case that talks about  
20 that you have to bring up and tell the other side that  
21 they don't have a good enough expert. I mean, let's  
22 not forget the fact that this is an adversarial  
23 relationship. I am representing a doctor. Somebody  
24 is suing my client. I see that this person has no  
25 basis whatsoever for his opinions. I then have to go

1 to the other side and say, hey, listen, you don't have  
2 a good enough expert against my doctor. You ought to  
3 go and get a better expert. I mean, does the conflict  
4 of interest, does that strike anybody as something  
5 that's raised here? I have the duty to go tell the  
6 other side that they have to go get a better expert  
7 against my doctor or my hospital?

8           Actually what this is -- I mean, the statute  
9 is very clear. The statute is clear as to what the  
10 requirements are for experts. The statute is clear  
11 the requirement of what you have to do. In effect  
12 what you are saying here, ladies and gentlemen, is that  
13 when one side's malpractice, when one side commits  
14 malpractice, I have a duty to tell them you are  
15 committing malpractice here by not having a good  
16 enough expert, so I have to tell you that so it won't  
17 get in your way of your claiming malpractice against  
18 my client. I think that's ridiculous.

19           I don't see any duty that I have on the part  
20 of my client to go tell another side they have to go  
21 get a better expert against my own client.

22           Last point -- I think I may have exhausted my  
23 five minutes. I think this is a seriously flawed and  
24 very biased attempt to get around the Court Rules and  
25 it should be defeated.

1                   CHAIRPERSON ROMBACH: Thank you very much,  
2 Gerard. At this point, because there were some  
3 concerns raised, I am going to refer back to  
4 Mr. Bisio. Perhaps he can address a couple of these  
5 issues, and if anybody else wants to comment, then  
6 please make your way to the microphone during this  
7 response.

8                   MR. BISIO: To the question of whether this  
9 is an MTLA proposal or a plaintiff's Bar proposal, our  
10 committee is composed of both plaintiffs and  
11 defendants attorneys, attorneys representing both  
12 plaintiffs and defendants from large firms and small  
13 firms, and we have a federal judge and a couple of  
14 state judges on the committee. We have a wide  
15 diversity of experience and viewpoints on the  
16 committee, and this is something that we agreed to,  
17 including people who represent defendants. So I don't  
18 think it's fair to say that this is a plaintiff's  
19 proposal.

20                   On the question for the deadline of  
21 challenging an affidavit, the rule did not make that  
22 an inflexible deadline. It allows a showing of good  
23 cause to make a challenge after the times that are  
24 presumptively set in the rules. I think it probably  
25 is a good point that the time should start running



1 from the time of service rather than filing of the  
2 affidavit, because it is a good point that it's filed  
3 but perhaps not immediately served. So that may be an  
4 appropriate modification.

5 On the question of challenges to expert  
6 qualifications, the proposal is aimed mainly at the  
7 qualifications that are set out in the medical  
8 malpractice area which sets out some very specific  
9 requirements for the types of certifications that  
10 expert witnesses must have, matching those  
11 certifications to the certifications of the defendant.

12 Those types of challenges, I think, are things  
13 that can be raised as a threshold issue early on in  
14 the case rather than save it to the end of the case,  
15 and the proposal is aimed simply at resolving those  
16 questions early on in the case so that, if it's  
17 possible during the scheduling of the case, those  
18 problems can be cured and the case can be decided on  
19 the merits rather than on the question of the  
20 technical qualifications of the expert witness.

21 CHAIRPERSON ROMBACH: Thank you. Typically I  
22 am not going to have everyone respond in that nature,  
23 but, again, because some question had been raised  
24 about the committee, I thought it was important.  
25 Mr. Rotenberg.

1 MR. ROTENBERG: Steven Rotenberg, 6th  
2 circuit. My comments are mostly with regards to the  
3 modification, the proposed modification to 2.116, and  
4 I really don't see the point in it. There is an  
5 automatic -- the way the scheduling rule is set up,  
6 there is an automatic cut-off about three weeks before  
7 trial for filing, because you need to give three weeks  
8 notice to the other side. And I can foresee situations  
9 where right up to the day, up to very close to the day  
10 of trial one can have situations where you might want  
11 to invoke summary disposition because they haven't  
12 failed to, filed a claim or a defense and the case  
13 hasn't developed itself sufficiently for one side or  
14 the other to determine that it's prudent to file a  
15 motion at that time.

16 So I just don't see the reason for doing it  
17 at all. If a circuit or district wants to put in  
18 their local rules they are going to put it in there,  
19 there are provisions in the Court Rules for them to do  
20 that. I have seen scheduling orders that do, you  
21 know, cut off motions at a certain date. I just don't  
22 see why we need to standardize it and make it that  
23 rigid.

24 The other thing too is unless the court  
25 orders otherwise, I can see that being potentially

1 ripe for abuse. You know, no judge wants to have  
2 their docket cluttered up on motion call day. Unless  
3 the court orders otherwise, they could, you know,  
4 you could have somebody do something extreme such as  
5 saying, okay, fine, you have to file it with your  
6 first responsive pleading. And I agree with the  
7 previous speaker that the way it's written that you  
8 will create a situation where there is no rule, so I  
9 just don't see the reason for adding that language  
10 there.

11 CHAIRPERSON ROMBACH: So are you speaking  
12 then against that portion --

13 MR. ROTENBERG: I am speaking against that  
14 portion because it makes it unclear, and I just don't  
15 see a justification for doing it

16 CHAIRPERSON ROMBACH: So you can either ask  
17 to amend that portion if you are in favor of the  
18 resolution in the rest of its entirety, or you could  
19 sit down and ask somebody else to do that, or you can  
20 sit down anyway.

21 MR. ROTENBERG: I think I am going to sit  
22 down. I am just saying I don't think it's a good  
23 idea.

24 CHAIRPERSON ROMBACH: You are speaking  
25 against it at this juncture generally.

1 MR. ROTENBERG: Correct.

2 CHAIRPERSON ROMBACH: Thank you, Steve. Does  
3 anybody else have any comments or any questions of  
4 anyone that has spoken? His eminence, Mr. Brinkmeyer.

5 MR. BRINKMEYER: Scott Brinkmeyer from the  
6 17th circuit. Did I hear the proponent suggest that  
7 he would accept in Rule 2.112(L)(2)(b) as a friendly  
8 amendment the exchange of the word "filing" for the word  
9 "service."

10 CHAIRPERSON ROMBACH: Actually we need to  
11 address, rather than the proponent, we would need to  
12 address the maker of the motion, which is  
13 Mr. Peterson. If you are suggesting a friendly  
14 amendment, if Mr. Peterson adopts that and the second  
15 would concur, then we could proceed without an  
16 adversarial proceeding on that topic.

17 MR. PETERSON: I would accept that as a  
18 friendly amendment to change 2.112(L)(2)(b) so that  
19 the remainder of that sentence after the comma would  
20 read, Must be made within 63 days of the service of  
21 the affidavit on the opposing party.

22 CHAIRPERSON ROMBACH: I believe that Nancy  
23 Brown, in charge of communications of the State Bar,  
24 is incredibly efficient, and I believe that change is  
25 being made as we speak. So from what I understand --

1 and who, again, was the second on this? It was  
2 Mr. Breck. Is that okay with you, Scott?

3 MR. BRECK: Yes.

4 CHAIRPERSON ROMBACH: So, Gary, you have  
5 accepted as a friendly amendment as proposed by  
6 Mr. Brinkmeyer?

7 MR. PETERSON: Yes.

8 MR. BRINKMEYER: Next, although I do not  
9 practice in the med mal area, I do practice  
10 extensively in civil litigation, and I am persuaded by  
11 the first speaker that the proposed change to  
12 2.116(D)(4) is inappropriate. If there is one thing  
13 that at least I like to see and most of the attorneys  
14 that I practice with or against like to see, it is  
15 consistency in rules, court rules, and I think in  
16 large part by adding what you have to  
17 2.401(B)(2)(a)(vi), you pretty much take care of that  
18 anyway. Because if you are going to get the judges  
19 now to have to order deadlines for summary  
20 disposition, then you can argue at that point whether  
21 or not a shorter or longer time for filing would be  
22 appropriate under (C)(8), (9) or (10), so I would move  
23 to amend by striking the proposed change in  
24 2.116(D)(4) and ask for a second.

25 VOICE: Second.

1 CHAIRPERSON ROMBACH: Actually, again, you are  
2 going to have to ask Mr. Peterson, because he is the  
3 maker of the motion.

4 MR. BRINKMEYER: I am proposing --

5 CHAIRPERSON ROMBACH: You are proposing now a  
6 new amendment?

7 MR. BRINKMEYER: Correct.

8 CHAIRPERSON ROMBACH: You are not asking him  
9 whether he likes it or not?

10 MR. BRINKMEYER: If he will accept it --

11 CHAIRPERSON ROMBACH: I am just trying to be  
12 efficient here.

13 MR. BRINKMEYER: If he will accept it as a  
14 friendly amendment, I am happy to do that. We won't  
15 even have to vote.

16 MR. ROMBACH: Gary, again, it's up to you.  
17 We are going to propose it as a friendly amendment.  
18 If you are not in concurrence, then Mr. Brinkmeyer is  
19 in a position to move that through the amendment  
20 process in voting. What do you think of his proposed  
21 change to 2.40 -- where am I at?

