

STATE OF MICHIGAN

STATE BAR OF MICHIGAN

MEETING of the REPRESENTATIVE
ASSEMBLY of the STATE BAR OF
MICHIGAN

Proceedings had by the Representative Assembly of the
State Bar of Michigan at Ypsilanti Marriott at Eagle Crest,
Ypsilanti, Michigan, on Thursday, September 14, 2006, at the
hour of 9:30 a.m.

AT HEADTABLE:

LORI A. BUITEWEG, Chairperson
EDWARD L. HAROUTUNIAN, Vice-Chairperson
ROBERT C. GARDELLA, Clerk
JOHN T. BERRY, Executive Director
HON. CYNTHIA D. STEPHENS, Parliamentarian
ANNE SMITH, Staff Member

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9-14-06

1

Ypsilanti, Michigan

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Thursday, September 14, 2006

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9:33 a.m.

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R E C O R D

5

CHAIRPERSON BUITEWEG: The September 14, 2006

6

meeting of the State Bar of Michigan Representative

7

Assembly is hereby called to order.

8

Mr. Clerk, is there a quorum?

9

CLERK GARDELLA: Madam Chairperson, yes,

10

there is a quorum, and I certify we have the numbers.

11 CHAIRPERSON BUIREWEG: Thank you, sir.
12 Is there a motion to adopt the proposed
13 calendar?
14 VOICE: So moved.
15 VOICE: Support.
16 CHAIRPERSON BUIREWEG: I heard a motion and
17 support on the calendar. Is there any discussion?
18 All those in favor of adopting the proposed
19 calendar, please say yes.
20 Any opposed?
21 Any abstentions?
22 Motion carries. The calendar is adopted.
23 Is there a motion to approve the April 29th
24 minutes?
25 VOICE: So moved.

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1 VOICE: Support.
2 CHAIRPERSON BUIREWEG: I heard a motion and a
3 second to approve the April 29th minutes. Is there
4 any discussion?
5 All those in favor say yes.
6 Any opposed?
7 Abstentions?
8 Motion carries.
9 I am going to introduce Carl Chioini, the
10 chairperson of our Assembly Nominating and Awards
11 Committee, and I would ask you to please pull the
12 white sheet from the packet at your desk which
13 contains an amended list of nominations, and
14 Mr. Chioini is going to go to the microphone up front
15 here and present the interim nominations.

16 MR. CHIOINI: If the parties are in the room,
17 would you please stand.

18 From the 1st judicial circuit, Mr. Barry
19 Poulson of Hillsdale. From the 6th judicial circuit
20 we have one vacancy, Martin Krohner of Farmington
21 Hills. From the 6th judicial circuit we have one
22 vacancy till 2008, Joan Vestrand of Rochester.

23 From the 17th judicial circuit, one vacancy,
24 Mr. Nelson Miller from Grand Rapids. From the 28th
25 judicial circuit, one vacancy, Mr. Shane Pranger of

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1 Cadillac. From the 51st judicial circuit, one
2 vacancy, Jeffrey Nellis of Ludington.

3 And the last one from the 53rd judicial
4 circuit, Mr. Daniel Martin of Cheboygan.

5 CHAIRPERSON BUIREWEG: You have a motion?

6 MR. CHIOINI: I do move that the members, the
7 nominees be appointed, seated.

8 CHAIRPERSON BUIREWEG: Is there a second?

9 VOICE: Support.

10 CHAIRPERSON BUIREWEG: Any discussion?

11 All those in favor of the motion to appoint
12 these individuals as interim appointees to the State
13 Bar of Michigan Representative Assembly, please say
14 aye.

15 Any opposed?

16 Any abstentions?

17 The motion carries, and welcome. Please take
18 your seats if you haven't already.

19 (Applause.)

20 CHAIRPERSON BUIREWEG: And I owe an apology

21 to these folks right out of the gate. I was supposed
22 to have a new member meeting out in the front in the
23 lobby at 9, and I became a little distracted with
24 other matters this morning. I promise I will give you
25 an orientation at some point, but, believe me, you

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1 will be oriented by the end of the day.

2 Those of you who are sitting next to a new
3 member, please help them along if they have some
4 questions. I know you will do that.

5 Again I have Mr. Chioini coming forward to
6 present consideration of the award recipients for the
7 awards that we will be giving at the luncheon today,
8 and those are the Michael Franck and Unsung Hero
9 Awards.

10 MR. CHIOINI: Again, thank you. For the
11 Michael Franck Award, all of you have in your packets
12 all of the nominations. You can see that this one is
13 well deserved. The committee selected the Honorable
14 Judge William Leo Cahalan. The committee would ask
15 the Assembly to support the motion.

16 CHAIRPERSON BUIREWEG: Support?

17 VOICE: Support.

18 CHAIRPERSON BUIREWEG: Is there any
19 discussion?

20 All those in favor of awarding the Michael
21 Franck Award to the Honorable William Leo Cahalan,
22 please say yes.

23 Any opposed?

24 Any abstentions?

25 Motion carries.

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1 Mr. Chioini.

2 MR. CHIOINI: The next one is the Unsung Hero
3 Award, and the committee has nominated Mr. Jay D.
4 Kaplan, who is the Legal Project Staff Attorney for
5 the ACLU. Again, I would move the committee's
6 recommendation be approved.

7 VOICE: Support.

8 CHAIRPERSON BUITEWEG: Is there a second?
9 Thank you.

10 I have heard a motion and a second to award
11 the Unsung Hero Award to Jay D. Kaplan. Is there any
12 discussion?

13 All those in favor say yes.

14 Any opposed?

15 Abstentions?

16 Motion carries. Congratulations to the award
17 recipients, and we will talk more about them at the
18 luncheon today.

19 Mr. Chioini, don't go away yet. We have you
20 on the calendar for consideration of an amendment to
21 the Permanent Rules of Procedure regarding Awards,
22 8.8, and that is the tab four of your packet.

23 MR. CHIOINI: The committee has suggested to
24 the body that we avoid a little bit of a problem that
25 we have logistically, and that is having the

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1 nominations done in the morning and having the lunch
2 in the afternoon, and the proposal from the committee
3 would require the Assembly to vote on the awards at
4 the April meeting. This would be the official, when
5 they would receive their awards, and the idea being to
6 avoid all of the difficulties we have when we have the
7 morning nominations and a luncheon this afternoon.

8 I would ask that the Assembly adopt the
9 recommendation of the Rules Committee, Nominating
10 Committee.

11 CHAIRPERSON BUIREWEG: Is there a support?

12 VOICE: Support.

13 CHAIRPERSON BUIREWEG: There is a motion and
14 a second to support the proposal that the April
15 meeting of the Assembly be established as a deadline
16 for the Nominations and Awards Committee to meet and
17 recommend to the Assembly qualified members of the
18 State Bar as recipients of the Michael Franck and
19 Unsung Hero Awards. Is there any discussion?

20 All those in favor of the motion, please say
21 yes.

22 Any opposed?

23 Abstentions?

24 Motion carries. Thank you, Mr. Chioini.

25 We turn now to our item which I am sure is of

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1 great interest to all of those in the room, the jury
2 reform proposals, which you will find at tab number
3 five of your packet. I am going to ask you to look at
4 your yellow and blue sheets that are at your desk.

5 Those are the Exhibits A and B that are referenced in
6 the packets, and specifically that is the press
7 release that was issued by the Supreme Court and the
8 actual Court Rule amendment. Those were also sent to
9 you by electronic mail, and we also have them
10 available to put up on the screen.

11 The first thing that we need to do with
12 respect to this portion of the agenda is I need to
13 have Tom Rombach from Special Issues come forward and
14 propose some special rules for how we are going to
15 handle this matter. Mr. Rombach.

16 MR. ROMBACH: Madam Chair, Tom Rombach from
17 the 16th circuit. At this time I would like to
18 propose adoption of special rule of procedure in order
19 for us to suspend certain and amend certain parts of
20 Robert's Rules of Procedure.

21 VOICE: We cannot hear back here.

22 MR. ROMBACH: Madam Chair, I am Tom Rombach
23 from the 16th circuit. At this time I would like to
24 move that we adopt the proposed rules for the Assembly
25 debate regarding the jury reform proposals. This is a

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1 special rule that will suspend certain of Robert's
2 Rules and also would amend certain of Robert's Rules,
3 for this discussion only.

4 CHAIRPERSON BUITEWEG: Before I ask for a
5 second, I am going to allow the Assembly a moment to
6 view this up on the screen. Nancy, if you could get
7 the whole thing up there, because you do not have this
8 in front of you. You were sent a draft of it by
9 electronic mail, and the panel met yesterday evening

10 and made some minor revisions to it. So I do
11 apologize, this is the first time you are seeing this.
12 I will walk you through it briefly. Can you make it
13 the whole screen?

14 MS. BROWN: I can't.

15 CHAIRPERSON BUIREWEG: This is going to grant
16 floor privileges to all of the panelists that you see
17 in front of you who I will introduce momentarily, as
18 well as Justice Markman, who is here and will
19 introduce the rules to us. We will also appoint our
20 own Assembly member, Wallace Kent, Jr., judge from
21 Tuscola County, to serve as moderator of the panel.
22 It will also allow us to have the panel discuss the
23 proposals in clusters, clusters first affecting juror
24 materials, proposals that affect juror participation,
25 that affect the role of the judge, the role of the

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1 attorney, that affect the submission of evidence.

2 what will happen under this special rule is
3 that the clusters will be discussed by the panel in a
4 group. They have each chosen rules that they would
5 like to address. We will then open it up to the floor
6 for discussion and debate and questions proposal by
7 proposal. We will take a vote one proposal at a time
8 and then move on to the next cluster, and that is
9 basically what this special rule says.

10 So that is the motion to adopt this rule, and
11 is there a second?

12 VOICE: So moved.

13 CHAIRPERSON BUIREWEG: Is there any
14 discussion? All right.

15 All those in favor of adopting the special
16 rule, say yes.

17 Any opposed?

18 Any abstentions?

19 Motion carries. The rules are adopted.

20 Thank you.

21 I would next like to introduce our esteemed
22 guest, the Honorable Justice Stephen J. Markman, who
23 is going to introduce the proposed jury reforms to us.

24 Justice Markman was appointed to the Michigan
25 Supreme Court by Governor John Engler effective

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1 October 1, 1999 to fill the seat vacated by Justice
2 James H. Brickley. In 2000 he was elected to complete
3 the term which expired January 1, 2005. In 2004 he
4 was reelected to an eight-year term which expires
5 January 1, 2013.

6 Prior to this Justice Markman served for four
7 years as an assistant attorney general of the United
8 States after being nominated by President Ronald
9 Reagan and confirmed by the United States Senate.

10 would you please join me in welcoming Justice
11 Markman at this point in time.

12 (Applause.)

13 JUSTICE MARKMAN: Thank you very much, Lori.
14 This is a very daunting audience here, and I expect I
15 will see the same kind of unanimity on this issue that
16 we did on the last issue on the agenda.

17 It is an honor to be here this morning to
18 introduce the deliberations of the Representative
19 Assembly on the matter of jury reform, and I know I

20 speak for all of my colleagues when I say that we are
21 very much looking forward to your thoughts and your
22 feedback on this issue.

23 As you know, the Supreme Court several months
24 ago issued proposed reforms for public comment. In
25 addition to the kind of forum for discussion that we

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1 are witnessing today, the Court hopes to receive
2 comments, not only from members of the Bench and Bar
3 and from key organizations, such as this of course,
4 but also from individuals who themselves have
5 participated in jury service.

6 Our comment period will culminate, I expect,
7 sometime early next year with an administrative
8 hearing before the full court at which any person or
9 organization will be invited to share their comments,
10 and I really do urge your individual participation, as
11 well as your participation through the Representative
12 Assembly and the Bar.

13 Each one of you is welcome to participate and
14 share your particular thoughts on any aspect of jury
15 reform, and we have this public comment system now.
16 we have three or four administrative hearings a year
17 which we open them up to the public, and we found this
18 to be a very valuable process for eliciting comments
19 from the public, and they have been extremely helpful.
20 Again, we invite you to participate.

21 I am not here this morning to urge your
22 approval of any or all of these reforms but only your
23 thoughtful consideration. I suspect that there is no
24 member of my court, including myself, who favors each

25 of these specific reforms. They are proposals that

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1 have been collected together from various sources, and
2 they were thought sufficiently meritorious or
3 provocative to warrant dissemination for public
4 review.

5 Therefore, there is much that these reforms
6 do not have in common. Some are couched in terms of
7 what trial courts may do and others in terms of what
8 trial courts shall do. Some represent current
9 practice in Michigan and are merely consolidated here,
10 while others represent new initiatives. Some are
11 drawn from other jurisdictions and some are not.

12 However, what these proposals do have in
13 common is that each is designed, at least intended, to
14 enhance the quality of the jury's deliberative process
15 and thereby further the truth seeking function of the
16 jury trial. Each is designed to strengthen the
17 ability of the jury to undertake to make informed and
18 intelligent decisions by making evidence more
19 accessible.