22 MR. PETERSON: I would not accept it as a  
23 friendly amendment.

24 CHAIRPERSON ROMBACH: I didn't suspect so,  
25 but, again, I want to be as consistent as we can.

1                   At this point the maker of the motion, not  
2                   having accepted it, Mr. Brinkmeyer.

3                   MR. BRINKMEYER: Let me make clear what this  
4                   would mean. If we were to strike the proposed  
5                   2.116(D)(4), you would then retain and it would remain  
6                   unchanged what is currently in 2.116(D)(3) on the  
7                   first page of the proposal.

8                   CHAIRPERSON ROMBACH: And you are applying  
9                   this then across the board to both matters in tort and  
10                  matters generally in civil as well, because that  
11                  aspect, from what I understand, doesn't have any  
12                  particular ramifications just in medical malpractice,  
13                  that is across the board.

14                  MR. BRINKMEYER: That's correct, and that's  
15                  my point, and hopefully my second would agree with  
16                  that, whoever that was.

17                  CHAIRPERSON ROMBACH: So Mr. Brinkmeyer is in  
18                  search of a second to his resolution.

19                  MR. ROTENBERG: Second.

20                  CHAIRPERSON ROMBACH: Mr. Rotenberg will  
21                  second that, and, again, we will proceed with debate.  
22                  Considering that this is actually a new aspect of  
23                  this, everyone's previously used five minutes is wiped  
24                  clean and anyone can discuss the proposed amendment.  
25                  Is there any mind to discuss this? Okay.

1                   Hearing no discussion from anybody on the  
2 floor, we will move this to a vote, and what we will  
3 do is we will say all in favor please signify by  
4 saying yes.

5                   All those opposed say no.

6                   I believe that the yeses carried. That  
7 amendment is adopted, and Nancy Brown has made or soon  
8 will make the appropriate change striking item 4 from  
9 2.116, summary disposition.

10                   Are there any other further comments?

11 Mr. Brinkmeyer.

12                   MR. BRINKMEYER: You also have to leave 3  
13 unchanged, so we have to remove the strikes from 8, 9  
14 and 10.

15                   CHAIRPERSON ROMBACH: Thank you very much for  
16 that clarification. And, again, now we are speaking to  
17 the primary motion as Mr. Brown points out, anything  
18 people want to discuss, and if so, please go ahead,  
19 get up to the microphone and state your name and  
20 circuit for the record.

21                   MS. LIEM: Veronique Liem, 22nd circuit. I  
22 have actually a couple questions, one on the first  
23 amendment concerning modifying the filing language to  
24 service of the opposing party language. I have two  
25 questions. One, what if you have several opposing



1 parties, what if not all opposing parties are served,  
2 and shouldn't that be addressed as part of the  
3 amendment, because when does the clock start ticking  
4 essentially is my first question.

5 The other question I have is I am not sure I  
6 understand why we need a relation back amendment on  
7 the amended affidavit of merit if we have a very short  
8 time frame for objections, and I am asking questions  
9 on that as well.

10 CHAIRPERSON ROMBACH: Why don't we address  
11 those in order. Basically the amendment that we had  
12 passed with regards to service on a party, you are  
13 asking for clarification as to how that would come  
14 about. I could either address that I guess to  
15 Mr. Peterson, it's your motion.

16 MR. PETERSON: Obviously a party who is  
17 served would have the option if they choose to  
18 challenge it, they can file a challenge. Any party  
19 can file a challenge. So if there are multiple  
20 defendants, each and every defendant could file their  
21 own challenge. One defendant may choose not to  
22 challenge it, another may, and it's up to the  
23 individual party within that time frame of service.  
24 If they choose to challenge it, then they have to  
25 abide by that time deadline in order to file their

1 challenge.

2 CHAIRPERSON ROMBACH: Does that clarification  
3 meet with your needs for that?

4 MS. LIEM: Yes.

5 CHAIRPERSON ROMBACH: How about the second  
6 matter now. Would you like to address that question  
7 to Mr. Bisio? Would that be best? Richard.

8 MR. BISIO: The relation back provision was  
9 intended to resolve statute of limitations problems.  
10 It's, as you point out, less important if there is a  
11 short deadline for challenging the affidavits, but it  
12 still may be an issue in some cases where the case is  
13 filed at the very end of the statute of limitations.

14 MS. LIEM: May I comment?

15 MR. ROMBACH: Yes, go ahead. It's your  
16 question. You still have the floor. You need to go  
17 up to the microphone, though, (a), for our hearing  
18 impaired like myself, and secondly for the record to  
19 be kept. Go ahead.

20 MS. LIEM: Veronique Liem, 22nd circuit. I  
21 have problems with that provision because I believe  
22 there is a certain obligation on the part of the  
23 plaintiff to provide a reasonable affidavit of merit,  
24 and that would give too much latitude to provide a  
25 sloppy one or an insufficient one early on, so

1 personally I would move to strike this portion of the  
2 proposal.

3 CHAIRPERSON ROMBACH: So you are moving that  
4 we amend that by striking that portion of the  
5 proposal?

6 MS. LIEM: The relation back amendment, yes.

7 CHAIRPERSON ROMBACH: Is there a second for  
8 that initiative?

9 MR. ANDREE: Second.

10 CHAIRPERSON ROMBACH: Whose got the second?  
11 Gerard Andree of the 6th circuit.

12 Basically we are talking about 2.118(D), is  
13 that where you want the correction made?

14 MS. LIEM: Yes.

15 CHAIRPERSON ROMBACH: Nancy, do you have  
16 that -- and make sure, ma'am, that we will have that  
17 done to your satisfaction and Mr. Andree's  
18 satisfaction in the rule as displayed on the overhead  
19 so that we get this right. If you would just read off  
20 perhaps --

21 MS. LIEM: I would strike to amend in a  
22 medical malpractice action, amendment of an affidavit  
23 of merit or affidavit of meritorious defense relates  
24 back to the date of original filing of the affidavit.  
25 I am moving to strike that language.

1 CHAIRPERSON ROMBACH: So basically that is as  
2 corrected on the screen is the way you want it?

3 MS. LIEM: Yes.

4 CHAIRPERSON ROMBACH: Mr. Andree, does that  
5 meet with your approval?

6 MR. ANDREE: Yes.

7 CHAIRPERSON ROMBACH: Tremendous. That is as  
8 a proposed amendment and seconded, now open for  
9 debate. Anybody, again, can speak to this because all  
10 the five minutes are erased.

11 Hearing none, what we will do is we will move  
12 that for a vote.

13 All those in favor of striking the language  
14 as proposed signify by saying yes.

15 All those opposed to striking the language  
16 signify by saying no.

17 The Chair has to make a ruling. Actually the  
18 Chair is going to ask, because the Chair is uncertain  
19 and because, again, I have hearing defects, I am going  
20 to ask that we do this by standing, and I would have  
21 Dan and Elizabeth help count on this and typically  
22 Rules and Calendar. Lori could you help them out too.  
23 Lori Buiteweg our chair up here in this endeavor.

24 So if Lori you can take a third, Dan, you  
25 take a third and, Elizabeth, take the other flank here.

1 All those in favor of the striking the  
2 language, please stand at this moment.

3 (Vote being counted.)

4 CHAIRPERSON ROMBACH: Madam clerk, 28?  
5 Twenty-eight is the magic number to beat. All those  
6 against this proposal please rise now.

7 (Vote being counted.)

8 CHAIRPERSON ROMBACH: Thirty-eight. That  
9 motion fails by ten. We are back now to the case in  
10 chief, the main motion. Is there any further comment  
11 on that?

12 We have one successful amendment which will  
13 be considered in the main motion. At this point we  
14 will vote up or down as proposed, and as proponent it  
15 would be most proper to allow Mr. Peterson carrying  
16 the burden of proof here to have final comment if he  
17 chooses.

18 MR. PETERSON: I don't have any further  
19 comment.

20 CHAIRPERSON ROMBACH: Mr. Bisio.

21 MR. BISIO: I don't have anything.

22 CHAIRPERSON ROMBACH: Hearing none, we will  
23 move to a vote. All in favor of passing this  
24 resolution as proposed and amended, please signify by  
25 saying yes.

1 All those opposed signify by saying no.

2 In the opinion of the chair the ayes, the  
3 yeses have it. The resolution passes.

4 At this point we are going to turn to our  
5 next item on the agenda. Thank you very much,  
6 Mr. Bisio, for your committee's hard work on this  
7 topic and your coming back to us for our concurrence  
8 in the proposal.

9 Next item on the agenda will be from the  
10 Prisons and Corrections System, the proponent being  
11 Stephen Gobbo, the chair of that section. Steve is  
12 here with us today. He is going to come up and  
13 address us with their proposal that I know has certain  
14 interests in the Governor's office. Steve.

15 MR. GOBBO: Good morning. I am somewhat  
16 moved by being here following a Court of Appeals  
17 Judge, Mr. Whitbeck, and just following up on some  
18 comments that he made. I am going to just talk about  
19 the reason why this proposal has been put forth before  
20 this Representative Assembly.

21 I could state it probably in some words that  
22 will kind of be flowery or in some way straight to the  
23 point, and I guess, as attorneys, coming and dealing  
24 with different ideas and issues is probably one of the  
25 things of our profession that makes us great.