20 Each is designed to diminish opportunities
21 for gamesmanship in the trial process and to
22 facilitate the ability of the jury to assess the
23 evidence before it, and each is designed to render
24 somewhat less true Robert Frost's famous adage that a
25 jury consists of 12 persons chosen to decide who has

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1 the better lawyer.

2 There may be other proposals designed to
3 further these same purposes that may be worthy of
4 consideration, and I invite you to share your thoughts
5 in this regard. We do not purport that the proposals
6 that we have issued for public comment are exclusive.
7 Are there additional reform proposals that would
8 empower the jury in a manner consistent with the
9 architecture and constitutional premises of our
10 overall legal system to better carry out its
11 responsibility of distinguishing between truth and
12 falsity?

13 while there is no particular brief that I or
14 any of my colleagues have for any particular reform,
15 there is nonetheless tentatively strong support, I
16 believe, for the idea that these reforms should be
17 seriously explored.

18 undeniably the burden of persuasion in this
19 realm must be upon the proponents of change, not that
20 the system cannot be strengthened but simply that
21 there is at least as much potential for the system to
22 be weakened. As John Randolph once remarked in the
23 Continental Congress, change is not reform.

24 The present rules of the game have worked
25 well in enabling the jury to carry out its missions,

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1 and those rules should not be altered lightly or
2 without struggling to anticipate the unanticipated
3 consequences of change.

4 At the same time there is considerable
5 evidence drawn from the experiences of other states
6 that at least some of these proposals have succeeded
7 in further strengthening the jury's ability to
8 apprehend what has taken place in the courtroom and to
9 rely upon such evidence in reaching accurate and
10 responsible factual determinations.

11 My court seeks your collective and individual
12 response, and we will take your comments very, very
13 seriously, as I believe we always do with respect to
14 the Representative Assembly. We appreciate the
15 expertise here, and it is unfathomable to me that your
16 comments on this matter or on any other matter would
17 not be given the most serious consideration by my
18 court.

19 In 1875 the Lieutenant Governor of our state,
20 Charles May, addressed the then new University of
21 Michigan Law School and stated at the time, The jury
22 system is the handmate of freedom. No civil liberty
23 can dispense with any of her armaments. I believe
24 that a jury is always the best and fittest tribunal to
25 find the facts of a case. The facts to be found in a

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1 trial in the courts are generally the facts of common
2 life. The deductions and conclusions to be drawn from
3 these facts in nine cases out of ten are the
4 deductions and conclusions of ordinary human
5 experience. They do not so much require learning and
6 logic as practical, common sense, knowledge of human
7 nature as seen in men and not in books, and intuitive
8 perceptions of right and wrong. Qualities often are

9 found combined, I think, in the jury box than upon the
10 bench.

11 Among other matters, I would urge you to
12 reflect on Lieutenant Governor May's observations and
13 share with us your thoughts as to whether the factual
14 determinations of the trial continue mostly to concern
15 the facts of common life. And whatever your answer, I
16 would urge you to reflect upon whether current
17 procedures and practices and rules in our state can be
18 improved to allow the jury to better carry out its
19 extraordinarily important responsibilities in self
20 government in ascertaining both common and uncommon
21 facts.

22 And we would ask you, of course, as I know is
23 implicit in all of your considerations, is to consider
24 this not merely from the perspective of the Bar, not
25 merely from the perspective of the Bench and Bar, but

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1 also from the perspective of the larger public
2 interest.

3 Thank you again for the efforts of the
4 Michigan Bar and particularly its Representative
5 Assembly to assist my court in the development of our
6 state's law. Thank you very much.

7 (Applause.)

8 CHAIRPERSON BUITEWEG: Thank you very much,
9 Justice Markman.

10 All right. I am going to at this time
11 introduce our panelists. We have with us today in
12 alphabetical order, and if you could raise your hand
13 as I call your name, James Bell. James Bell is a

14 member of the white collar practice group at the
15 Indianapolis law firm of Bingham McHale. He practices
16 in the area of the criminal defense at both the trial
17 and appellate levels and defends attorneys in
18 disciplinary matters. James is a frequent speaker on
19 the issues of ethics, trial practice, and criminal
20 defense. He received his undergraduate degree from
21 DePauw University in 1996 and graduated from Indiana
22 University School of Law at Indianapolis in 1999.

23 He brings with him today his personal
24 courtroom experience in using some of the jury reforms
25 that we are considering today in Indiana.

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1 Next we have the Honorable William Caprathe.
2 He has been a circuit court judge since 1981 and was a
3 trial attorney for 15 years before that. He served as
4 chief judge from 1984 to 1997. He is from Bay City.
5 In 2004 and 2005 he served on the American Bar
6 Association's American Jury Project that paved the way
7 for the ABA Board of Governors' passing of the
8 principles for jury and jury trials.

9 He is presently a member of the ABA's
10 Commission on the American Jury Project that is
11 assigned the task of disseminating information about
12 the principle throughout the country.

13 Next we have James Dimos. Jim is a partner
14 of Locke Reynolds and chair of the firm's intellectual
15 property group. He also serves as a member of the
16 firm's management committee. He is also an attorney
17 from Indiana who has personal experience in the
18 courtroom trying cases using some of these jury

19 reforms.

20 Mr. Dimos represents businesses in all areas
21 of law and is also very active in professional
22 organizations, such as Indiana State Delegate to the
23 American Bar Association House of Delegates.

24 Mr. Dimos is also a member of the Indiana State Bar
25 Association and served on its Board of Governors from

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1 2002 to 2004. He received his B.A. from Wabash
2 College in 1983 and his J.D. from Washington
3 University School of Law in early '86.

4 Next we have the Honorable Giovan the
5 infinite judge of the Wayne County Circuit Courts
6 since January 1976. Judge Giovan has written
7 extensively of the Bench and Bar on matters of
8 evidence and civil procedure. Judge Giovan is the
9 chair of the Michigan Supreme Court Advisory Committee
10 on the Rules of Evidence and was a member of the
11 original committee appointed by the court in 1975 to
12 recommend proposed rules of evidence for the state of
13 Michigan.

14 He is also chair of the Supreme Court
15 committee on Model Civil Jury Instructions. Judge
16 Giovan is one of the authors of the two volume
17 treatise in West Michigan called Civil Procedure
18 Before Trial.

19 Next we have the Honorable Daniel G. Heath.
20 He is a ten-year veteran of the Allen Superior Court
21 Civil Division located in Fort Wayne, Allen County,
22 Indiana.

23 Prior to becoming a judge he practiced law in

24 Fort Wayne concentrating on civil and family law. He
25 brings with him many years of experience presiding

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1 over cases involving many of the jury reforms we are
2 examining today.

3 Next we have the Honorable Wallace Kent, Jr.,
4 our own Representative Assembly member who is the
5 moderator. He obtained his B.A. from Kalamazoo
6 College in 1965 and his J.D. from University of
7 Michigan Law School in 1967. He has been the Tuscola
8 County Probate Judge since 1977 and is the past
9 president of the Tuscola County Bar Association. He
10 is also a member of the Assembly.

11 Next we have Terrence Miglio. Terrence is
12 the president of the Michigan Defense Trial Council.
13 He is also a member and vice president of the law firm
14 Keller Thomas in Detroit, Michigan. His practice is
15 devoted to representing and advising clients in such
16 areas as employment law, labor relations, civil
17 rights, personal injury defense, school law and
18 municipal liability. Mr. Miglio graduated from
19 University of Michigan undergraduate and has his J.D.
20 from Wayne State University School of Law, cum laude.

21 Next Doug Shapiro, who is a partner at Muth &
22 Shapiro in Ypsilanti, right here. He focuses on
23 serious personal injury and medical malpractice cases
24 and has practiced as a trial lawyer for 15 years.
25 Prior to his work in trial practice Doug spent three

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1 years as the law clerk to Michigan Supreme Court
2 Justice James Brickley and an additional two years in
3 full-time appellate practice. Doug graduated with a
4 B.A. with high distinction from the University of
5 Michigan and also received his J.D. cum laude from
6 University of Michigan. He is a past Representative
7 Assembly member from the 22nd circuit.

8 Have I got everybody? Okay. All right.

9 what we are going to do now is we are going
10 to have Mr. Rombach come forward, and he is going to
11 introduce the first cluster of proposals to us.

12 well, before we do that, if we could have
13 Nancy please put up on the screen the visual. what we
14 have done for you with this is to break down for you
15 the proposals that emanated or were propounded by the
16 ABA jury reforms and those that have been similarly or
17 wholly enacted in Indiana. This is just to give you a
18 point of reference as to which reforms are coming to
19 us from the ABA and which ones are being used in
20 Indiana. That's just really for your reference.

21 Tom, if I could have you introduce the first
22 cluster, and we will have Judge Kent moderate the
23 panel on that, then open up each individual proposals
24 to the Assembly for questions and debate.

25 MR. ROMBACH: Good morning. Tom Rombach. I

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1 am chair of the Special Issues Committee and also
2 serving on behalf of the 16th circuit, Macomb County.

3 As chair of the Special Issues Committee, I
4 am not a proponent of these jury reform proposals in a
5 traditional sense. The Special Issues Committee met
6 and discussed these. We are not making a
7 recommendation on any of them. So, therefore, my role
8 today is more of a presenter. I do, however, reserve
9 the right to express my own personal opinion in an
10 appropriate manner, at least as an appropriate manner
11 as I can muster.

12 with that proviso, I will move to the first
13 cluster that Lori referred to. That's proposals
14 affecting jury materials under A. Just for your
15 reference, in your materials that were sent to your
16 respective offices, the trial notebook proposal, the
17 first one we will be considering is actually on page
18 seven of your materials under the tab referencing the
19 jury reform proposals. So page seven is the first
20 under consideration.

21 The next jury instructions is going to be
22 listed on page ten of your materials. And the final
23 one in this cluster, the proposal regarding final
24 instructions, is actually on page 11. So if you want
25 to sing along with the experts, you may do so in the

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1 appropriate pages.

2 At this point, I will now defer our
3 discussion to the chair of our panel and our fellow
4 Representative Assembly member, Judge Kent.

5 JUDGE KENT: Thank you. By way of
6 introduction, first of all, I wanted to thank
7 Justice Markman for his comments and assure you that

8 in my experience the Supreme Court really does want
9 your comments, not only today, but in the future until
10 this matter is resolved.

11 Secondly, I want to think Lori for all the
12 work she has put into structuring this. This is
13 almost a Herculean task to debate these matters in the
14 time allotted, and Lori and others have worked
15 diligently in order to get this organized.

16 Many of the proposals will have generated
17 some very strong opinions, many of them we may find
18 that there is general consensus. Because of the time
19 allotted, I am going to ask that to the extent
20 possible you spend the bulk of your time in comment on
21 those matters concerning which there may not be any
22 basic consensus in order that we may spend more time
23 listening to the comments of all persons who have
24 views on the matters concerning which there is not
25 consensus.

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1 with that having been said, regarding this
2 first cluster, I would ask if either of the gentlemen
3 from Indiana wish to speak about the experience that
4 they have had with any of these three issues, because
5 Indiana has already implemented some of these
6 proposals in their Court Rules, and they can speak
7 from actual experience.

8 Excuse me. I have been reminded before we do
9 that Judge Caprathe is going to briefly discuss the
10 genesis of this whole litany of proposals as generated
11 by ABA.

12 JUDGE CAPRATHE: Many of the proposals that

13 are here have come from the principles that were
14 referred to earlier that the ABA passed in 2005 at the
15 annual meeting, the Board of Governors passed. Can
16 you hear me back there? And many of them haven't come
17 from those principles. Some of the principles would
18 support in concept rather than directly.

19 The one that we start with has a criticism
20 from myself and many of the judges from the Michigan
21 Judges Association, and that is that it uses the term
22 "must encourage," which is rather confusing. In a
23 sense it's sort of contradictory. But we would
24 support that rule for notebooks if it were to say
25 "may," because, depending upon the complexity of the

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1 case, the length of the case, the issues involved, the
2 attorneys, there are a lot of considerations before
3 you would want to take that big step of using a
4 notebook in a particular case, and, therefore, we
5 would support it if it were to be changed in that
6 respect.

7 And that cuts through many of these
8 suggestions, that if the word "may" would replace
9 "must" or "shall" or "should," we would prefer it, and
10 then we would be able to make a group decision with
11 the attorneys and the judge as to how to proceed, with
12 the judge making the ultimate decision.

13 JUDGE KENT: Thank you, Judge Caprathe.
14 Judge Heath, would you like to comment at all?

15 JUDGE HEATH: Yes, thank you very much. We
16 have, in fact, the words "may authorize" in our Jury
17 Rule Number 23 in Indiana regarding trial notebooks.

18 It says, In both criminal and civil cases the court
19 may authorize the use of juror trial books, and I
20 won't read the rest of the rule, but those are the
21 pertinent words we use.