1 I couldn't help but notice coming into this  
2 room that there was a note by the assignment of rooms,  
3 and I don't know if it pertained to this room or to  
4 one of the other events taking place, but it was  
5 basically a quotation from Tom Watson, who I believe  
6 was the chair of IBM. The great accomplishments of  
7 man have resulted from the transmission of ideas and  
8 enthusiasm. So I am hoping that this body does have  
9 some enthusiasm for this resolution.

10 To get to the point with Judge Whitbeck, he  
11 talked about capacity and a problem in terms of  
12 production. Obviously the prisons and corrections  
13 aspect of the criminal justice system is one that is  
14 always dealing with capacity. There are other  
15 implications beyond capacity, the concept of justice,  
16 the concept of cost, and this proposal goes to the  
17 heart of those concepts, and what I would like to do  
18 is for the representative body to, I guess, address the  
19 resolution that's before you in an open way, and I  
20 will be glad to address any other questions that will  
21 come up in terms of the resolution. So, having said  
22 that, I am not going to say much more.

23 CHAIRPERSON ROMBACH: What I would like to  
24 note is that there is a change to the resolution from  
25 what you have in front of you. Mr. Gobbo has been

1 working on this, as has our vice-chair, Mr. Levy.  
2 Just so you know that you need to follow the language  
3 as proposed on the overhead. That's going to be, I  
4 believe, introduced as a substitute.

5 One of the reasons is that certain Keller  
6 concerns had been raised as far as this being  
7 ideological or political in nature, and some of those  
8 concerns had resulted in this motion being refigured  
9 for the Assembly's consideration.

10 Again, the section had initially proposed it  
11 not particularly with an eye to anything other than  
12 the initiative that they would like to see the State  
13 Bar take, and then when our corporation counsel and  
14 other forces looked at it, they thought it was more  
15 appropriately configured in the manner before you. So  
16 thank you very much, Steve.

17 MR. GOBBO: And I thank the Chair for  
18 clarifying that.

19 CHAIRPERSON ROMBACH: At this point a motion  
20 would be in order from a member of the Assembly. Who  
21 are you and why do you come here?

22 VICE CHAIRPERSON LEVY: Daniel Levy, 3rd  
23 circuit. I come here because I am a former  
24 member and, in fact, chair of the Prisons and  
25 Corrections Section and currently I guess I am serving



1 as the Assembly liaison to the section.

2 I wanted to point out that the amended  
3 language makes it clear that the intent of this  
4 resolution is not to adopt any of the particular  
5 proposals in whole but to suggest that these are the  
6 questions that should be being asked, not suggesting  
7 the answers.

8 I look at this resolution and this process a  
9 little bit post-sentencing justice in this state, like  
10 a lot of places, has been a little like that notorious  
11 balloon effect. We have the habit of squeezing in one  
12 place and watching it pop up in another without ever  
13 looking at the whole balloon, and the essence of this  
14 proposal is that somebody needs to stop and take a  
15 look at the whole balloon rather than just squeezing  
16 one little part, and for that reason I would move its  
17 adoption.

18 MR. GARDELLA: Second.

19 CHAIRPERSON ROMBACH: Mr. Levy has made the  
20 motion. We have a second from where? Mr. Gardella,  
21 right? What circuit are you from, 45?

22 MR GARDELLA: Robert Gardella from the 44th  
23 circuit, I second.

24 CHAIRPERSON ROMBACH: My readability from  
25 here may not be the best, so we are at the 44th

1 circuit.

2 At this point it's been moved and seconded.  
3 I next need to turn to any sections or other  
4 committees that had been invited to comment if the  
5 chair of those august groups are here. Seeing none,  
6 then we will turn to Assembly debate. Lisa, go ahead.

7 MS. KIRSCH-SATAWA: Lisa Kirsch-Satawa, 6th  
8 circuit. First of all, I urge you all to adopt this  
9 resolution as proposed for many reasons, and those of  
10 you who don't practice in criminal law, keep in mind  
11 that just because you support something that has to do  
12 with crime, it does not mean you are soft on crime.

13 These proposals will not only help the state  
14 budget, but they will help the community as a whole.  
15 The reason that they would help the community is  
16 that -- and I have never done this before, so my heart  
17 is about to bust out of my chest.

18 Basically research shows that incarceration  
19 alone does not do anything to prevent recidivism or to  
20 reduce repeat offenders. What prison needs and what  
21 the community needs is for them to be educated and to  
22 receive services.

23 Right now, because of the backlog in our  
24 prisons and the lack of services available, a  
25 convicted sex offender who might only be sentenced to

1 a period of one year to 15 years will serve probably  
2 at least three or four because they cannot get into  
3 the necessary one-year program that they are required  
4 in order to meet their eligibility requirements for  
5 parole.

6 If we could address some of the mental health  
7 issues, the sex offender issues, substance abuse  
8 issues, and mental health issues in the pre-trial  
9 stages as well as through alternative programs in  
10 communities, then the backlog of prisons, the lack of  
11 capacity, the need for future prisons and then  
12 hopefully a decrease in recidivism would all follow.  
13 It makes complete sense for the benefit of everyone  
14 that these issues and this blueprint be adopted to be  
15 explored as a whole.

16 The most critical age of prisoners, and this  
17 is described in the commentary in the materials, is  
18 that we have teenagers to mid-teen prisoners are the  
19 ones who really need to be targetted for programs. As  
20 our laws become tougher on younger defendants, we see  
21 more youngsters, children going into the prison  
22 system with all of those mentors to teach them how to  
23 be career criminals around them and no intervention  
24 that's appropriate at this time.

25 The community as a whole needs intervention

1 and needs education for these people. We can't stop  
2 the violence unless we have it. So I urge you to  
3 remember alternatives to incarceration, putting  
4 services in place earlier, and looking at all of these  
5 issues does not mean that we are soft on crime, and I  
6 would be their request for the one who is enthusiastic  
7 about this.

8 CHAIRPERSON ROMBACH: Thank you, Lisa. Do we  
9 have any other comments going to this proposal?  
10 Hearing none, we will move this to a vote.

11 All in favor -- and I guess I will ask either  
12 the proponent, do you have anything else to say,  
13 Steve? Go ahead.

14 MR. GOBBO: If I can make a brief summary and  
15 just give you a brief history of how the ABA proposal  
16 was kind of put together.

17 The ABA has, under the auspices of the  
18 Criminal Justice Section, has a sentencing and  
19 corrections committee. That committee is made up of  
20 professionals like you, law professors, consider those  
21 professionals in some ways, and people that work  
22 within the criminal justice system in various areas of  
23 the criminal justice system.

24 Some of the people that are on this committee  
25 have served in very high positions. One of the people

1 was Mike Quinlan, former director of the Bureau of  
2 Prisons under President Reagan, Don Santarelli, former  
3 head of the LEAA, which is the Law Enforcement  
4 Assistance Agency, which has now basically gone away.  
5 However, he served under Nixon.

6 So when we talk about this proposal, it was  
7 really put together by the Sentencing and Corrections  
8 Committee of the Criminal Justice Section of the ABA  
9 in order to provide some guidelines to the states and  
10 territories and the federal government for reviewing  
11 things that are out there in the criminal justice  
12 system to make it more cost effective, not to mitigate  
13 or militate against public safety. It's basically a  
14 call with some outline to take a look at things that  
15 might just improve the system.

16 Very similar to Judge Whitbeck's comments  
17 this morning about capacity and the issue that with  
18 more research people you can move things along and  
19 reduce the backlog. With this proposal, at least it  
20 gives the attorneys in this state, who I think would  
21 have an interest in looking at the justice system, the  
22 impetus to move forward. Thank you.

23 CHAIRPERSON ROMBACH: At this juncture  
24 Mr. Levy will waive any final comment and move to the  
25 jury's decision.

1 All those in favor of the proposal as has  
2 been amended in front of you today on the overhead,  
3 please signify by saying yes.

4 All those opposed, signify by saying no.

5 In the opinion of the Chair the yeses do have  
6 that one. So thank you very much for your passion,  
7 your time, your consideration to Mr. Gobbo and his  
8 committee, as well as Mr. Levy.

9 MR. GOBBO: Thank you.

10 CHAIRPERSON ROMBACH: We will now move to  
11 item 10 on the agenda. That's consideration of the  
12 proposed resolution in support of increasing the  
13 federal judicial compensation as recommended by the  
14 National Commission on the Public Service, the Volcker  
15 Commission. Speaking on behalf of Sheldon Light, who  
16 was not able to make it as the chair of the U.S.  
17 Courts Committee, we have Charles Chamberlain, Jr.  
18 from Grand Rapids. He is known as Chip to his  
19 friends. I simply refer to him as Mr. Chamberlain.

20 MR. CHAMBERLAIN: Thank you, Tom. I will try  
21 to be quite brief.

22 As we all know, Article III of the  
23 Constitution provides that our judiciary shall serve  
24 for life, during which time their compensation shall  
25 not be diminished. The realities are that our

1 founding fathers did not take into account the  
2 insidious effects of inflation or the politics of  
3 compensation of our federal executives.

4 District judges, which I will use simply as  
5 an example, are compensated at the rate of \$150,000 a  
6 year. By any comparison, that is far below what you  
7 find in the private sectors of similarly qualified  
8 people. To compare them to law school deans, they are  
9 compensated at a rate of 50 percent. Compared to the  
10 average pay of a full professor, they make \$50,000  
11 less.

12 We as a committee believe that we should take  
13 a stand. We believe our judiciary is uniquely  
14 unqualified to advocate on its own behalf for a pay  
15 raise.