22 I have been using trial notebooks for many
23 years, well before this jury rule was adopted.
24 Generally what happens, and you are probably doing
25 some of that as well already without this rule,

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1 generally what happens, we meet at a final status
2 conference and go over many things, but among them
3 will be the things in the jury trial notebook. Those
4 usually include those matters to which the attorneys
5 have stipulated the authenticity of the exhibits.
6 Those materials that have not been stipulated to are
7 kept out of the trial notebook, at least in my court,
8 and they are treated like any other exhibit and
9 considered for admission at the time pertinent during
10 trial.

11 So the trial notebook contains stipulated
12 material. Record is made outside the presence of the
13 jury before the trial begins about those matters of
14 which they wish to preserve objection. For example, I
15 think I mentioned some comments I gave to the
16 committee before I got here. Medical costs or medical
17 records may be in the trial notebook, but counsel
18 often makes a record that just because there is an
19 exhibit that has the total costs involved for medical
20 care in no way is an admission or stipulation as to
21 causation or as to the right of the attorney to
22 further controvert the total cost of the medical care

23 and so on.
24 So that's normally what happens, and in the
25 practice itself when the jury is there and they have

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1 the notebooks presented to them, the attorneys make a
2 record at that time that they stipulate to the
3 authenticity of those exhibits before they are
4 actually handed to the jury, and then they are given
5 to the jury, and, frankly, it's neater, it's cleaner,
6 it's more efficient. The attorneys themselves often
7 direct during examination a certain exhibit in the
8 trial notebook, so they can turn to it quickly.

9 The old system when I first started on the
10 bench was that the exhibits would be disseminated to
11 the jury as they occurred during trial, and that was a
12 slow, laborious process. Now they are in a notebook
13 ready to go.

14 The court has one, the attorneys each have
15 one, each of the jurors have one and then -- now,
16 sometimes during the trial the exhibits are not
17 discussed at all. It just happens that way, and at
18 times perhaps before it's over something might be
19 removed, and that's true. But generally during the
20 trial the trial notebook is noncontroversial. It's
21 something that's been decided weeks beforehand, and
22 also motions in limine can take care of some of the
23 concerns about trial notebooks. So my experience has
24 been very beneficial to the use of trial notebooks.

25 JUDGE KENT: Also included in this cluster is

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1 the proposal about providing the jury with written
 2 copies of the preliminary and the final instructions.
 3 Do any panelists wish to comment on that?

4 JUDGE HEATH: Just a quick comment. We give
 5 our jurors both the preliminary instructions and the
 6 final instructions. Each juror gets one. We read it
 7 to them. We don't stop reading instructions just
 8 because they have a copy. We read it to them, and we
 9 find them going through the instructions with us one
 10 by one reading along with them, and then they have the
 11 instructions with them, and we have found that to be
 12 extremely beneficial, and, frankly, now that we have
 13 been doing that for a few years I can't imagine doing
 14 it the other way, because some these instructions --
 15 it makes the instructions more usable by the jury. It
 16 doesn't require them to rely completely on their
 17 memory, which could be foggy about the language of
 18 some instruction, and so I find it very beneficial.

19 JUDGE KENT: Mr. Dimos, I believe you also
 20 had some comments on this cluster.

21 MR. DIMOS: I did. Thank you, Your Honor.

22 On the notebooks, one concern that I saw
 23 expressed in the materials and is a legitimate concern
 24 is human nature in that when someone has something in
 25 their hands they are going to page through it during a

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1 full time, and when you are dealing with materials

2 that perhaps might be considered inflammatory,
3 pictures in a personal injury situation, we have sort
4 of done a modified approach as described by
5 Judge Heath, and that is pass certain exhibits out at
6 a time or pass all the exhibits out still but have
7 them stored in the notebook. It doesn't save the
8 time, but it allows you to avoid the situation of, if
9 you will, the jury reading ahead. That's something
10 though that the parties generally work towards an
11 agreement and seems to work out fine.

12 On the jury instructions, I think the
13 notebooks -- this whole cluster addresses a bigger
14 point that people who try cases need to be well aware
15 of, and that is you have to be cognizant of how people
16 learn. We are in the education business as much as
17 the advocacy business, and human nature is such today
18 that they need to see things more than once. They
19 need to read along while listening, and so while these
20 may be different than the practice you are used to, I
21 would ask that you consider them and the notion of how
22 do people learn today.

23 A small aside, I have a nine-year-old son who
24 was working on a Power Point the other night for
25 class. If nine-year-olds are using Power Points in

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1 class, what do you think our jurors are going to be
2 looking for from us in the courtroom?

3 JUDGE KENT: Thank you. According to our
4 plan here, Mr. Rombach would be moving the three
5 proposals.

6 Any other comments -- I am sorry. Yes, sir.

7 MR. SHAPIRO: Very briefly. Terry and I were
8 whispering to each other that one thing that should be
9 brought to the Assembly's attention which differs from
10 the Indiana proposal and I think merits its own
11 consideration under this one is that the trial
12 notebook under the proposed Michigan rule would
13 provide not only for admitted exhibits, but it says,
14 And other appropriate information to assist jurors in
15 their deliberations. What such other materials may be
16 other than materials that have been properly entered
17 into evidence is hard to imagine, and I think that
18 that portion of the rule is questionable in terms of
19 how it would be administered and whether or not it
20 would require modification to the Rules of Evidence.

21 MR. BELL: It's been our practice in Indiana
22 to only put the exhibits in. Judge, is that your
23 practice as well?

24 JUDGE HEATH: That's right.

25 MR. BELL: Our rule does provide you can put

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1 witness lists and some other items in there, but I
2 have never seen statutes or witness lists or anything
3 other than agreed upon exhibits in those notebooks.

4 JUDGE KENT: Any other comments?

5 JUDGE GIOVAN: I have a comment. Strangely
6 enough, of all the new provisions, the one that I am
7 personally afraid of the most is being required in 100
8 percent of the cases to prepare written instructions
9 to the jury. I am in a busy urban trial court. We
10 try sometimes, you know, cases one right after
11 another. Sometimes people are on standby, and the

12 cases differ vastly in their complexity.

13 In many cases the jury instructions are
14 practically irrelevant, and a good example is the case
15 that I just finished yesterday where the sole issue in
16 the case was did the plaintiff burn his own house
17 down? That was the question that we put to them. It
18 was a claim under insurance policy. There were no
19 issues about the policy or the extent of damages. Did
20 the plaintiff set the fire or not?

21 For us to sit down and do all the
22 instructions I think would have been a waste of time.
23 We have the ability under the present rules to do
24 either a complete or a partial set of jury
25 instructions, and I object to being required to do it

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1 in 100 of the cases regardless of the complexity or
2 simplicity.

3 CHAIRPERSON BUIREWEG: Tom, I am going to
4 have you come up and introduce 2.513(E) to the
5 Assembly and then invite the Assembly members to come
6 forward as they wish and comment or ask questions.

7 MR. ROMBACH: Thank you, Lori. At this time,
8 for purposes of facilitating the Assembly discussion
9 and debate, I am moving for adoption of the trial
10 notebook provision. That's located on page seven
11 under the appropriate tab, and that issue is should
12 the courts be required to encourage attorneys in civil
13 and criminal cases to provide jurors with a reference
14 document or notebook, the contents of which should
15 include, but not limited to, witness lists, relevant
16 statutory provisions, and copies of the relevant

17 documents if the witness lists, relevant statutory
18 provisions, admitted exhibits, and in cases where the
19 interpretation of a document is at issue, copies of
20 the relevant document? At this time I move for that
21 adoption. I need a second.

22 VOICE: Second.

23 CHAIRPERSON BUITEWEG: Thank you. All right.
24 It has been moved and seconded that we adopt the
25 revisions to 2.513(E) regarding reference documents.

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1 If we could get that actual Court Rule up there,
2 2.513(E), with the proposed revisions to it. That's
3 at your desk in the green, I believe -- no, not green.
4 Yellow. If you look at the yellow, the yellow
5 document, and flip to 2.513(E), all right, which is on
6 page five, middle of the page. Does everybody see
7 that? That's the actual Court Rule that coordinates
8 with this proposal.

9 So we have a motion and a second. Is there
10 discussion? Now is not the time to be shy. Come on
11 down to the microphone.

12 I am sorry for the logistics. If you know
13 you are going to want to talk about any of the three
14 proposals in this cluster, you might want to line up
15 at the microphone now, since it does take a little
16 while to get through the seating. And please state
17 your name and circuit for the record.

18 MR. ANDREE: Gerard Andree from the 6th
19 circuit. I have a point of order question. Are we
20 limited to the wording as indicated here, or may we
21 propose an amendment?

22 CHAIRPERSON BUIREWEG: You may propose an
23 amendment.

24 MR. ANDREE: First of all, I would propose
25 that we take out the words "must encourage" and

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1 substitute the words "may, in the court's discretion,
2 allow," so it reads, "The court may, in the court's
3 discretion, allow counsel," et cetera.

4 CHAIRPERSON BUIREWEG: That's a proposed from
5 the amendment. Does the proponent accept the friendly
6 amendment?

7 MR. ROMBACH: Yes, I will accept that.

8 CHAIRPERSON BUIREWEG: Is there a second on
9 this proposed amendment?

10 VOICE: Support.

11 CHAIRPERSON BUIREWEG: Is there discussion on
12 the proposal as amended?

13 MR. ANDREE: I just have a question. Are we
14 allowed to put it to the panel members?

15 CHAIRPERSON BUIREWEG: Yes.

16 MR. ANDREE: I am asking this question based
17 on questions proposed by the judges of the 6th
18 circuit. Among those, they wanted to know is there
19 one notebook that is jointly used, or does each side
20 give a notebook?

21 MR. BELL: The trials I have been a part of,
22 each juror has had his own or her own notebook.

23 MR. ANDREE: No, no, does each side give
24 their own notebook? Does each juror end up with two
25 notebooks?

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1 CHAIRPERSON BUITEWEG: One notebook.

2 MR. DIMOS: Though it can be in multiple
3 volumes, given the size of the case.

4 MR. ANDREE: That is the only question I
5 have.

6 CHAIRPERSON BUITEWEG: Is there further
7 discussion on this proposal as amended?

8 MR. LOOMIS: Daniel Loomis, 35th circuit. I
9 am in agreement with the amendment that the court may
10 authorize, but I had a question for the panel. What
11 kind of expense has been added to the process because
12 of the notebook being used?

13 CHAIRPERSON BUITEWEG: You are asking this of
14 the Indiana attorneys?

15 MR. LOOMIS: Yes.

16 MR. BELL: I can comment in a murder trial I
17 did this summer there were probably 380 exhibits, so
18 there were 15 notebooks for 15 jurors with the
19 alternate, one for the court, one for the parties, and
20 there was probably one of our paralegals billing by
21 the hour, you know, at the courthouse for at least two
22 days getting those together, so certainly there is
23 xerox costs and things like that.

24 MR. DIMOS: Though at the same time, at least
25 before we had notebooks we were making copies of

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1 exhibits for each juror anyway, and so I think that
2 the cost is really somewhat incremental to having to
3 put a binder in. The fact is we had to copy our
4 exhibits and have enough for all the jurors. That
5 same time was being spent making the copies, the same
6 copying costs. It's just binding them together.

7 JUDGE HEATH: I might add that I was
8 requiring each one of the lawyers to make a copy for
9 each juror anyway before the notebook, because I
10 didn't want to have to pass an exhibit around to each
11 juror. The trial time is just exponent -- you know,
12 enlarged if you have to do that, so you want each
13 juror to have a copy anyway.

14 CHAIRPERSON BUITEWEG: Mr. Romano, then
15 Buchanan.

16 MR. ROMANO: Vince Romano, 3rd circuit. I
17 wonder if the panelists -- I have two issues having to
18 do with content of these notebooks. I wonder if,
19 particularly some of the folks that sit on the bench,
20 if they are bothered by providing relevant statutory
21 provisions to the jurors.

22 JUDGE HEATH: If I could address that.

23 MR. ROMANO: Second, at the very end, other
24 appropriate information. How in the world is that
25 other appropriate information going to be determined?

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1 JUDGE HEATH: I think --

2 MR. ROMANO: Those two issues, relevant
3 statutory documents and other appropriate information.

4 JUDGE HEATH: The relevant statutory
5 documents often end up in instructions anyway, final

6 instructions. I, frankly, have never included
7 statutes or other material in my trial notebooks.
8 They have always been stipulated documents by the
9 attorneys. I will admit that some attorney might want
10 to get a statute in that.

11 I normally determine the admissibility of
12 such statutes in argument through motions in limine
13 before trial. So I really don't have a problem with
14 including them, because it will have been
15 predetermined that a statute applies or not.

16 Now, I have the rare case in which I had to
17 wait for the evidence to see if I thought a statute
18 did apply. I had a recent trial like that. I would
19 not include that controversial statute -- I shouldn't
20 say controversial -- that statute that I hadn't
21 determined yet without evidence. I wouldn't put that
22 in the trial notebook. I would leave it out until we
23 hear the evidence and determine that it is a relevant
24 statute, and then if it is relevant and the evidence
25 shows that it is, then that becomes part of my final

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1 instructions anyway.

2 So I wouldn't get bogged down with this
3 statutory stuff, because I think what you are going to
4 find is the trial notebook is just going to be your
5 stipulated, admissible documents, as counsel said
6 beforehand. I have never had a case where it has been
7 anything but that.

8 CHAIRPERSON BUITEWEG: Mr. Buchanan.

9 MR. BUCHANAN: Robert Buchanan from 17th
10 circuit. I guess my question is more of a

11 clarification. Is the notebook -- I understand it's
12 one, and is it agreed, meaning both parties have to
13 agree what goes in the notebook would be my first
14 question. The second, with respect to witness lists,
15 is the expectation that this is the list that's filed
16 early in the pre-trial process and we are disclosing
17 our witnesses, and, obviously, as trial is a fluid
18 process, we may change and decide we don't want to
19 bring a particular witness or an expert has a
20 scheduling conflict, what is the expectation with
21 respect to the type of witness list that goes in this
22 document? I guess that is my question.

23 JUDGE HEATH: I have not put witness lists in
24 it, so I can't really answer that, but my only comment
25 would be that if I did it would be the final witness

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1 list at the final status conference just days before
2 trial, if at all, but we haven't done that.

3 MR. BUCHANAN: And in Indiana is it an agreed
4 notebook, so what goes in both parties agree, so it's
5 not --

6 JUDGE HEATH: Yes.

7 MR. BUCHANAN: -- plaintiff gives them one,
8 defense gives them one?

9 JUDGE HEATH: Yes.

10 MR. MIGLIO: I think the issue is what does
11 the proposal say versus what has been the practice. I
12 think what you are hearing is that there isn't a
13 significant opposition to having a judge in his or her
14 discretion decide that juries are entitled to see a
15 jury notebook that's comprised of jury instructions

16 under some circumstances and exhibits that have been
17 admitted. Unfortunately the proposal uses the term
18 reference documents, statutory provisions, and other
19 appropriate information, which is highly unusual,
20 which means that things get before the jury that have
21 not been sanctioned through the evidentiary process,
22 and that's the concern that I have as a trial lawyer,
23 allowing that information to get in the jury's hands
24 when it hasn't been admitted.

25 CHAIRPERSON BUIREWEG: State your name and

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1 circuit for the record.

2 MR. HERRINGTON: David Herrington from the
3 52nd circuit. I move to amend sub (E) as follows:
4 Next to the last line after "jury instructions," I
5 would put, after the word "instructions," "and," the
6 word "and," then go to the next line and delete "and
7 other appropriate information," and then pick up with
8 "to assist jurors in their deliberations."

9 CHAIRPERSON BUIREWEG: If we could have
10 2.513(E), the proposal itself, back up on the screen,
11 it is on the screen, and make those proposed
12 modifications, then I will find out if Mr. Rombach
13 will agree to that modification.

14 MR. SHAPIRO: May I just point out that the
15 proposal does not mirror the actual text of the
16 proposed rule.

17 CHAIRPERSON BUIREWEG: Yes, I understand.

18 JUDGE CAPRATHE: Could I make a comment,
19 Lori, while we are doing that?

20 CHAIRPERSON BUIREWEG: Yes.

21 JUDGE CAPRATHE: I should have mentioned this
22 earlier when we were talking about the American Jury
23 Project, the ABA principles. How they came about was
24 the president of the ABA during his term made that the
25 purpose of his term, to attempt to improve the jury

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1 system in America, and so he appointed prosecutors,
2 defense attorneys, plaintiffs lawyers, defense
3 lawyers, professors and judges from all around the
4 country, and we met for over a year, and we heard what
5 people were doing all over the country, and we had a
6 symposium, invited interest groups to come to it, and
7 we came up with these principles.

8 So they do reflect what's happening around
9 the country, and with this particular one, it is in
10 the principles, and it indicates, I just would like to
11 read one short paragraph, it says, "Jurors in
12 appropriate cases be supplied with identical trial
13 notebooks, which may include such items as the court's
14 preliminary instructions, selected exhibits which have
15 been ruled admissible, stipulations of the parties,
16 and other relevant materials not subject to genuine
17 dispute." That was the suggestion of the principle in
18 that respect.

19 CHAIRPERSON BUIREWEG: Thank you, Judge
20 Caprathe. That was very helpful.

21 I understand people are having difficulty
22 hearing towards the back of the room, so when you are
23 speaking make sure you speak right into the microphone
24 so you can be heard.

25 Mr. Rombach, we have a proposal to amend the

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1 proposal. would you like to address that?

2 MR. ROMBACH: Yes, I tell you what, for the
3 purposes of our motions going forward, I would prefer
4 to actually go from the language of the proposed
5 statute rather than -- or the Court Rule rather than
6 go off of the kind of derivative language that we have
7 before us. So if there is no objection to that, at
8 this time I would like to amend this particular
9 proposal to reflect word for word what's actually in
10 front of you on the yellow sheets with the language
11 that our esteemed colleague, Mr. Andree from the 6th
12 circuit, had inserted about the permissive language
13 with may allow the parties.

14 CHAIRPERSON BUIREWEG: Are there any
15 objections? And I will just give you some background
16 on this. Historically the Assembly has found itself
17 not to be particularly great drafters because of the
18 size of this body, and we have traditionally tried to
19 sort of keep away from doing group drafting, but if
20 the preference of the Assembly is to look at each
21 individual Court Rule and to make proposed
22 modifications to them, you know, that's your decision.
23 You are the Assembly, and that's your decision.

24 That's what Mr. Rombach is suggesting. The
25 proposals that you have are a bit, a bit more general

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1 in terms, but I am going to leave that up to the
2 Assembly, and that's what's been proposed, and I am
3 not hearing any objections.

4 So if I could, just by a voice vote, find out
5 if some of these preferences to address the actual
6 court ruling, which versus the proposals that you see
7 in the book. Is there a second to that?

8 VOICE: Support.

9 CHAIRPERSON BUITEWEG: Is there any
10 discussion about that?

11 Everybody in favor.

12 Any opposition?

13 Abstentions?

14 Motion carries.

15 We will work with the actual Court Rules. I
16 hope that Nancy will be able to accommodate us with
17 that in terms of putting it up on the screen. So does
18 everybody follow now? We are now looking at the
19 yellow packet. We are on page five, and I need a
20 second to the amendment that was just made. Is there
21 a second on the friendly amendment?

22 VOICE: Support.

23 CHAIRPERSON BUITEWEG: Now, Nancy, do you
24 need --

25 NANCY BROWN: I need the amendment again.

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1 CHAIRPERSON BUITEWEG: Could you please
2 restate that.

3 MR. HERRINGTON: My proposed amendment is in
4 sub (E), the second line from the bottom after "jury

5 instructions" --

6 VOICE: Madame Chair, point of order, we
7 still can't hear.

8 MR. HERRINGTON: Can you hear me now? My
9 proposed amendment is in the first line up in the
10 bottom of sub (E) after the words "jury instructions,"
11 delete the comma, insert the word "and," and then
12 going to the next line, which is the last line, after
13 the word "exhibits," to delete the words "and other
14 appropriate information," then pick up with "to
15 assist jurors in their deliberations."

16 CHAIRPERSON BUIREWEG: So, Mr. Rombach, why
17 don't you read the rule as you are proposing it now in
18 its entirety.

19 MR. ROMBACH: The proposal as it now stands
20 is the court may -- the court may in its, or in the
21 court's discretion, allow counsel in civil and
22 criminal cases to provide the jurors with a reference
23 document or notebook, the contents of which should
24 include, which is not limited to, witness lists,
25 relevant statutory provisions, and, in cases where the

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1 interpretation of a document is at issue, copies of
2 the relevant document. The court and the parties may
3 supplement the reference document during trial with
4 copies of the preliminary jury instructions and
5 admitted exhibits to assist the jurors in their
6 deliberations.

7 MR. ROMANO: Point of order. So you are
8 accepting his as a friendly amendment?

9 MR. ROMBACH: Yes.

10 CHAIRPERSON BUITEWEG: Yes, he was, and its
11 been seconded.

12 MR. ROMBACH: I am striking, as a friendly
13 amendment, "and other appropriate information."

14 CHAIRPERSON BUITEWEG: Is there any
15 discussion on the reference documents Court Rule as
16 amended?

17 MR. KROHNER: Martin Krohner, 6th circuit.
18 My question goes to the -- not on? Supposed to be on.
19 There we go.

20 My question revolves around the inclusion of
21 the word "criminal" in this, the criminal cases, for
22 the question that what has been the Indiana practice
23 as it pertains to appointed cases, and how has that
24 affected your appointed counsel budget?

25 MR. BELL: Being the only criminal lawyer on

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1 the panel here from Indiana, when I was a public
2 defender we did not have these juror books, so I can't
3 say. I will tell you most of my, when I was a public
4 defender, most of our cases did not have many
5 exhibits, so I doubt it would affect the budget too
6 much.

7 MR. KROHNER: The way I am looking at the
8 rule as it has been proposed, it mostly pertains to
9 civil cases and not criminal cases, and so I would
10 propose that we strike the word "criminal" out of this
11 particular one, because I am concerned from the
12 standpoint of the cost factor of whether or not we
13 will be able to afford that in the appointed cases.

14 CHAIRPERSON BUITEWEG: Mr. Rombach.

15 JUDGE CAPRATHE: Can I answer that?
16 MR. ROMBACH: At this time I'd prefer you
17 move that through the Assembly, because I believe that
18 that's going to lop off half of the rules and text, so
19 I am not going to accept that as a friendly amendment.
20 CHAIRPERSON BUIREWEG: It's been moved, is
21 there a second to strike "criminal"?
22 VOICE: Support.
23 CHAIRPERSON BUIREWEG: Is there discussion?
24 Judge Caprathe.
25 JUDGE CAPRATHE: The court would --

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1 VOICE: Don't we have a previous motion
2 pending and we were going to debate the friendly
3 amendment by the gentleman standing there?
4 CHAIRPERSON BUIREWEG: Yes, we do. You are
5 correct.
6 We will take a vote on the amended Court
7 Rule, and then we will move forward with the motion to
8 amend it to strike the word "criminal."
9 Does everybody understand what we are voting
10 on at this time? We are voting on the proposal that
11 MCR 2.513(E) read as follows: Reference Documents.
12 The court may, in the court's discretion, allow
13 counsel in civil and criminal cases to provide the
14 jurors with a reference document or notebook, the
15 contents of which should include, but which is not
16 limited to, witness lists, relevant statutory
17 provisions, and, in cases where the interpretation of
18 a document is at issue, copies of the relevant
19 document. The court and the parties may supplement

20 the reference document during trial with copies of the
21 preliminary instructions and admitted exhibits to
22 assist jurors in their deliberations.

23 I will take a vote on that, and then we will
24 entertain -- I am sorry, I am told I don't need a vote
25 on this. Strike that. I don't need a vote yet.

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1 So the motion to amend the proposal to strike
2 the word "criminal" is before the Assembly, and I did
3 hear a second. Is there any discussion on the
4 proposal to eliminate the word "criminal" from this
5 Court Rule? And I am looking, so if you have got
6 discussion on that, then you can come up to the mike
7 on this. You may only come to the microphone one time
8 on each proposal.

9 MS. KIRSCH-SATAWA: I am Lisa Kirsch-Satawa,
10 6th circuit, in support of the motion to strike "and
11 criminal." I think this would put a tremendous burden
12 on indigent counsel. As this Assembly is very well
13 aware of, Michigan has the second lowest fees for our
14 court-appointed attorney, court-appointed counsel, and
15 so they have to do an extreme amount of volume in
16 order to make a living and provide the service and
17 representation that they do. We are adding one more
18 step in order for them to be, quote-unquote,
19 effective, and I think it would be extremely
20 burdensome on criminal cases, but even more so in
21 cases where you do have an indigent defendant.

22 CHAIRPERSON BUITEWEG: Thank you. Is there
23 further comment on that particular motion?

24 MS. STANGL: Terri Stangl from the 10th

25 circuit. I am also very sensitive to the cost issue

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1 for indigent defendants. However, as I read the rule
2 now, it's only about allowing it, not requiring it,
3 and if we need additional language to make that clear,
4 I would support it, but it seems to me we should not
5 prevent complicated criminal cases from using this
6 when appropriate, but I absolutely agree it should not
7 be required.

8 CHAIRPERSON BUIREWEG: Thank you. Is this on
9 this particular motion?

10 MS POWELL: Yes.

11 CHAIRPERSON BUIREWEG: Okay.

12 MS. POWELL: Jaimie Powell from the 3rd
13 circuit. I work for the Wayne County Prosecutor's
14 Office. Again, the cost issue is a concern. It's not
15 uncommon for our prosecutors to be doing two and three
16 jury trials within a week. It would be almost
17 impossible for us to put together these binders. We
18 have limited resources as it is. I did have a question
19 for Mr. Bell. Maybe I should table that until --

20 CHAIRPERSON BUIREWEG: You may ask it.

21 MS. POWELL: Mr. Bell, when you were doing
22 your murder case, did the prosecutor bear the cost at
23 all with you, or was it the defense that --

24 MR. BELL: That was an indigent case, so that
25 was appointed case, and so the State paid for all the

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1 fees on that case.