16 There are two aspects to our proposal. One  
17 is that we urge that there be -- and I should mention  
18 that the proposal is tied to the Volcker Commission  
19 report, which is in its entirety in your materials.  
20 But there are two recommendations, nine and ten, and  
21 the 9th recommendation is the that congress should  
22 grant an immediate and significant increase in  
23 judicial, executive, and legislative salaries to  
24 ensure a reasonable relationship to other professional  
25 opportunities. Our resolution just pertains to

1 judicial compensation.

2 And recommendation ten is that congress  
3 should break the statutory link between the salaries  
4 of members of congress and those of judges and senior  
5 political appointees.

6 So there are two aspects to the proposal, one  
7 that congress immediately compensate judges  
8 adequately, and secondly that they sever the statutory  
9 link.

10 We believe that there may not be a crisis  
11 today, but we as a committee believe we want the bench  
12 to continue to remain diverse and representative of  
13 our community. If something is not done about  
14 judicial compensation, over the long-term people will  
15 not be attracted to those positions. If they are not  
16 attracted to those positions, our judiciary will not  
17 be representative of the people whom they serve.  
18 Thank you.

19 CHAIRPERSON ROMBACH: Since Robert Neaton,  
20 our liaison to this committee, is not available at  
21 this juncture, I am going turn to Barbara McQuade, I  
22 believe, with a motion and order.

23 MS. MCQUADE: Thank you, Mr. Chairman.  
24 Barbara McQuade from the 3rd circuit. I do move to  
25 adopt the resolution in support of increasing federal



1 judicial compensation as recommended by the National  
2 Commission on the Public Service.

3 CHAIRPERSON ROMBACH: Thank you very much,  
4 Ms. McQuade. Does your colleague, Mr. Riordan, second  
5 that?

6 MR. RIORDAN: I second it and I support  
7 Ms. McQuade.

8 CHAIRPERSON ROMBACH: Since you both work in  
9 the same office as Mr. Light, that this is kind of a  
10 job requirement of sorts.

11 MR. RIORDAN: I should disclose he is my  
12 immediate supervisor.

13 CHAIRPERSON ROMBACH: I figured I would give  
14 you that opportunity, particularly I know federal  
15 judges are probably in favor of this too.

16 MR. RIORDAN: I am sure they are. I haven't  
17 discussed it with them.

18 CHAIRPERSON ROMBACH: At this point does any  
19 other member of the Assembly have a comment to make on  
20 this proposal? Mr. Piatt.

21 MR. PIATT: Paul Piatt from the 16th judicial  
22 circuit. I just have a comment. I have been  
23 practicing law for 34 years, and I have never seen a  
24 short line for an appointment for a federal judgeship  
25 yet.

1 (Applause.)

2 CHAIRPERSON ROMBACH: Are you speaking on  
3 behalf in favor or against the motion?

4 MR. PIATT: Just a comment.

5 CHAIRPERSON ROMBACH: Thank you very much.  
6 You have added to the confusion of the debate.

7 Does anybody else have any insights to share  
8 with us?

9 MR. ANDREE: Gerard Andree from the 6th  
10 circuit. I think it's important that we pass this  
11 resolution for this reason. I think as attorneys and  
12 members of the Bar and members of the legal profession  
13 we should be proud of the people that serve as our  
14 judges, and it has always rankled me that, truth be  
15 told, by the time a person gets to the point where  
16 they could be a darn good judge, they simply can't  
17 afford to be one because of the realities of what we  
18 have today. I mean, it's nice to come home to your  
19 wife and say, Hey, listen, the president wants to  
20 appoint me as a judge. You wouldn't mind my taking a  
21 pay cut? And even though there may not be a short  
22 line for it, maybe if we paid people the bread and put  
23 the best and the brightest on our benches, then that  
24 long line would be a long line of better qualified  
25 people.

1 CHAIRPERSON ROMBACH: Thank you very much,  
2 Gerard. Does anybody else have a comment on this  
3 resolution? You need to go to the microphone,  
4 reintroduce yourself to the Assembly.

5 MS. LIEM: Veronique Liem, 22nd circuit. I  
6 just have a brief comment. I want to remind everyone  
7 that we are facing significant budget deficits at the  
8 federal level which we are looking like we are  
9 passing on to the next generation, so that's my  
10 comment in opposition to the proposal.

11 CHAIRPERSON ROMBACH: In opposition. I  
12 detected that. Mr. Abel.

13 MR. ABEL: Matthew Abel from the 3rd circuit.  
14 I am not sure whether I support this or not. Clearly  
15 I do support adequate compensation for everyone, but I  
16 don't think that the federal judges are the people in  
17 the system who are the least adequately compensated.  
18 There are lots of other areas of the system that need  
19 to be better compensated.

20 Furthermore, I don't know that increasing the  
21 pay will attract the best and the brightest. The best  
22 and the brightest perhaps already will have made their  
23 fortune before they get to the federal bench and won't  
24 need the money for that.

25 And, in addition, if you can't live on over a

1 hundred thousand dollars a year, perhaps you should  
2 reassess your standard of living. Thank you.

3 CHAIRPERSON ROMBACH: Are you sure you are  
4 not in favor of that, Matthew?

5 MR. ABEL: After I have been appointed to the  
6 federal bench I may change my opinion.

7 CHAIRPERSON ROMBACH: Thank you. Mr. Miller.

8 MR. MILLER: Randall Miller on behalf of the  
9 6th circuit. Not on behalf, from the 6th circuit.

10 It wasn't that many years ago that I actually  
11 ran for a circuit court position, and in the middle of  
12 my campaign somebody asked me how much I was going to  
13 be making, and I really had no idea. I wasn't running  
14 for the money. I was running for the principle. I  
15 was running because I felt that that was what I needed  
16 to do. It had nothing to do with the money. That's  
17 number one.

18 Number two is there are too many judges on  
19 the benches right now that are there because of the  
20 money. They weren't qualified as attorneys in the  
21 first place. It was an easier way to make a living,  
22 so it was just a simple way for them to make more  
23 money than they ever would have made in private  
24 practice, and that's all I have to say on this.

25 CHAIRPERSON ROMBACH: Again, are you in

1 favor or opposed?

2 MR. MILLER: I think it's clear I am against.

3 CHAIRPERSON ROMBACH: Does anybody else have  
4 any insights to share with the Assembly at this  
5 juncture? Hearing none, we will move this to a vote.

6 Actually I need to hear from either  
7 Mr. Chamberlain, if you want to say some other words  
8 of encouragement or -- you want to say anything?

9 MR. CHAMBERLAIN: No.

10 CHAIRPERSON ROMBACH: Ms. McQuade, I know you  
11 are dying to say something in rebuttal.

12 MS. MCQUADE: I agree, I don't think people  
13 become judges because of how much it pays, but I think  
14 people who are federal judges deserve to be paid more  
15 than the first year associates appearing before them.  
16 I think they deserve at least as much as  
17 run-of-the-mill law professors. And so the fact that  
18 they -- I am not saying all law professors are run of  
19 the mill. I am saying --

20 MR. ROMBACH: There are several that are  
21 guests here today.

22 MS. MCQUADE: -- the ones who are  
23 run-of-the-mill are making more than our federal  
24 judges, and it just seems inappropriate to me. And I  
25 think the real problem is it's linked to the

1 congressional pay increase for cost of living, and for  
2 political reasons they are often in a position of not  
3 being able to raise the pay, and judges are kind of  
4 just swept along with that. So for that reason part  
5 two of the proposal is very essential.

6 So for all those reasons I would ask that  
7 this body adopt the resolution.

8 CHAIRPERSON ROMBACH: Fortunately the  
9 professors we have visiting with us are very  
10 distinguished and they do not --

11 MS. MCQUADE: None of them are run of the  
12 mill.

13 CHAIRPERSON ROMBACH: Thank you. So that  
14 present company is excluded from those comments.  
15 Thank you for forgiving us.

16 At this point we will move this for a vote.  
17 All those in favor of the proposal as before you  
18 signify by saying yes.

19 All those against the proposal signify by  
20 saying no.

21 Okay. Again, I believe that the chair is  
22 uncertain, and I am going to call for the division.  
23 All those in favor of this proposal please rise to  
24 show your concurrence. And I will have the same  
25 folks, if they are available. I believe that we will

1 need to deputize somebody else.

2 (Vote being counted.)

3 CHAIRPERSON ROMBACH: Twenty-three. Okay.  
4 All those opposed to this signify by standing at this  
5 juncture.

6 In the opinion of the Chair the noes have it.  
7 I am not going to go to a count. Thank you very much  
8 for your indulgence. I guess I will wish  
9 Mr. Chamberlain better luck with his next resolution.

10 As proposed initially -- we are catching up.  
11 We are currently at the lunch break. What I suggest  
12 is that we take probably ten minutes on the watch and  
13 then come back and listen to our eminently qualified,  
14 not possibly compensated enough professor from Boston,  
15 as well as our ABA expert from Chicago and Elaine  
16 Fieldman and Tom Byerley and Mr. Berry. If you can  
17 take ten minutes, be back, and we will discuss this  
18 final item during lunch.

19 (Break was taken at 12:22 p.m.)

20 CHAIRPERSON ROMBACH: Thank you for coming  
21 back here so expeditiously while you enjoy lunch, to  
22 which we spared no expense, as usual.