2 MS POWELL: And the jury instructions that
3 were provided, did the court provide the jury
4 instructions to the jurors, or did the defense do
5 that?

6 MR. BELL: The court provided the jury
7 instructions.

8 MS. POWELL: Copies for each?

9 MR. BELL: Copies for each, yes.

10 MS POWELL: Thank you.

11 CHAIRPERSON BUITEWEG: Yes.

12 MS. SAWYER: Elaine Sawyer, 24th circuit.
13 Majority of my practice is indigent representation. I
14 don't think "criminal" should be taken out. I think
15 we have in there may in their discretion allow, and if
16 it's going to be a burden, an expense, I think that
17 can be taken up with the individual judge and a
18 decision can be made. I think this would be helpful
19 in certain criminal cases to supply this notebook to
20 jurors, depending on what type of case it is. So I am
21 not supportive of taking out criminal.

22 CHAIRPERSON BUITEWEG: I am going to ask
23 everybody to be mindful of the time. We do need to
24 put another proposal before the Assembly at 11:30. If
25 necessary we can reconvene on these issues after the

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1 luncheon. If a point has already been made and you
2 have heard it, I would ask that you please be mindful
3 of the time and not make the same point again.

4 JUDGE CAPRATHE: Can I just make that one
5 point?

6 CHAIRPERSON BUIREWEG: Yes.

7 JUDGE CAPRATHE: With it being may, either
8 the court would pay for it out of the court's budget
9 or would not do it, so that I think Terri Stangl
10 answered the question.

11 CHAIRPERSON BUIREWEG: Yes, sir.

12 MR. PAUL: Rick Paul from the 6th circuit.
13 By adding the Jerry Andree amendment, deleting the
14 "must encourage" to "the court may, in the court's
15 discretion, permit," and I think that would alleviate
16 some of the concerns between criminal and civil
17 dockets as well.

18 MR KANTOR: Alan Kantor, 6th judicial
19 circuit. I just had a question for the gentlemen from
20 Indiana in terms of their experience with respect to
21 finding errors, missing exhibits, missing pages,
22 whether that occurs during the course of the trial or
23 it's found out afterwards, whether or not that would
24 be grounds for a mistrial or potentially reversible
25 error on appeal.

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1 JUDGE HEATH: I had one case, it was a
2 personal injury case in which counsel forgot to
3 redact, and we go over this in chambers beforehand,
4 any reference on the medical records about insurance
5 plans. And, you know, that did open the door to some
6 insurance problems, so it does happen. I have found
7 it to be extremely rare. I have never found it to
8 cause any kind of mistrial. I have never been

9 reversed on any matter that was in the trial notebook,
10 and we have been doing it -- I have been doing trial
11 notebooks for about eight, nine years, the last
12 several years under our new rules, but I am doing the
13 same thing I used to do. So I have not found it to be
14 a problem.

15 Counsel is usually very careful and usually
16 the adversarial process itself takes care of problems
17 that can arise in the notebook. Counsel is usually
18 very careful about what their opponent is doing
19 putting in that notebook. And, again, the motion in
20 limine process prior to trial also takes care of a lot
21 of issues. I have not had a problem so far.

22 CHAIRPERSON BUITEWEG: All right. Please try
23 not to be distracted by what's been going on behind
24 me. The record is the record. We have a transcript
25 of the proceedings. We know what we are voting on.

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1 what's behind me is not the transcript, so try not to
2 get distracted and worried about that. Just try to
3 follow with the discussion.

4 Yes.

5 MR. REISING: Bill Reising, 7th circuit. I
6 have one further friendly amendment consistent with
7 Jerry Andree's earlier amendment. Third line down --

8 VOICE: Point of order, we still have an
9 amendment pending.

10 CHAIRPERSON BUITEWEG: Right, we have a
11 motion on the floor right now, and so if you don't
12 have any discussion about that, I will ask you to hold
13 off on your comment for a moment.

14 Is there any other discussion on the motion
15 pertaining to the deletion of the word "criminal" from
16 this Court Rule? The Court Rule.

17 Then may I hear by vote of the Assembly,
18 everybody who is in favor of deleting the word
19 "criminal," please say yes.

20 Opposed?

21 Abstentions?

22 we have tellers, and I am going to ask
23 everybody who voted yes to stand up, and I would ask
24 the tellers to please count and come forward.

25 In the future I would ask you to please not

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1 yell your answer. It makes it very difficult for the
2 chair. I would ask that we approve Kathy Kakish,
3 Barry Poulson and Colleen Cullitan from the 3rd, 1st,
4 and 2nd circuits respectively as the tellers. May I
5 have a motion?

6 VOICE: So moved.

7 CHAIRPERSON BUITEWEG: And support?

8 VOICE: Support.

9 CHAIRPERSON BUITEWEG: And all those in favor
10 of these being the tellers say yes.

11 Objections?

12 Abstentions?

13 Motion carries.

14 Please, tellers, if you could count up the
15 yes votes.

16 VOICE: Point of order. What is the vote?

17 Are the stand-ups against it or for it?

18 CHAIRPERSON BUITEWEG: If you are voting yes

19 in favor of deleting the word "criminal."

20 VOICE: One more point of order. Is this
21 with or without the amendment "must"? Is this on
22 "may"?

23 CHAIRPERSON BUITEWEG: This is on the "may."

24 VOICE: This is a "may"?

25 CHAIRPERSON BUITEWEG: Yes. All the friendly

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1 amendments have been accepted. This has not been
2 accepted. We are voting on this one.

3 If you want to strike the word "criminal,"
4 you should be standing.

5 (Vote being counted.)

6 CHAIRPERSON BUITEWEG: As soon as the tellers
7 give me the number of yeases, I will ask the yeases to
8 sit down and have the noes stand up.

9 Sir, in the back of the room without a badge,
10 are you an Assembly member? Could you put your badge
11 on, please, so we know to count your vote.

12 Please sit down, and everybody who wishes to
13 leave the word "criminal" in the Court Rule please
14 stand up.

15 Mr. Clerk, do you have a count?

16 CLERK GARDELLA: 65.

17 CHAIRPERSON BUITEWEG: Okay. You may sit
18 down.

19 For the record, we have 40 people who would
20 like to remove the word "criminal" from the Court Rule
21 and 65 who want to leave it in, so the motion to
22 remove the word "criminal" fails, and it will remain
23 in.

24 Is there any further discussion regarding the
25 Court Rule regarding reference documents?

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1 MR. REISING: I have one further friendly
2 amendment.

3 CHAIRPERSON BUIREWEG: Yes, sir.

4 MR. REISING: As I indicated earlier --
5 Bill Reising, 7th circuit, and I am making a friendly
6 motion that the third line down of subsection (E), the
7 word "should" be changed to the word "may" to make the
8 proposed Court Rule consistent internally and to give
9 the court the discretion it needs at the time that
10 such a notebook is put together. Thank you.

11 CHAIRPERSON BUIREWEG: Is that amendment
12 accepted, Mr. Rombach?

13 MR. ROMBACH: Yes, I accept that as a
14 friendly amendment.

15 CHAIRPERSON BUIREWEG: Is there a second to
16 the friendly amendment.

17 VOICE: Support.

18 CHAIRPERSON BUIREWEG: Any discussion? Is
19 there further discussion?

20 MR. LOOMIS: Daniel Loomis, 35th judicial
21 circuit.

22 The second friendly amendment that struck the
23 words "other appropriate information" I think has the
24 negative effect of limiting how the court and the
25 parties may supplement this notebook. For example, we

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1 may want to supplement it with the final instructions,
2 but it only allows for preliminary jury instructions
3 during the trial. So I think that has a negative
4 effect.

5 MR. ROMBACH: If I may, Tom Rombach, but
6 "which is not limited to" coming after "which may
7 include," so I believe that would be broad enough
8 language that would allow any other supplemental
9 material.

10 MR. LOOMIS: But doesn't that last sentence
11 refer to supplementing during the trial and the first
12 sentence at the beginning?

13 MR. ROMBACH: Again, at this point I have
14 already accepted that as a friendly amendment. For
15 logistical purposes I don't think I should reconsider
16 it.

17 CHAIRPERSON BUIREWEG: Are there other
18 comments?

19 MR. CRAMPTON: Jeff Crampton, 17th circuit.
20 I am troubled that this rule doesn't even use the word
21 "exhibit." When we were talking about or Judge Heath
22 was talking about what is in notebooks in Indiana, or
23 at least in his courtroom, he said typically it is
24 primarily just exhibits, and this rule doesn't even
25 use that. Frankly, I would like to see us replace it

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1 with the rule that Judge Caprathe read, but I would
2 add a friendly amendment which addresses the concern

3 of not only indigent criminal defense, but also those
4 that work in legal aid. I would move that we add a
5 friendly amendment that says, If the court determines
6 that one or more parties are indigent, a notebook
7 shall not be provided to the jurors unless all parties
8 consent.

9 CHAIRPERSON BUIREWEG: Mr. Rombach, there has
10 been a friendly amendment request. Your response.

11 MR. ROMBACH: Again, I am not going to accept
12 that as a friendly amendment simply because I think it
13 would be against the spirit of the vote that the
14 Assembly had taken before. If you want to offer that
15 as an amendment for which the Assembly could vote,
16 that would be allowable under the rules.

17 MR. CRAMPTON: I would offer that as a rule.

18 CHAIRPERSON BUIREWEG: would you please state
19 your motion again.

20 MR. CRAMPTON: The amendment would be to add
21 a sentence at the end of whatever rule ultimately gets
22 adopted that says, If the court determines that one or
23 more parties are indigent, a notebook shall not be
24 provided to the jurors unless all parties consent.

25 CHAIRPERSON BUIREWEG: Did your motion also

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1 include the request to add the word "exhibits,"
2 "stipulated exhibits"?

3 MR. CRAMPTON: whatever -- I used the word
4 notebook. This was very quickly and unartfully
5 drafted, but with regards to "with a reference
6 document or notebook, the contents of which shall
7 include," that's what I am talking about. So perhaps

8 it should say, "If the court determines that one or
9 more of the parties are indigent, a reference document
10 or notebook shall not be provided to the jury unless
11 all parties consent."

12 CHAIRPERSON BUIREWEG: Is there a second to
13 that?

14 VOICE: Support.

15 CHAIRPERSON BUIREWEG: Is there discussion on
16 the motion?

17 MR. ANDREE: Point of order. May I address
18 that again, or am I precluded from addressing that
19 again? I thought my amendment already covered that.

20 CHAIRPERSON BUIREWEG: Yes, it's new items.
21 I have been asked to restate the motion, because for
22 some reason our technical information isn't working.
23 It is more than five words. It needs to be in
24 writing. Can you please bring it to the chair.

25 The motion is to add to the end of the Court

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1 Rule, "If the court determines that one or more
2 parties are indigent, a notebook or reference document
3 shall not be provided to the jurors unless all parties
4 consent." One moment.

5 And that has been seconded. Mr. Reiser, I
6 think you were next in line.

7 MR. REISER: John Reiser, 22nd circuit. I
8 rise in opposition of the proposed amendment. I am an
9 assistant prosecuting attorney, and I can't imagine
10 the expense that it's going to be for these trial
11 notebooks. It's going to be 12 plastic notebooks that
12 you reuse for your trials. It's going to be, in a

13 drunk driving case, the data master ticket or the
14 breath result, maybe the jury instructions related to
15 drunk driving. In an assault case it's going to be
16 the jury instructions, it's going to be some
17 photographs. I don't think it's going to be that
18 expensive.

19 Color printers are common nowadays. We
20 provide the defense Bar currently with photographs,
21 color photographs. We provide them with all our
22 documents, so I just don't think that it's going to be
23 that cumbersome of a burden.

24 I don't want to be enjoined from putting
25 together a short trial notebook if I want to do that

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1 for trial strategy purposes, and I would urge others
2 to vote against this. Thank you.

3 MS. KIRSCH-SATAWA: Lisa Kirsch-Satawa, 6th
4 circuit. I would be in support of this language with
5 a friendly amendment to it, and that would be that
6 it's added that the expense of the notebook will
7 become -- actually strike that. That the notebook
8 will be provided by the court and at public expense.

9 In a criminal case we are required to file a
10 motion for an investigator or for an expert to be paid
11 at public expense, and I think that to avoid the
12 discretionary component that could be prejudicial, it
13 should be right in the rule that it would be, in an
14 indigent situation, it would be provided by the court
15 and at public expense.

16 CHAIRPERSON BUITEWEG: Is the friendly
17 amendment accepted by the moving party?

18 MR. CRAMPTON: If the friendly amendment, if
19 I understand it right, is that it will not be provided
20 to the jurors unless all parties consent or a notebook
21 will be provided by the court or at public expense,
22 then it's accepted.

23 JUDGE KENT: Wally Kent, 54th judicial
24 circuit. I object to the proposed amendment on the
25 basis I believe it's well covered by allowing the

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1 court the discretion already to allow or disallow the
2 use of the notebook in any given case, which,
3 therefore, would allow the court to protect indigents
4 from being unduly burdened by the preparation of a
5 notebook.

6 CHAIRPERSON BUIREWEG: Further discussion?
7 Yes, sir.

8 MR. POULSON: Barry Poulson, 1st circuit.
9 The budget in our county for indigent defense is
10 105,000. It's going to be that next year, because
11 it's always been that. The county commissioners have
12 provided that much money. The three attorneys slated
13 to carry that burden next year deal with 15 cases a
14 week, and the question -- I haven't seen a color
15 printer in our county yet, and so I suspect that this
16 sort of a refinement should be refined by adding at
17 the expense of the State of Michigan, but I am not
18 making that as an amendment. I don't see how it could
19 possibly be funded.

20 MS. CARSON: Daryl Carson from 3rd circuit. I
21 work with Wayne County Prosecutor's Office. We have a
22 bifurcated system. We have 28 courtrooms in our

23 criminal division, and we have one prosecutor for each
24 one of those courtrooms.

25 The burden of having these copies made is

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1 going to fall on the prosecutor's office, so not only
2 is it burdensome for our prosecutors, but it's also
3 burdensome for our budget, which we have little or
4 none of.

5 MS. STANGL: Terri Stangl from the 10th
6 circuit. I represent indigents in civil cases, and if
7 my indigent client or I feel that it's the best thing
8 for us to use a notebook, I would hate to be barred
9 because the opposing party in a divorce or landlord
10 tenant case didn't want it, so I oppose it the way
11 it's written.

12 CHAIRPERSON BUIREWEG: Further discussion?
13 Does everybody understand the motion?

14 The motion is to add to the end of this
15 exhibit if the court determines -- or this court rule
16 rather -- if the court determines that one or more
17 parties are indigent, a notebook or reference document
18 will not be provided to the jurors unless all parties
19 consent, unless it is provided by the court at the
20 public's expense.

21 unless it will be provided by the court at
22 public expense. By the court or at the public's
23 expense?

24 who made the friendly amendment?

25 MS. KIRSCH-SATAWA: I did.

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1 CHAIRPERSON BUIREWEG: What was the exact
2 wording? It should be in writing.

3 MS. KIRSCH-SATAWA: I did have it in writing,
4 but I don't know what happened to the piece of paper.
5 It should say "and the notebook," instead of "or,"
6 "will be provided by the court or at public expense."

7 CHAIRPERSON BUIREWEG: Thank you. Could you
8 please bring that to the clerk, the written amendment.
9 Okay. There has been a motion made and
10 seconded. I see no further discussion. Please do not
11 yell your answer.

12 All those in favor of this amendment, please
13 say yes.

14 All those opposed please say no.

15 Okay. The motion is denied, fails.

16 Yes, sir.

17 MR. GIGUERE: Gary Giguere, 9th circuit. I
18 had a proposed friendly amendment which would address
19 the previous gentleman's concern regarding the
20 supplement to the notebook, and I would ask the movant
21 if we removed the word "preliminary" with the jury
22 instructions, that would allow any jury instructions,
23 preliminary or final, to be supplemented to the
24 notebook, so I would make that as a friendly amendment
25 to remove "preliminary."

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1 CHAIRPERSON BUIREWEG: Mr. Rombach.

2 MR. ROMBACH: If that's a friendly amendment,
3 I would accept it.

4 CHAIRPERSON BUIREWEG: Are there further
5 comments or questions before we take a vote on
6 reference documents? Looks like we have got one more.

7 VOICE: Call the question.

8 CHAIRPERSON BUIREWEG: The question has been
9 called, and all those in favor of calling the question
10 say aye.

11 Any opposed?

12 Motion carries.

13 Anybody in favor of adopting the Court Rule
14 reference documents contained in the friendly
15 amendments that have been accepted, please say yes.

16 Any opposed?

17 Any abstentions?

18 Motion carries.

19 Let us move forward to the next Court Rule.

20 VOICE: We have a call on that.

21 VOICE: Division.

22 CHAIRPERSON BUIREWEG: Division has been
23 called. If you voted yes, please -- if you voted yes,
24 please stand and the tellers will take the count, if
25 you are voting in favor of Rule 2.513(E) with the

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1 friendly amendments.

2 May I have permission to withdraw the
3 division, person who moved for division?

4 VOICE: Yes.

5 CHAIRPERSON BUIREWEG: Thank you. Motion
6 passes.

7 More than one person apparently called for
8 division. You are not withdrawing?

9 MR. BARTON: I am not withdrawing.

10 CHAIRPERSON BUIREWEG: Stand up if you said
11 yes. Sorry. Tellers, please take the count. This is
12 if you are voting yes to 2.513(E) with the friendly
13 amendments. I am sorry they are not showing on the
14 screen. Hopefully you have been making notes. We
15 will try to fix that during our break.

16 (Vote being counted.)

17 CHAIRPERSON BUIREWEG: Please be seated, and
18 if you are voting no, please stand up.

19 You may be seated, and the vote was 59 yes,
20 36 no. The motion carries.

21 The next Court Rule that is up for
22 consideration is 2.513(A). Mr. Rombach, if you would
23 come forward and read that into the record.

24 MR. ROMBACH: I would just direct the
25 Assembly's attention to page ten under the subsection

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1 jury reform.

2 As we have decided previously, rather than
3 move the issue as outlined in our packet of materials,
4 I am actually going to move the language as proposed
5 by the court seeking our comment, that being on the
6 fourth page of your yellow sheet packet. I am moving
7 for adoption of Rule 2.513, conduct of jury trial,
8 subsection (A) preliminary instructions. After the
9 jury is sworn and before evidence is taken, the court
10 shall provide the jury with pre-trial instructions
11 reasonably likely to assist in its consideration of

12 the case. Such instructions at a minimum shall
13 communicate the duties of the jury, trial procedure,
14 and the law applicable to the case as are reasonably
15 necessary to enable the jury to understand the
16 proceedings and the evidence. The jury also shall be
17 instructed about the elements of all civil claims or
18 all charged offenses, as well as the legal
19 presumptions and burdens of proof. The court shall
20 provide each juror with a copy of such instructions.
21 MCR 2.512(D)(2) does not apply to such preliminary
22 instructions. Do I have a second?

23 VOICE: Second.

24 CHAIRPERSON BUITEWEG: All right. It's been
25 moved and seconded. Is there discussion regarding

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1 2.513(A)?

2 Seeing none, all those in favor of adopting
3 the Court Rule as read into the record by Mr. Rombach,
4 please say yes.

5 Any opposed?

6 Abstentions?

7 Motion carries.

8 Let's move on to the next Court Rule, which
9 is 2.513(N)(2) final instructions. Mr. Rombach.

10 MR. ROMBACH: Again, I would direct your
11 attention to page eleven of the materials that were
12 originally sent by mail that has this issue
13 identified, particularly on line two, instead of "is,"
14 you put in an "if." That puts the issue in a
15 nutshell.

16 But at this time, pursuant to our new

17 procedure, I am moving for adoption of MCR 2.513(N)(2)
18 and (3), final instructions to the jury. That can be
19 found on page seven of the yellow packet, final
20 instructions to the jury, (N)(1), Before closing
21 arguments, the court -- actually that's (1). I am
22 moving (2) and (3).

23 subsection (2), solicit questions about final
24 instructions. As part of the final jury instructions,
25 the court shall advise the jury that it may submit in

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1 a sealed envelope given to the bailiff any written
2 questions about the jury instructions that arise
3 during deliberations. Upon concluding the final
4 instructions, the court shall invite the jurors to ask
5 any questions in order to clarify the instructions
6 before they retire to deliberate.

7 If questions arise, the court and the parties
8 shall convene, in the courtroom or by other
9 agreed-upon means. The question shall be read into
10 the record, and the attorneys shall offer comments on
11 an appropriate response. The court may, in its
12 discretion, provide the jury with specific response to
13 the jury's question, but the court shall respond to
14 all questions asked, even if the response consists of
15 a directive for the jury to continue its
16 deliberations.

17 subsection (3), copies of final instructions.
18 The court shall provide each juror with a written copy
19 of the final jury instructions to take to the jury
20 room for deliberation. The court, in its discretion,
21 may provide the jury with a copy of electronically

22 recorded instructions.
23 Madam Chair, I move that for adoption. I
24 seek support.
25 Is there support?

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1 VOICE: Support.
2 CHAIRPERSON BUIREWEG: Discussion?
3 VOICE: Is it just (2) and (3) that we are
4 talking about right now?
5 CHAIRPERSON BUIREWEG: That is what the
6 motion is at this time.
7 MR. LOOMIS: Daniel Loomis, 35th circuit. I
8 propose a friendly amendment in paragraph two that we
9 delete the words "in a sealed envelope given."
10 CHAIRPERSON BUIREWEG: Mr. Rombach.
11 MR. ROMBACH: At this time I am going to
12 oppose the friendly amendment, more for logistical
13 purposes, simply because I think the court is seeking
14 our comment on the proposals as delivered to us, and
15 rather than getting into drafting on the floor on the
16 minutia, I prefer we move issue forward, so I am not
17 going to accept this as a friendly amendment.
18 MR. LOOMIS: Comment. I think that was
19 pointed out by the judges in their fax to the Assembly
20 just recently, their concern about that.
21 JUDGE CAPRATHE: Can we speak to any of these
22 issues or not, as a point of order?
23 CHAIRPERSON BUIREWEG: You do have floor
24 privileges, so, yes, you may.
25 JUDGE CAPRATHE: I would like to ask the

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1 Assembly to consider making that discretionary.
2 Recorder's Court, for example, judges there tell me
3 that they have one-day trials and it would just be
4 impossible if they had to make written copies of all
5 the instructions. They just don't have the ability to
6 do it. So I would say if we could make it
7 discretionary, it would depend on the court, the final
8 instructions.

9 CHAIRPERSON BUIREWEG: Is that regarding
10 number (2) and/or (3)?

11 JUDGE CAPRATHE: Number (2) and (3), I am
12 sorry.

13 CHAIRPERSON BUIREWEG: (2) and (3).
14 Mr. Rombach.

15 JUDGE CAPRATHE: If I do have floor
16 privileges, I can make a motion, that would be my
17 motion.

18 MR. ROMBACH: We are just seeking clarity
19 from the parliamentarian here.

20 So, Judge, you are suggesting that we switch
21 the "shall" in subsection (2) on the second line to
22 "may," the "shall" in line five, "the court may invite
23 the jury to ask questions," you want that to read as
24 permissive language as well?

25 JUDGE CAPRATHE: Yes.

□

1 MR. ROMBACH: In sub (3) you are asking in
2 the first line "the court may provide each juror,"
3 instead of "shall?"

4 JUDGE CAPRATHE: Yes.

5 MR. ROMBACH: I will accept as a friendly
6 amendment.

7 CHAIRPERSON BUITEWEG: Is there further
8 discussion regarding N(2) and/or (3).

9 MR. HERRINGTON: David Herrington, 52nd
10 circuit. I am opposed to the entire section (2). I
11 think it basically preempts part of the deliberative
12 process on the part of the juries. When juries get
13 their final instructions, they really haven't had a
14 chance to digest it. If they get written copies,
15 that's fine, but to ask the jury at the close of the
16 instructions do you have any questions about the final
17 instructions I think is premature, and also I think
18 that it detracts from the deliberative process once
19 they go to the jury room, because if they are talking
20 about an instruction involving specific intent or
21 wanton and willful or things like that, I think that's
22 open to discussion, and I am not sure the judge can
23 answer right off the bat without side bar with counsel
24 and so on, so forth. So I think there is actually
25 some judicial economy that's at stake there.

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1 So I move to delete section (2) from sub (N).

2 CHAIRPERSON BUITEWEG: Is there a second to
3 the motion?

4 VOICE: Support.

5 JUDGE GIOVAN: Can I make a comment about

6 that? Actually it's been my practice at the close of
7 every jury instruction I have given in the last 10 or
8 15 years, I say, just before they leave, I say, "Do
9 any of you have any questions about my instructions,
10 anything that isn't quite clear?" That's exactly the
11 way I say it. And I will say, first of all, I never
12 get a response.

13 MR. SHAPIRO: You are so clear.

14 JUDGE GIOVAN: But once in a while, once in a
15 while I do, and it's usually sometimes they say, just
16 a point of clarification -- well, it's not been a
17 problem, but at least I give them the opportunity.

18 And point of personal privilege. I made, in
19 an excess of optimism, I told my jury trial to come
20 back this afternoon, so if you don't see me here this
21 afternoon, it's not because I don't think this is all
22 very important. It is, but I have to honor that, and
23 it's my second jury trial this week, and the reason I
24 am able to schedule a second jury trial this week is
25 because I didn't have to provide them with a copy of

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1 the written instructions for the first trial.