23 At this point I would like to introduce John  
24 Berry, our executive director, who is probably most  
25 appropriately in a position to introduce all his

1 friends here who, with his national clout and esteem,  
2 was able to land these nationally renowned speakers,  
3 as well as a member of his own staff, Mr. Byerley, and  
4 our co-chair of our Ethics Committee, Ms. Fieldman.

5 Additionally, I would like to remind you at  
6 the conclusion of this I would be happy to entertain a  
7 motion to adjourn. Technically, as well as in order  
8 to get credit for being at today's meeting, so I don't  
9 have to invoke owners absence policy, please fill out  
10 one of the slips that will be available after this  
11 presentation on the way out.

12 Mr. Berry.

13 MR. BERRY: Thank you. It is really a  
14 privilege to introduce the folks at this table. We  
15 are, first of all, very lucky within this state to  
16 have a tremendous amount of expertise in the area of  
17 ethics and professional responsibility, and Elaine  
18 Fieldman to my right is co-chair of our Ethics  
19 Committee, and I have had the privilege the last two  
20 years to see not only her very hard work and the work  
21 of that committee, but also to see the technical  
22 expertise joined together with the real world approach  
23 to looking on how this is going to affect lawyers, and  
24 I am very privileged to have the opportunity to work  
25 with you and to learn from you.



1 Tom Byerley from the far left heads up the  
2 Professional Standards Division of the State Bar, and  
3 as part of that responsibility works with the Ethics  
4 Committee. Just as a small plug, I will let you know  
5 that he gets engaged in the ethics hotline process,  
6 and the numbers to that have risen dramatically over  
7 the last several years, and one of the areas of your  
8 Strategic Plan is to try to help provide even more  
9 services to our lawyers in that regard.

10 The two guests to my left that I would like  
11 to introduce with a little bit more background, the  
12 first to my direct left is Nancy Moore. I looked over  
13 at her during the last debate, and I was -- I don't  
14 know whether you know this, but the executive director  
15 does have floor privileges, and I was going to seat my  
16 floor privileges to her, but I don't think that's  
17 necessary with Nancy Moore.

18 I have come to know Nancy most recently in  
19 the last couple of years during the Ethics 2000  
20 process of the American Bar Association. She is a  
21 member of the faculty of Boston University School of  
22 Law where she teaches professional responsibility.  
23 She has been teaching and writing in the professional  
24 responsibility field for over 20 years. She has a  
25 long list of writing accomplishments. She is also

1 chair of the Multi-State Professional Responsibility  
2 Examination Text Drafting Committee, and has been  
3 engaged in all kinds of activity concerning  
4 professionalism and teaching.

5 From my personal experience, however, I have  
6 had the chance to watch her be the reporter to Ethics  
7 2000, and for those of you who haven't had the chance  
8 to go to some commissions or committees of the ABA and  
9 others, the reporter position is really, in my mind, the  
10 key to the whole workings of a committee or a  
11 commission. They bring great expertise. They have to  
12 work with the voting members of the committee or  
13 commission to help them be able to make the decisions.

14 I have never seen anyone better at what she  
15 did, and I also have had a great opportunity to learn  
16 from her as well.

17 Becky Stretch, next to Nancy. Becky and I go  
18 back a ways, since 1989 when she came to the American  
19 Bar Association. Becky has been the staff liaison to  
20 almost every major American Bar Association effort in  
21 the area of ethics and professionalism. She worked  
22 with the McKay Commission, which worked on the issues  
23 concerning the discipline side of how we regulate our  
24 profession, and most recently has been working and  
25 worked with as the person attached to the Ethics 2000

1 work.

2 Becky brings to the experience of this entire  
3 process, both a working experience of the technical  
4 rules, but also the real world implications of what  
5 this means, and I think I will conclude with one  
6 remark. The process of looking at the ethics rules,  
7 which you will have the opportunity to vote on in  
8 September, has been a process which has brought  
9 together the sort of technical aspect of rules and how  
10 to make sure they are drafted appropriately, but more  
11 importantly I think the Ethics 2000 work spent a lot  
12 of time working with outside entities to make sure  
13 that this really related to the real world and what we  
14 should be about as an attorney. So I, with you, look  
15 forward to their presentation. Thank you very much.

16 And I think I will turn it over to, first of  
17 all, Elaine Fieldman, who will describe the process  
18 that we have been going through in Michigan and how  
19 that's related back to the ABA, and after that I will  
20 turn it over to Nancy and Becky. Thank you.

21 MS. FIELDMAN: Thank you, John. First of  
22 all, it's been my privilege to serve as a co-chair for  
23 the Ethics Committee for the State Bar. We have a  
24 terrific committee, very active, very dedicated  
25 committee.

1                   And we started with a wonderful product from  
2                   the ABA, the proposed rules from the Ethics 2000, and  
3                   what we have done is, first of all, we assigned every  
4                   rule to a member of the committee. Every proposed  
5                   rule, they did an analysis on the rule, how it was via  
6                   change or not a change to the current Michigan rule.  
7                   We then formed a subcommittee which met three times  
8                   over the summer and fall to review every single rule,  
9                   discuss it, analyze it, debate it, and make a  
10                  recommendation to our full committee.

11                  The full Ethics Committee then considered  
12                  every rule, thoroughly discussed it, debated it,  
13                  analyzed it, made a few more changes, and for the most  
14                  part our task of reviewing the rules has been  
15                  completed, and the rules, as I understand it, as we  
16                  recommend are posted on the website for all of you if  
17                  you want to review them before September. You will  
18                  get them anyway before September, but they are  
19                  available now.

20                  The last thing that we have left to do is in  
21                  a couple of weeks we are meeting to discuss the  
22                  comments to the rules and to wrap up some loose ends  
23                  to the rules that we have reviewed.

24                  We looked at the rules with a view to adopt  
25                  as close as possible the ABA recommendations, and I

1 suggest to you that we have, and I state to you that  
2 we have thoroughly analyzed, discussed, debated from  
3 all ends, and I really ask that when you look at these  
4 rules in September you keep that in mind. Thank you  
5 very much.

6 MS. MOORE: Thank you very much for having me  
7 here. I am delighted to be in Michigan, and I am  
8 delighted to be back in touch with John Berry. It's  
9 been a pleasure to work with him. He was one of the  
10 many liaisons to different organizations that we  
11 worked very closely with. He was the liaison from the  
12 National Organization of Bar Counsel.

13 What I want to do, as Elaine mentioned, our  
14 understanding is that Michigan, the Michigan Ethics  
15 Committee is going to be proposing to you in September  
16 proposed changes to the Michigan Rules of Professional  
17 Conduct that are very largely, not exclusively, but  
18 very largely based on the changes that were originally  
19 recommended by the ABA Ethics 2000 Commission.

20 So what I am here to do today is to tell you  
21 a little bit about the Ethics Commission at the ABA  
22 level, what motivated the process that led to these  
23 changes, and to give you just a quick highlight of  
24 some of the rules that we recommended, most of which  
25 are being recommended in Michigan, but not all of

1           them.

2                       The ABA Ethics 2000 Commission was appointed  
3           in 1997 and charged with the task of undertaking a  
4           comprehensive evaluation of the Model Rules of  
5           Professional Conduct. There were several reasons that  
6           the ABA decided that this was an appropriate time to  
7           undertake such an evaluation.

8                       First of all, by that time the Model Rules  
9           had then been adopted in approximately 44  
10          jurisdictions, but with a number of significant  
11          variations at the state level. This was both good  
12          news and bad news.

13                      The good news is that it gave us an  
14          opportunity to learn from state experimentation, and a  
15          number of the changes that we proposed were changes  
16          that we picked up from the states, and one of the  
17          Michigan contributions there is that the Michigan  
18          approach on confidentiality and disclosure is one that  
19          we thought was a significant improvement on the  
20          current or at least the then current ABA Model Rule.

21                      So that was the good news, that states had  
22          really made a number of significant improvements and  
23          had experimented with a number of different ideas.

24                      The bad news, of course, is that with the  
25          increase in multi-jurisdictional practice, having so

1 much variation among the states makes it extremely  
2 difficult for lawyers who practice in different  
3 jurisdictions. So that one of our goals was the need  
4 for at least some greater uniformity in light of the  
5 increase in cross border practice.

6 Second development was that the American Law  
7 Institute had recently completed a ten-year project  
8 that culminated in the publication of an entirely new  
9 restatement of the law governing lawyers. As many of  
10 you know, the restatement did not focus on  
11 disciplinary rules but rather identified and  
12 elaborated the broader legal framework in which  
13 lawyers work. We thought that it was a good time to  
14 review the disciplinary rules in light of what we have  
15 learned about this broader legal framework.

16 And, third, obviously there have been  
17 dramatic changes in the organization and structure of  
18 modern law practice. This includes not only the  
19 growth in the size of many law firms but also the  
20 increasing variety of forms in which lawyers practice  
21 and, of course, changes in technologies available both  
22 to lawyers and to their clients.

23 Now, when the commission first began meeting,  
24 it decided very quickly that the rules were not in  
25 need of any radical overhaul of the type that had

1 occurred in 1969 when the ABA moved from the Model  
2 Code of Professional Responsibility to the Model  
3 Rules. Rather, we thought that the rules were working  
4 quite fine, and the Commission then defined its goals,  
5 a more limited goal of updating the rule in light of  
6 the developments that occurred since their initial  
7 adoption in 1983.