2 CHAIRPERSON BUI TEWEG: Is there further
3 discussion regarding the motion to eliminate section
4 (2) from subsection (N)?

5 Okay. Hearing none, all those in favor of
6 eliminating subsection (2) from section (N), please
7 say yes.

8 All those opposed say no.

9 Motion fails.

10 Is there further discussion regarding (N)(2)

11 or (3). Yes, Ms. Kirsch.

12 MS. KIRSCH-SATAWA: I have a friendly
13 amendment to section (2) that language be added at the
14 end that says, "The sealed envelope shall be made part
15 of the record and preserved for appeal."

16 CHAIRPERSON BUIREWEG: Is there a second?

17 VOICE: Second.

18 CHAIRPERSON BUIREWEG: Let me let Mr. Rombach
19 think about that for a moment. Could you please bring
20 it forward in writing.

21 MS. KIRSCH-SATAWA: My colleagues in the 17th
22 circuit have pointed out a friendly amendment to my
23 friendly amendment, so I would like to change it.

24 CHAIRPERSON BUIREWEG: Would you like to
25 restate your request for a friendly amendment?

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1 MS. KIRSCH-SATAWA: You have my piece of
2 paper now, but I would like it to say that the sealed
3 envelope and its contents be preserved, become part of
4 the record and be preserved for appeal.

5 CHAIRPERSON BUIREWEG: One moment, please.

6 MR. ROMBACH: Although I think if there is
7 questions arise, they shall be read into the record,
8 so it would be preserved under those circumstances. I
9 would accept this as a friendly amendment.

10 VOICE: Support.

11 CHAIRPERSON BUIREWEG: It's been accepted.
12 Is there any further discussion regarding 2.513(N)(2)
13 and/or (3)?

14 VOICE: Call the question.

15 CHAIRPERSON BUIREWEG: All those in favor say

16 yes.
17 All those opposed say no.
18 Motion carries. And that completes cluster
19 number one.
20 At this point it's 11:20. We have two
21 panelists who are unable to be here this afternoon
22 after the lunch, and we have to take the proposal
23 regarding trust overdraft accounts at 11:30. I am
24 going to exercise privileges of the chair and ask
25 those two panelists if there is anything further they

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1 would like to comment or discuss upon at this time
2 before we take the next issue. And we may have time
3 to resume more on the jury reforms before lunch, but
4 we will take it as it comes.

5 Judge Caprathe, Judge Giovan.

6 JUDGE CAPRATHE: There is one very
7 controversial proposal, and I would just like to speak
8 on behalf of it, because I may be one of the very few
9 that would so, and it is on juries discussing the
10 evidence during recesses. And I just want to read a
11 short paragraph from the principles, commentary that
12 might help in considering that.

13 The rule or the principle is that jurors in
14 civil cases may be instructed that they will be
15 permitted to discuss the evidence among themselves in
16 the jury room during recesses from trial when all are
17 present as long as they reserve judgment about the
18 outcome of the case until deliberations.

19 And the commentary indicates, "In exercising
20 its discretion to limit or prohibit jurors' permission

21 to discuss the evidence among themselves during
22 recesses, the court should consider the length of the
23 trial, the nature and complexity of the issues, and
24 the makeup of the jury and other factors that may be
25 relevant on a case-by-case basis," and that quotes the

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1 Arizona rule, because there is actually an Arizona
2 rule that allows that. It cites the Arizona rule.

3 And this also is in the commentary. Recent
4 empirical studies or structured jurors, of structured
5 jurors' discussions on the evidence during actual
6 trials of civil cases found that allowing discussions
7 did not lead to premature judgments in cases by
8 jurors, enhanced juror understanding of the evidence,
9 and in more complex cases served to decrease the
10 incidence of fugitive discussions of the trial by
11 juries with family and co-workers and met with high
12 levels of acceptance by jurors, judges, and trial
13 counsel. See Sherry Diamond, et al, jury discussions
14 during civil trials, 45 Arizona Law Review 1 2003, and
15 there are other citations, and you can find those in
16 the commentary of the principles.

17 And that's -- I just wanted to make sure I
18 had a chance to share that with you, and I have a
19 plane to catch at 3:00 to go to Chicago for the ABA
20 officers conference this afternoon.

21 JUDGE KENT: Judge Giovan, you also have to
22 leave before we reconvene. Do you have any further
23 comments that you would like call to the attention of
24 the Assembly?

25 JUDGE GIOVAN: This morning I was told I

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1 should comment on two sections, and so I will address
2 those. One of them is 2.513(J) which is about a jury
3 view, and it's like our present rule, except that
4 it -- well, what it says, "On motion of either party
5 or on its own initiative," then it adds the language
6 "or at the request of the jury, the court may order a
7 jury view."

8 I hear a lot of people being scared by this
9 provision that, you know, the jury might be requesting
10 a jury view, but actually I think this doesn't change
11 the present practice.

12 Suppose you are in a case and a juror writes
13 a note now and says, Judge, you think we could go out
14 and look at the scene, or they might raise their hand
15 and say, Could we go look at the scene? It's possible
16 right now.

17 what's the judge going to say? well, I can't
18 allow it. Of course the judge, that could be the
19 trigger right now under our present practice, a signal
20 to the judge that maybe it's appropriate for the jury
21 to go out and take a view.

22 I think that adding that really doesn't
23 change anything, all it does -- now, see the rule
24 doesn't say you have got to tell them that they may
25 request a view. I would probably not want to do that

1 in my preliminary instructions, and I don't think my
2 committee on standard civil instructions will add
3 that. They will do it over my dead body, I will tell
4 you that.

5 But I would like to point out one other
6 thing. Something came to my attention in here. The
7 present rule says that the only person that can talk
8 at the scene is an officer appointed by the court.
9 That isn't the way it works. I have taken jurors on
10 views a number of times, and in every case the lawyers
11 or a witness will want to say, That's the hole I was
12 talking about or this is where I was standing, and of
13 course the whole purpose of going there is to assist
14 the jury to understand the testimony that was in
15 court.

16 Our criminal rule actually provides for that.
17 It says that when you go out to the scene somebody may
18 comment on the scene, and of course a record is made
19 of that, and so one of the groups that I chaired a
20 discussion has recommended that we simply adopt the
21 rule in criminal cases. And I think that's the actual
22 practice in any event.

23 Then the only other thing -- oh, the judge
24 commenting on the evidence. Would you believe it's in
25 our rules already? It's actually in MCR 2.516(B)(3).

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1 It says something like the judge may comment on the
2 evidence as justice requires, or something to that
3 effect.

4 I don't think in the history of Michigan any

5 judge has ever commented -- used that provision. I
6 have always wondered why it's in there. I suspect
7 it's a holdover from the common law.

8 I was in Old Bailey once, and I heard the
9 judge say, well, you heard Mr. Jones say this, that,
10 and the other. Such evidence should be received with
11 some skepticism. You know, I think that if the judge
12 did that, it seems to me it would be instant reversal.

13 There is also an inherent contradiction. It
14 says that the judge may -- on the proposal -- the
15 judge may comment on the weight of the evidence, but
16 it says it also has to be fair and impartial. The
17 judge is either going to make a comment that's
18 influential or not, which has not been our custom,
19 because the jurors are, supposed to be up to the
20 jurors, or it's going to be perfectly impartial.
21 well, if it's a perfectly impartial summary of the
22 evidence, why do it? You know, we usually leave that
23 to the attorneys.

24 So you might -- I think it shouldn't be
25 adopted, and I think we might even recommend that the

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1 Supreme Court take it out of the present rule.

2 MR. DIMOS: If I may, because I may have
3 problems as well, depending on the pace of the
4 deliberations.

5 First of all, I wanted to thank Lori and
6 everyone here at the State Bar of Michigan for
7 allowing myself and my fellow Hoosiers to participate.
8 we hope that we have provided some insight and benefit
9 as to our experience.

10 I did want to comment. I have some thoughts,
11 but one particular one which I think would be unique,
12 and that is the proposal regarding reading of
13 deposition summaries to the jury.

14 while it's not provided for in the Indiana
15 rules, we had a federal judge in the Southern District
16 of Indiana, who sits primarily in Indianapolis, who
17 had this practice for years. Where it works in
18 practice is on evidence, for instance medical
19 testimony, where a treating physician, even
20 investigating police officers at times. It's not
21 going to be for perhaps a key witness, but for
22 witnesses that at one time we would bring in, even if
23 it was to lay evidentiary foundations, this is before
24 the courts were more forceful in getting stipulations
25 out, that kind of summary would work.

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1 The practical effect is that we have got two
2 weeks out you have to submit all your deposition
3 summaries, settlement discussions seem to intensify at
4 that point and cases were resolved.

5 JUDGE KENT: Thank you. It's now 11:30, and
6 I suggest perhaps we should suspend this discussion on
7 jury amendments until we deal with the 11:30 schedule
8 and then resume our discussion until lunch.

9 CHAIRPERSON BUIREWEG: That is exactly what
10 we are going to do. Thank you, Judge Kent and
11 panelists. Panelists, if you wouldn't mind staying
12 where you are, I don't know how long the next proposal
13 will take, and we may be able to get back to these
14 issues.

15 I would like to call forward at this time
16 Mr. Timothy O'Sullivan from the Client Protection Fund
17 Standing Committee to introduce the next proposal. I
18 need a motion, however, from the floor to grant floor
19 privileges to the following non-Assembly members:
20 Mr. Fallasha Erwin, Mr. Daniel Dalton, Mr. Joseph
21 Garin, Mr. John VanBolt, Mr. Robert Agacinski, and
22 Ms. Linda Rexer. Is there a motion?

23 JUDGE KENT: Wally Kent, 54th circuit. I so
24 move.

25 VOICE: Support.

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1 CHAIRPERSON BUITEWEG: Any discussion?
2 All those in favor.
3 Any opposed.
4 Motion carries. Thank you very much.
5 Mr. O'Sullivan, would you like to come
6 forward and introduce your contingency and your
7 proposal.

8 MR. DALTON: Good morning. My name is
9 Dan Dalton. Mr. O'Sullivan will be speaking as part
10 of the presentation today.

11 I am here on behalf of the Client Protection
12 Fund. We are here to present a proposal that was
13 provided to this Assembly earlier this spring on trust
14 overdraft notification.

15 The drafters of this proposal include a
16 committee from the fund, including Fallasha Erwin, who
17 is the chair of our fund; Roshunda Price from the
18 University of Michigan Legal Clinic, who can't be here
19 today; Joe Garin of Lipson Neilson in Bloomfield

20 Hills; myself from Tomkiw Dalton of Royal Oak, a small
21 firm in Royal Oak, Michigan.

22 We also have Linda Rexer, Executive Director
23 of the State Bar Foundation, who has managed the IOLTA
24 since 1990; Rick Winder, the Deputy Director for the
25 State Bar Foundation; John VanBolt, Attorney

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1 Discipline Board; and Mark Armitage from the Attorney
2 Discipline Board as well, who are here to answer
3 questions, and they are also part of the Drafting
4 Committee.

5 The other drafter is Patrick McGlinn from the
6 Attorney Grievance Commission, and he could not be
7 here today.

8 Your speakers today include myself, Joe
9 Garin, Robert Agacinski of the Attorney Grievance
10 Commission, and Tim O'Sullivan of the New York Client
11 Protection Fund.

12 Why are we here today? As members of the
13 Client Protection Fund, we have learned there has been
14 a pattern of individuals that individuals take when
15 they start stealing money from clients. They usually
16 start with something small, and then funds are taken,
17 paid back, and then more monies taken, and eventually
18 it's not paid back. This is a way that we believe
19 that other states have used to intercept those
20 problems, and this is through the client overdraft
21 issue. Joe Garin will talk about this in greater
22 detail.

23 MR. GARIN: Good morning. Thank you. I am
24 Joe Garin, and I am an attorney. I practice in

25 Michigan and other states, so I have got kind of a

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1 unique practice. I represent lawyers in malpractice
2 cases and ethics disputes. I have been on the Client
3 Protection Fund for about three years, and we have
4 been working with a lot of different people over the
5 last several months to come up with a proposal for
6 trust account overdraft notification rules.

7 It's a rule that's been adopted in many other
8 states. You will see a slide in moments where it's
9 been adapted in 36 states, and Michigan is one of the
10 few states that has not adopted the rule yet. It's a
11 rule that's long overdue.

12 The rule that we are considering today is the
13 result of the collaboration of the Client Protection
14 Fund Standing Committee, the State Bar Foundation, the
15 Attorney Grievance Commission staff and Attorney
16 Discipline Board.

17 We have looked at rules from other states.
18 We have looked at various drafts of this rule. It has
19 gone through several iterations and redrafts, and what
20 we are presenting to you today is the result of many
21 hours of work by our committee and the subcommittee.