8 Moreover, after some initial tinkering with  
9 the first rules that we looked at, the Commission  
10 increasingly adopted what we continually refer to as a  
11 minimalist approach. As we went along, more and more  
12 often the mantra would be repeated, if it ain't broke,  
13 don't fix it. What's wrong with the rule? Not is  
14 this the best possible rule we could have but rather  
15 is the rule working, if it's not working, why isn't it  
16 working, let's fix it.

17 I want to mention just a word about what we  
18 thought was the extraordinary openness of the  
19 Commission's process in recommending these changes.

20 We met approximately four to five times a  
21 year. I think we had something like 50 days of  
22 meetings. All of our meetings were open. They were,  
23 in fact, regularly attended by a number of lawyers,  
24 including our liaisons, such as NOBC liaison, John  
25 Berry. We had representatives from the United States



1 Department of Justice representing prosecutors who  
2 were, I believe, present at all of our meetings. We  
3 had representatives from ALAS, which is the large law  
4 firms self-insurance group, and a number of Bar  
5 organizations and just individual lawyers who were  
6 interested in the process.

7 They attended the meetings. They were  
8 invited to speak at the meetings. They gave us their  
9 comments. We often reached out to them to ask  
10 questions about how these rules were working in  
11 practice.

12 We posted drafts all along during the  
13 five-year process. We posted drafts on the commission  
14 website, virtually all of the drafts that we  
15 considered. We received a very large number of  
16 comments, and we revised our drafts continuously  
17 throughout this period.

18 We submitted our final report to the ABA  
19 House of Delegates in August of 2001. The House of  
20 Delegates began its review at that time, and that  
21 review was completed the following February 2002, and  
22 there were a couple of additional rules that were  
23 considered the following summer, August 2002,  
24 recommendations from the ABA Commission on  
25 Multi-Jurisdictional Practice. Those resulted in

1 changes to Rules 5.5 and 8.5 that I will mention in a  
2 moment.

3 During the time that the House considered the  
4 Ethics 2000 proposals, they adopted virtually all of  
5 the recommendations we made, although with a couple of  
6 important exceptions.

7 So what kinds of changes were adopted as a  
8 result of the Ethics 2000 process? What I want to do  
9 now is just talk about, just to highlight a couple of  
10 the more significant changes. There is no way I could  
11 possibly report to you even all of the major changes  
12 in the time that I have allotted, but just to hit some  
13 of the highlights and to sort of group them according  
14 to different categories, different types of changes  
15 that we made.

16 You probably know that the number one  
17 complaint about lawyers is that they don't adequately  
18 communicate with their clients. Among the most  
19 important changes that we think we made are those that  
20 were designed to clarify and to strengthen the  
21 lawyer's duty of communication.

22 For example, throughout the Rules we replaced  
23 the phrase "consent after consultation" to "informed  
24 consent" because we thought that would more clearly  
25 communicate the nature of the communication that's

1 required between a lawyer and client.

2 Secondly, we required that -- we added a  
3 number of writing requirements throughout the Rules.  
4 For example, we required that conflict waivers be  
5 confirmed in writing; that is, recognizing that it's  
6 often difficult to get the client's signed consent,  
7 nevertheless we thought it was important that there be  
8 a writing. We took the proposal from a couple of the  
9 states. I think Washington state had a specific  
10 requirement that the client's consent be confirmed in  
11 writing, so it would be sufficient, for example, to  
12 send a confirming letter.

13 Along these lines, the Ethics 2000 Commission  
14 had recommended that fee agreements be confirmed in  
15 writing as well. That was one of the recommendations  
16 that was not adopted by the ABA. And my understanding  
17 is that the first two changes that I mentioned,  
18 changing consent after consultation to informed  
19 consent and requiring that conflict waivers be  
20 confirmed in writing, are being recommended by the  
21 Michigan committee and that the Michigan committee,  
22 like the ABA, has declined to recommend that fee  
23 agreements be put in writing.

24 In our second category of changes we  
25 clarified and strengthened the lawyer's duty to

1 clients in specific problem areas. For example, we  
2 added a prohibition on most client/lawyer sexual  
3 relationships, a change that I understand is not being  
4 currently recommended by Michigan. I hope there will  
5 be a little more discussion on that.

6 In addition, and a change that is being  
7 recommended by Michigan, modifications were made in  
8 Rule 1.14, the rule that applies to representing  
9 clients with diminished capacities, and the point of  
10 those changes was to give additional guidance to  
11 lawyers as to what specific types of protective  
12 measures lawyers can take, that is, short of requesting  
13 a guardianship.

14 Third category of changes, we responded to  
15 the changing organization and structure of law  
16 practice, first of all, by recognizing the extent to  
17 which lawyers are now serving as arbitrators,  
18 mediators, and third party neutrals. We have  
19 recommended an entirely new Rule 2.4 that specifically  
20 addresses the lawyer who serves in that third party  
21 neutral role, and in addition we have modified  
22 Rule 1.12 to address conflicts of interest of lawyers  
23 who have previously served as the arbitrator,  
24 mediator, or third party neutral in a particular  
25 matter, what can that lawyer or that lawyer's law firm

1 subsequently do by way of representing clients in the  
2 same or substantially related matters?

3 We made important change -- we began the  
4 process of recommending changes to Rules 5.5 and 8.5  
5 that were then picked up by the Commission on  
6 Multi-Jurisdictional Practice, and these are the  
7 changes to Rule 5.5 and 8.5 having to do with -- 5.5  
8 creates a number of so-called safe harbors; that is,  
9 situations in which we make it clear that lawyers who  
10 are engaged in cross border practice will not be  
11 considered to be engaged in the unauthorized practice  
12 of law, and Rule 8.5 deals with the disciplinary  
13 authority of a state to discipline lawyers who engage  
14 in unauthorized practice in their state or even while  
15 engaged in authorized cross border practice,  
16 nonetheless will be held to be subject to the  
17 disciplinary authority of the host state.

18 It also addresses a choice of law provision  
19 as to if you are going to be disciplined by a state  
20 that is not your licensing jurisdiction which of the  
21 rules, again keeping in mind that there inevitably  
22 will continue to be a lack of complete uniformity,  
23 it's important to know how do you know which state  
24 rules to comply with when your practice involves more  
25 than one jurisdiction.

1                   With respect to the imputation of conflicts  
2 of interest and the question of screening, the  
3 Ethics 2000 Commission had recommended to the ABA that  
4 lawyers be permitted to or law firms be permitted to  
5 avoid imputation by enacting screens in some  
6 situations involving lateral moves by lawyers. The  
7 ABA rejected that recommendation. It's my  
8 understanding that Michigan has a proposal that is  
9 somewhat of a compromised position which reflects the  
10 practice that has already existed in Michigan, if not  
11 specifically in the rules themselves, at least in an  
12 ethics committee opinion.

13                   By and large, let me say that I am absolutely  
14 thrilled. I think the Michigan committee did a  
15 terrific job. I am particularly impressed with the  
16 recommendation on screening. I wish we had had that  
17 proposal before us. I think it's a proposal that we  
18 might have been able to sell to the ABA.

19                   Fourth, we responded to questions raised  
20 about the new technology. For example, throughout the  
21 advertising and solicitation rules we have talked  
22 about what happens when lawyers have their own  
23 website. We have talked about electronic  
24 communications. We have defined, by the way,  
25 throughout the rules whenever there is a requirement

1 of a writing, writing is defined to include electronic  
2 communication. So if you want to confirm a conflicts  
3 waiver through e-mail, that would be an acceptable  
4 form of writing.

5 Fifth category, we tried to clarify any  
6 ambiguities in existing rules and the comments to  
7 provide better guidance and explanation to lawyers.  
8 For example, we took the terminology section and we  
9 elevated it to a black letter rule, an entirely new  
10 Rule 1.0. We added some newly defined terms, and then  
11 we added commentary to the definitions, again with the  
12 view towards doing as much as we can to educate and  
13 give lawyers guidance as to how they can comply with  
14 the rules.

15 Throughout the rules we revised and expanded  
16 the comments in order to give better explanations and  
17 examples, once again with a view towards making it  
18 easier for lawyers to comply with the rules.

19 We completely reorganized Rule 1.7, the basic  
20 conflicts of interest rule, not with a view toward  
21 making substantive changes but simply to try to better  
22 articulate what the conflict rule is and how it works.

23 Sixth category of changes, we clarified and  
24 strengthened the lawyer's obligations to the tribunal  
25 and to the justice system itself. For example, in

1 Rule 1.6, the confidentiality rule, we added a  
2 provision that permits lawyers to disclose in order to  
3 obtain legal advice for themselves about their own  
4 compliance with the rules.

5 And we revised Rule 3.3 to strengthen the  
6 lawyer's obligation of candor to the tribunal with  
7 respect to testimony and actions taken by clients and  
8 other witnesses, for example to clarify that the duty  
9 of candor to the tribunal applies to depositions as  
10 well as to trial testimony.

11 Seventh and finally, we recommended the need  
12 for changes in the delivery of legal services to low  
13 and middle income persons. For example, we added a  
14 new Rule 6.5 which relaxes the conflict of interest  
15 and imputation rules in situations in which lawyers  
16 acting under the auspices of programs sponsored by  
17 nonprofit associations, such as the Bar association or  
18 by the court, provide short-term limited legal  
19 services, for example manning one of these lawyer  
20 association hotlines, to encourage lawyers to do this  
21 without worrying excessively that a failure to perform  
22 a conflicts check may ultimately conflict their law  
23 firm out of a representation.

24 That just gives you, I think, just a  
25 smattering of some of the changes we recommended and



1 the reasons why we recommended, and I hope if you have  
2 questions we would be happy to answer them. At this  
3 point I am going to turn the program over to Becky  
4 Stretch who is going to tell you a little bit about  
5 what the ABA has been doing since the adoption of the  
6 rules to assist states like Michigan in reviewing  
7 these proposed changes.

8 MS. STRETCH: Thank you. I first want to  
9 thank the State Bar of Michigan for its long history  
10 of contribution to the field of ethics and  
11 professionalism nationally. There have been several  
12 members on our Standing Committee on Ethics and  
13 Professional Responsibility from Michigan, and of  
14 course you have had two wonderful executive directors  
15 who have made tremendous contributions to increasing  
16 professionalism and ethics in the profession.

17 Mike Franck, of course, was involved in these  
18 rules when they were first adopted in 1983, and he was  
19 a moving force and had a lot of influence on how the  
20 rules first started. And, of course, as Nancy has  
21 already told you, John was there with us, lo, these  
22 five years as we have been looking at them again. So  
23 we at the ABA Center for Professional Responsibility  
24 are very appreciative, and we believe that the  
25 profession has been greatly strengthened by those

1 contributions.

2 As Nancy said, we are here on behalf of the  
3 Joint Committee on Lawyer Regulation. That is the  
4 entity that we are working with to help states review  
5 the rules. And in terms of reviewing the rules, this  
6 includes the amendments made by the ABA House of  
7 Delegates not only based on the recommendations of the  
8 Ethics 2000 Commission but also the  
9 Multi-Jurisdictional Practice Commission, so E2K and  
10 MJP. And I see that Michigan has proposed amendments  
11 that do coincide with what the ABA has recommended on  
12 multi-jurisdictional practice. We will say a little  
13 bit more about that in a second.

14 Of course each state has to decide whether to  
15 accept, modify, or reject the many amendments made by  
16 the rules. We understand that there are important  
17 policy differences between the states and the ABA, and  
18 we, of course, are not trying to persuade everyone  
19 that they need to adopt the Model Rules exactly as we  
20 have adopted them by the ABA, and, of course, Ethics  
21 2000 doesn't totally agree with a couple of things  
22 that the ABA did. But, nevertheless, we are certainly  
23 encouraging states, urging states to seriously  
24 consider the advantages of at least substantial  
25 uniformity of the state rules.

1 Nancy mentioned there is a great deal of  
2 cross border practice going on in America today.  
3 Lawyers are increasingly engaged in  
4 multi-jurisdictional practice. As they cross state  
5 borders, they need to comply with the ethical rules of  
6 what you might call the host jurisdiction, the  
7 jurisdiction where they are not licensed, even if they  
8 are licensed in more than one jurisdiction. If the  
9 rules in those jurisdictions are substantially the  
10 same, it is, of course, much easier for the lawyer to  
11 comply with the ethics rules. And it is also easier  
12 for the state disciplinary systems to administer  
13 reciprocal discipline or just any kind of discipline.

14 Uniformity also helps to preserve the  
15 position of the state courts as the primary regulators  
16 of lawyer conduct. There have been, of course, a  
17 number of recent efforts to transfer some of that  
18 authority to the federal government, evidence the  
19 Sarbanes-Oxley legislation and SEC regulations, and  
20 also on a slightly similar note, the efforts of  
21 federal prosecutors to have federal courts adopt rules  
22 governing the conduct of federal prosecutors in  
23 federal court or even in state courts, particularly  
24 with respect to Rule 4.2, the rule prohibiting contact  
25 with represented persons. If state rules differ too

1 widely, we believe that gives ammunition to those who  
2 would argue for more national regulation.

3 With those thoughts in mind and for other  
4 more pragmatic reasons, many state committees have  
5 taken the view that they will take a strong look at  
6 the ABA proposals and try to agree with them where  
7 necessary but, of course, to adopt their own rules where  
8 there are significant policy differences.

9 Of course in keeping with the high standards  
10 that Michigan already has, your committee has done a  
11 thorough job, as Elaine and Nancy have already pointed  
12 out. It agreed with the bulk of the ABA  
13 recommendations, but, of course, maintained differences  
14 that are important in Michigan, most notably is, of  
15 course, the confidentiality rule where Michigan decided  
16 to not agree with what the ABA did in keeping a very  
17 limited discretionary rule on disclosure. Michigan  
18 continues to have a leadership role in this area, and  
19 I believe that because of states like Michigan and  
20 others the ABA will, of course, be looking at this  
21 again.

22 There is currently a task force on corporate  
23 responsibility that will bring back recommendations to  
24 the ABA, again, to consider changes in Rule 16 on  
25 confidentiality and Rule 113 on organizational

1 clients. This is partly in response to Sarbanes-Oxley  
2 and other federal legislation, but it's also just  
3 because the states are trying to let the ABA know that  
4 it needs to get with it in these areas. So we  
5 appreciate your leadership in that area.

6 One thing I would also like to point out that  
7 your committee is recommending is that, and I believe  
8 that will bring forward to you that Michigan consider  
9 adopting the comments to the ABA Model Rules or the --  
10 the Michigan rules. I should say there are comments  
11 to the ABA Model Rules that in the past Michigan has  
12 not included, and Michigan has looked at those rules,  
13 changed them where appropriate for Michigan, amended  
14 them and come up with, I think, a really terrific  
15 recommendation.

16 I do think one of the most important things  
17 that the Ethics 2000 Commission did was the excellent  
18 work that it did on the comments. They now provide  
19 what we call sort of book end examples of this would  
20 be a really good example of what not to do and here is  
21 a good example of what to do, but you can't really  
22 draw a fine line as to what's ethical and unethical,  
23 but here is consideration, and I think the comments  
24 are really terrific.

25 The Joint Committee is keeping track of the

1 progress in all of the various states. We can provide  
2 your committee and/or any of you who are interested  
3 with information about what's going on nationally. We  
4 do have a website that soon will have comparisons  
5 between every state's proposed rules and the Model  
6 Rules and also will have by rule what all the  
7 different states have so it's easier to say what all  
8 the differences are nationally, if any.

9 I would like to point out that I think most  
10 of the states that have looked at it are, indeed, going  
11 along with the rule on sex with clients, and I do  
12 think that is mostly because they don't want to talk  
13 about it, in spite of the fact that Nancy says she  
14 hopes that you will look at it again.

15 About 12 states have completed the review,  
16 like your state, but only one has actually voted by  
17 the court already, and that is North Carolina, and  
18 their rules have taken effect already.

19 This, of course, is a process where we all  
20 learn from one another, and we look forward to  
21 continuing to do so and learning from your experience  
22 as well.

23 Do you want to add anything?

24 MR. BYERLEY: I just wanted to add a couple  
25 of things. As the staff person with the Ethics

1 Committee, I am hoping all of you understand the  
2 amount and depth of the work that both the ABA  
3 Commission on Ethics 2000 undertook and our Michigan  
4 Ethics Committee. Just all of you that do not know,  
5 our committee is comprised of like 40 individuals of  
6 judges and lawyers throughout the state and some of  
7 which are on the Representative Assembly as well. But  
8 they have done a tremendous amount of work, starting  
9 with analyzing each rule, doing a report on each rule,  
10 our subcommittee hearings and meetings, and then our  
11 full Ethics Committee.

12 There has just been hundreds and hundreds of  
13 hours of work that have been undertaken to these  
14 rules, and procedurally, just so that you know, what  
15 will happen is the Ethics Committee meets next on May  
16 9th, which is less than two weeks away. It's our hope  
17 at that meeting that our work will be done as a  
18 committee. We will then put the final recommendations  
19 out to you, and we will get them out to you as soon as  
20 we can so that you will have plenty of time to look at  
21 them and discuss them with individuals that you know  
22 before your meeting in September.

23 So it's our goal when you come to the meeting  
24 in September not that we have a lot of amendments from  
25 the floor necessarily, because we want to give you

1 plenty of time to do that in advance so we can try to  
2 work that out. But, again, I hope you all appreciate  
3 the great depth of work that's been done by the  
4 volunteer committee of the State Bar of Michigan  
5 working in conjunction with the ABA to get a new set  
6 of ethics rules which I think will take us for many  
7 years ahead. Thanks.

8 MR. BERRY: I would like to add one other  
9 thing about the information that will be available to  
10 you prior to your deliberations in September.

11 We got together yesterday, and we sort of  
12 joked about being groupies in this area. When you  
13 work at it long enough, you start throwing around the  
14 numbers and everything else concerned. I asked Nancy,  
15 I said, What are you doing in reference to all this?  
16 She said, After five years, I would like to go on with  
17 my life. And, of course, here she is now doing the same  
18 thing, which is talking about this.

19 But, depending on the level of information  
20 that you want, I ask you probably to filter it through  
21 me first or Tom first. We can get you to more  
22 information than you possibly want, but one  
23 recommendation I have is there is a tremendous amount  
24 of ABA information that relates to reporter's notes  
25 concerning the sort of explanation of why certain



1 things were done and were considered. That  
2 information, I think, would be very helpful and useful  
3 to you for back-up information if you are interested  
4 in a particular rule. I can't imagine between now and  
5 September you would spend your whole lives reading  
6 through every page of that information. But I think  
7 as it goes forward we try to bring your attention to  
8 those areas that might perk your interest the most,  
9 whether or not it's a particular rule or whatever  
10 else, or through Tom or through the Ethics Committee,  
11 we will do all we can in the state to help you and  
12 then the resources available and the studies will be  
13 available for you as well.

14 Yes, Elaine.

15 MS. FIELDMAN: Two comments actually. First  
16 of all, we did thoroughly discuss the sex with client  
17 rule, and our Supreme Court recently considered that  
18 rule also and right before we undertook this task.

19 Secondly, when you do look at these rules,  
20 one thing we always had to keep reminding ourselves is  
21 that these are discipline rules, they are not  
22 aspirations. So when you read something and you think  
23 this would be a good idea, also think this is  
24 something that a lawyer could be disciplined for not  
25 doing or for doing, and that's very important to keep

1 in mind when you are looking at this. It's not only  
2 what's a good idea.

3 MS. DIEHL: You mean we are not recommending  
4 sex with clients?

5 MR. BERRY: But that is subject, Nancy, that is  
6 subject to debate in September, however, depending on  
7 how you want to go about that issue.

8 Are there any questions for the folks that  
9 are here? This is a great opportunity to pick their  
10 brains, or if you are ready to go home, well, we can  
11 work that out. Tom is over here as well. So any  
12 questions. Yes, there is one over here.

13 MS. RADKE: Victoria Radke from the 47th  
14 circuit. Is this information available online at  
15 aba.org?

16 MS. STRETCH: Yes. All the information I  
17 referred to is -- we have a new web page for the Joint  
18 Committee on Lawyer Regulation. I am sure Tom can  
19 give you the address, but if you have a pencil, it's  
20 abanet.org. If you go to the Center for Professional  
21 Responsibility home page, which is CPR, and you click  
22 on implementation initiatives. That's where we -- and  
23 we have all the different state reports. We have an  
24 ongoing status report of what all the states are doing  
25 on the various different recommendations, and it

1 clicks on, like if you want to see what North Carolina  
2 did, you just click on the North Carolina report, and  
3 it will take you right there. Pretty soon I will also  
4 have the comparisons I have done of all the different  
5 states' reports on the Model Rules, as well as the  
6 various rules, so yes.

7 MS. RADKE: Thank you. And are we doing the  
8 same on our website?

9 MR. BYERLEY: Yes.

10 MR. GREEN: Just a quick question. Has there  
11 been any consideration as to importance of documenting  
12 the termination of the client-attorney relationship?

13 MS. MOORE: I believe there was a proposal.  
14 As I said, throughout the Ethics 2000 process there  
15 was concern about documentation and the importance of  
16 doing as much documentation as possible. However,  
17 there was also the understanding that, again,  
18 remembering that this is a disciplinary rule, that it  
19 is substantially burdensome on lawyers to make all  
20 these writing requirements, and so we ended up that we  
21 debated both where in the rules -- we definitely  
22 wanted to add more writing requirements, and then the  
23 question is picking and choosing which are the points  
24 that are most important to require the documentation.

25 It was the belief of the ABA that it was the

1 conflicts waivers, that that was such a source of  
2 difficulty for both clients and lawyers that this is  
3 something that ought to be required.

4 I would think in terms of terminating in both  
5 engagement letters and termination of representation  
6 the ABA would have considered that at the level of  
7 best practices where we would absolutely urge lawyers  
8 for your own benefit as well as the benefit of your  
9 clients this is the best thing to do, but we did not  
10 require it in terms of a disciplinary rule.

11 MR. BERRY: What I might add for just a  
12 second is one of the beauties of our new ethics school  
13 is that the ethics school, and hopefully this will be  
14 expanded, will be talking about that issue of both  
15 termination and declination, not taking a client, and  
16 how you can use that determination as a marketing tool  
17 as well as a protection tool for yourself. And so we  
18 will be educating lawyers more and more in those  
19 particular efforts even though there is not a specific  
20 discipline rule to deal with it.

21 MS. FIELDMAN: There is a new rule proposed  
22 dealing with prospective clients and how  
23 confidentiality comes in and how you are conflicted  
24 out in situations in these so-called beauty contests,  
25 so there is a rule on a related matter that addresses

1 that.

2 MR. HARON: Dave Haron from the 6th circuit.  
3 This is really directed at Tom, Liz, and our staff.  
4 When we discuss this in September, will the proposal  
5 be presented in bulk or will we have opportunities to  
6 deal with specific areas? I haven't read them, you  
7 know, the proposal yet, but when we are talking about  
8 something like multidisciplinary practice, we have had  
9 debates on that in the past, and I am concerned that  
10 if, whatever the rule is recommended, that if it  
11 changes our practice, that when we get it in front of  
12 us it will be part of, you know, 20 or 30 or 40  
13 changes, and we won't have an opportunity to really  
14 address those because of the nature of debate at the  
15 Assembly. We tend to sometimes either go over  
16 something very quickly or don't debate it because it's  
17 too much. So I wonder how it will be presented to us.

18 CHAIRPERSON ROMBACH: Thank you very much,  
19 David. Tom Rombach. I am from the 16th circuit, as  
20 last I remember, and what we will be doing is we will  
21 be getting a book of this nature. Again, I am not  
22 sure that it's finalized, but this is a draft version.  
23 It does include a red line version of the current  
24 Rules of Professional Conduct here in Michigan and  
25 then a draft of the proposed Rules of Professional

1 Conduct that Barry Powers and Kevin Breck and Sharon  
2 Noll Smith all serve as liaison to that group, and I  
3 am sure they can go into detail, but you are right,  
4 there are several positions that the Representative  
5 Assembly has taken that are going to be in  
6 controversy there, not only the multidisciplinary,  
7 but I believe there may be some facets of  
8 multi-jurisdictional in there as well, as well as the  
9 attorney-client no sexual relations provision at least  
10 addresses an issue in that draft as well, and the  
11 Assembly has stated positions on a lot of those  
12 matters, so we are going to try to keep our  
13 institutional history and if you can be vigilant  
14 during that discussion.

15 But the reason we are doing this here today  
16 is to identify these issues and contentions so the  
17 Assembly can be thinking about it so when this draft  
18 is completed along with the comments that we can  
19 consider it, and all of this is on the website right  
20 now, so if you go to the State Bar website you can  
21 break down this book as it stands, but that's subject  
22 to further change in May as they come up with some of  
23 the comment editing that they feel is very important  
24 to show us the differences.

25 So, again, I am going to take up the whole

1 thing. It's the annual meeting. We meet both in the  
2 morning and the afternoon. I fought very hard to keep  
3 that meeting intact. So all these issues are on the  
4 table, so I appreciate everyone staying here today and  
5 trying to flesh out some of these items, but you are  
6 right, and if somebody wants to reinvent the wheel and  
7 say we are going to revisit past Assembly actions, we  
8 could do just that because, even though the Assembly  
9 has taken a policy position, this is a proposal, and  
10 we can change course at any time. So I appreciate you  
11 keeping that in mind. Thanks, David.

12 MR. BERRY: Tom, if I could add one more note  
13 in reference to helping you out. You are used to  
14 getting small packages and big packages, and the big  
15 packages, as you point out, have all kinds of  
16 different rules in it. Having worked with this group  
17 for five years and done this before, I cannot tell you  
18 how often -- out of those 50 meetings there were hours  
19 of discussion, and probably, we were joking about it  
20 yesterday, doing the 180-degree turns based upon new  
21 information that was provided, useful information that  
22 was provided.

23 The more time you can devote to this prior to  
24 the meeting, and we as a staff and I am sure the  
25 committee would give you as much time as you need, if

1 you see these things ahead of time and something perks  
2 up and you say, you know, I just don't like this,  
3 whatever, give us the opportunity to talk to you, and  
4 also if somebody finds something that is a problem, to  
5 the last second we will get to the committee and we  
6 might be able to figure out that we do need to make a  
7 change prior to that time.

8 But this is something that really takes a lot  
9 of study, and we will be glad to help you in any way  
10 that we possibly can between now and during the  
11 meeting.

12 CHAIRPERSON ROMBACH: As Chair, I guess are  
13 there any further comments or questions to the  
14 illustrious panel? As I said, we are going to be  
15 taking up the issue, as in any issues of great  
16 magnitude, importance, and complexity. That's why we  
17 are doing this here today. I know these folks would  
18 be willing to answer any questions you might have  
19 privately, although I have to assure the two people  
20 from out of town that they are aboard a plane in  
21 fairly short order, so I really appreciate them coming  
22 in. If we could have a round of applause for our  
23 guests.

24 (Applause.)

25 CHAIRPERSON ROMBACH: Thanks, everyone, for



1 your rapt attention. Glenna Peters and Ms. Lott and  
2 Ms. Allen-Kost are handing out the permission slips to  
3 leave, if you can fill those out. Additionally, if  
4 you can have us retrieve the name badges.

5 I would also just want to remind the people  
6 that are interim Assembly appointees to make sure that  
7 they have their nominating petitions. That's an  
8 interim appointment and you have to rerun for the  
9 balance of the term.

10 If there is no other further business before  
11 the Assembly at this juncture, I would entertain a  
12 motion to adjourn.

13 VOICE: So moved.

14 CHAIRPERSON ROMBACH: It's been moved and  
15 seconded. All those in favor indicate by saying yes.

16 Any opposed say no.

17 Hearing none, it passes unanimously. Thank  
18 you very much for your time.

19 (Proceedings concluded at 1:16 p.m.)  
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