22 The reason that we think this rule is
23 important is because lawyers are self-regulating. We
24 don't have the Legislature interfering or getting
25 involved in the way that we run our businesses and our

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1 practices. And in order to maintain this autonomy we
2 think it's important that we are proactive in the
3 regulation of lawyers in adopting a rule that prevents
4 lawyers from bouncing checks on their trust accounts
5 or borrowing clients' money so that they can live
6 their lives and go on with other things other than
7 taking care of business for their clients.

8 It's important to understand that since 2002
9 the Client Protection Fund has paid out in excess of a
10 million dollars for claims filed against the Client
11 Protection Fund, and of those payments \$705,000 was
12 attributable to nine lawyers in nine different
13 counties. It's not an isolated problem in southeast
14 Michigan, the Upper Peninsula, in Lansing. It's all
15 over the state we see claims coming in.

16 And the trust account overdraft notification
17 rule is a risk management tool that allows us as a
18 self-regulated profession to identify lawyers who are
19 likely to have problems. This is not a situation
20 where we are giving the Attorney Grievance Commission
21 or the Attorney Discipline Board carte blanche to come
22 in and investigate and interrupt lawyers' practices.

23 Instead, what happens is, if a lawyer bounces
24 a check on their trust account, the financial
25 institution that has the account will send the notice

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1 to the Attorney Grievance Commission and the lawyer.
2 The lawyer is given an opportunity to explain why the
3 check was bounced.

4 I represent a firm in Colorado who recently
5 had this kind of problem, and it was something that we
6 were able to clear up in about an hour. What had
7 happened was they had a client come in on a personal
8 injury settlement, and the client endorsed the
9 settlement check, and they were given a check from the
10 trust account to pay the client their portion of the
11 settlement, and they asked the client to hold the
12 check for a couple days so that the settlement check
13 could clear in the trust account. And what happened
14 is the client immediately went to the bank and
15 presented it, and it was stamped not sufficient.

16 And a notice was sent to the law firm by the
17 Grievance Commission out there, and what we had to do
18 was get a letter from the bank manager explaining that
19 the funds had been deposited but they hadn't cleared
20 and produced copies of the receipts. We sent it to
21 them and they closed the file, that was the end of it.

22 It wasn't a situation where they said, well,
23 we are going to come and we want to see all your trust
24 account records. It was very isolated and resolved
25 very quickly.

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1 We have got some highlights here or headlines
2 here I want you to look at. We see lawyers in lots of
3 states who do bad things with their clients' money.
4 There is the case out of New Jersey where the lawyer
5 was suspended amid a probe of gambling where he was
6 using client funds to sustain his gambling habit, and
7 the next one talks about another lawyer
8 misappropriated \$800,000 in client funds.

9 The next one is a Lansing State Journal
10 \$630,000. This is a lot of money. It's the kind of
11 thing if you catch it at the front end with the first
12 bounced checks and someone can come and investigate,
13 then you can slow it down or at least stop it.

14 I am going to pass the podium to Robert
15 Agacinski, who is going to give us some more input on
16 this, but before I do, the committee would like to
17 thank Lori Buiteweg for her help in putting this
18 together, for her hard work. I know she has worked
19 very hard in the last year for everything she has
20 done, so we would like to thank her for that. Thank
21 you.

22 MR. AGACINSKI: Good morning. I am Bob
23 Agacinski, the Grievance Administrator, and I was
24 asked to talk about two or three minutes.

25 My main function, I think, is to reassure the

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1 Bar that this rule is not creating a new Rule of
2 Professional Conduct that should change the way the
3 attorneys have to behave or to give us another insight
4 into the attorney's practice or another way to
5 threaten the attorneys.

6 We are not also being commissioned to
7 prosecute individuals for overdrafting their account,
8 the theory being though that overdrafting an account
9 is sometimes an indication that there may be
10 misappropriation going on and gives us an insight into
11 it, an inroad into it before it becomes too large and
12 maybe can stop it in the bud.

13 Sometimes it is also an indication that the

14 attorney doesn't know how to run a trust account and
15 will provide us with a method of educating the
16 attorney through ethics school or other methods as to
17 how to actually run a lawyer trust account, and
18 sometimes it might simply be an indication for bank
19 records that are wrong, and it will give everybody an
20 opportunity to correct the bank records.

21 The process is going to be quite simple with
22 our office. When you are notified of an overdraft, it
23 is the attorney's obligation to contact us with the
24 explanation as to what caused the overdraft. We will
25 be given a copy of that overdraft letter. We will be

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1 waiting diligently for the answer. And after some
2 time goes by, if we do not get an answer, we will
3 prompt an answer and perhaps have to begin an
4 investigation.

5 But if we do get an answer, it will be
6 directed toward a specialist in our office to maintain
7 uniformity and consistency in our practice. We will
8 review the answer, look at the records that are
9 provided, and in many instances I am told from other
10 states' history realize it's bank error, mathematical
11 error and involves no suspect behavior at all.

12 In those cases we simply close the case, and
13 we send out a letter indicating that there is nothing
14 here that interests us at all, and we do that in other
15 areas as well.

16 In some indications there may be something
17 suspect about the explanation and we may want further
18 bank records and we may indeed involve an

19 investigation as we do whenever we are presented with
20 a case that has some suspect behavior.

21 That investigation itself may lead us to one
22 or two conclusions. Again there is some lack of
23 education on the part of the attorney. It doesn't
24 need prosecution, doesn't need a disciplinary action.
25 It may indeed involve a reference to an educational

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1 source, such as ethics school or some other ICLE
2 institution. In those rare cases where we do have
3 misconduct, there will be an investigation.

4 One example has come to our attention
5 recently in which an individual attorney died, and
6 when we reviewed his files as a result of a
7 receivership found that he was misappropriating client
8 funds and replacing those client funds with future
9 client funds, sort of the way Social Security works.

10 But eventually he died, and he wasn't able to
11 replace the last set of client funds, and there was a
12 loss of about \$135,000 to clients, which would have
13 been caught had we been earlier involved in the
14 process, caught this pattern of behavior, seen some of
15 the overdrafts he was receiving, and, again, stopped
16 the behavior before it led to the large loss.

17 So that is a very brief synopsis of the kind
18 of procedure we would apply. Again, it is not one
19 that should be threatening to the Bar. It does not
20 call for a change in practice. It just calls for
21 preventing overdrafts on the account for whatever
22 reason they occur. Thank you.

23 MR. O'SULLIVAN: My name is Tim O'Sullivan.

24 I am the Executive Director of the New York State
25 Lawyers Fund for Client Protection, also a member of

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1 the ABA Standing Committee on Client Protection.

2 I just want to briefly give you some
3 experience of other jurisdictions that have
4 implemented this rule and the wide success that those
5 jurisdictions have enjoyed.

6 The trust account overdraft notification
7 rule, it's a model rule of the American Bar
8 Association. The ABA has, in the field of client
9 protection, a half a dozen model rules, and the trust
10 account overdraft notification is the most widely
11 adopted rule in our nation.

12 The first slide will show in the United
13 States there are now 36 jurisdictions that have
14 implemented this rule or some version of it, and that
15 rule has had many benefits, some of which have already
16 been mentioned, but I will briefly cover.

17 Number one is obviously protection for law
18 clients. Number two, it protects and prevents losses
19 by enabling early intervention by grievance offices
20 where money is being misused. And then, and this is
21 very important, because in New York it's been our
22 experience it serves a very important educational
23 value where there has been innocent mistakes by honest
24 lawyers in handling client money that allows the
25 grievance offices to bring those lawyers in and really

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1 educate them regarding their fiduciary
2 responsibilities in properly handling client money.

3 Another benefit which many funds have
4 enjoyed, it not only conserves and protects the assets
5 of the law clients but also of lawyer fund programs in
6 that jurisdiction that adopts the rules. The lawyer
7 funds, they operate with limited resources, so that's
8 certainly a very important benefit that does result.

9 By all accounts, the overdraft notification
10 rule has been very successful and well received
11 wherever it has been adopted.

12 I will just give you a few examples. In
13 New Jersey that rule has been in effect since 1985,
14 and they average 325 overdraft notices, and in that
15 period of time the rule has put 85 lawyers who were
16 misusing client funds.

17 Pennsylvania, which has also adopted the
18 overdraft rule, last year they received 225 overdraft
19 notices, and 26 of those resulted in referrals to
20 disciplinary authorities. It further emphasizes the
21 point that was made that not every lawyer subject to
22 one of those notices is being thrown in court or such
23 severe discipline. It's a chance to bring those
24 lawyers in, and they are honest, majority of these
25 notices are the result of an honest mistakes, and the

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1 authorities really view it as an opportunity to
2 educate those lawyers and prevent further losses -- or

3 prevent further problems down the line if those aren't
4 caught early.

5 Minnesota, the rule has been in effect in
6 Minnesota for 15 years now. They have received --
7 there has been 150 disciplinary actions taken in that
8 period of time, only 50 of which were really serious
9 discipline, any public discipline. The rest of those
10 were minor actions that were taken really, again,
11 through the educational aspect of the rule.

12 And Minnesota is interesting. They report
13 that they have actually had a fewer number of
14 discipline files have been opened since that rule has
15 been in effect, that more and more of these files are
16 closed after the attorney is given the education and
17 the instruction on proper record keeping with respect
18 to their client funds.

19 Our next slide. Just to tell you briefly
20 about the New York experience, which I am most
21 familiar with. Our dishonored check notification rule
22 has been in effect since January 1, 1983, and it's
23 really been successful beyond our expectations.

24 We have received over 6,800 notices in that
25 time of checks that have bounced on lawyer trust

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1 accounts. And those notices involved 4,500 lawyers,
2 face amount of money of \$195 million. why those
3 numbers are so much staggering, of that 4,500 lawyers,
4 of that number only 145 were lawyers that were
5 dishonest, were misusing the client funds. so those
6 145 lawyers have now been removed from practice.

7 Now, if we had not caught those 145 lawyers

8 as a result of the rule in New York, I am scared to
9 think of what client losses they would have lead to,
10 but the rule, again, has detected those lawyers and
11 removed them from practice. And the vast majority of
12 those notices were lawyers that were, again, had the
13 opportunity to be educated and given instruction with
14 respect to their fiduciary obligations.

15 Next week my board of trustees who review
16 claims on a quarterly basis involving client money
17 that's being misused, we meet next week, and at that
18 time there is 40 claims that will be before my board
19 involving 27 lawyers who had allegedly stolen client
20 funds. Four of those 27 lawyers were caught by our
21 bounce check rule in New York state.

22 And in the 13 years that our rule has been in
23 operation in New York, of awards made by our fund, 49
24 of the lawyers that were the subject of those awards
25 again were caught by the bounce check rule in New York

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1 state. So it's a proven loss detection device in
2 New York, as well as other jurisdictions I cover.

3 I just want to briefly emphasize the point
4 that the rule is not really harmful or a threat to the
5 honest lawyers, the lawyers making the innocent
6 mistakes.

7 we periodically in New York, we survey our
8 grievance committees who, with the lawyers fund in
9 New York, administer this rule, and they report, you
10 know, consistently that the biggest benefit that they
11 see out of the rule, in addition to detecting
12 dishonest lawyers, is really the educational value

13 that the rule provides.

14 Now, in New York the rule is structured very
15 similar to the proposed rule here in Michigan. You
16 have to use an approved bank. The bank has to provide
17 that notice. We have had very little problem in
18 New York with bank compliance. In the very early days
19 of the rule there were some notices that were
20 generated due to bank error, but again built into the
21 mechanism of our rule, as well as the proposed rule
22 here, there is an opportunity for those notices to be
23 withdrawn.

24 we found over time that the banks in New York
25 state, they have been very efficient at complying with

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1 the rule, and we receive a much, much smaller number
2 of notices now that really result in bank error, and,
3 you know, in this day and age of banks crossing state
4 lines, I am sure the vast majority of banks here in
5 Michigan do business in other jurisdictions that
6 already have such a rule in place, and I am not sure
7 that there has been much of a problem with bank
8 compliance with the rule.

9 New York lawyers sometimes are thin skinned,
10 but probably much more so than here in Michigan. In
11 13 years the rule has been in place in New York we
12 have never once had a complaint from a lawyer, a law
13 firm, a Bar association of any kind about the
14 operation of the rule. Because, again, just to drive
15 home the same point, the rule is catching the
16 dishonest lawyers, and the innocent or the honest
17 lawyers that are making mistakes that get detected by

18 the rule, they are really being assisted in complying
19 with their fiduciary obligations.

20 So just to conclude, the trust account
21 overdraft rule in New York, as well as other
22 jurisdictions, 36 which now adopted it, it's a proven
23 loss prevention and detection device, a client
24 protection device, and it is really a helpmate to the
25 members of the Bar in educating them regarding

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1 handling client funds.

2 MR. DALTON: Thank you, Tim, and members of
3 the panel.

4 we have taken quite a long time drafting this
5 rule and thinking things through, especially to the
6 point that banks already do this from a national
7 scale. This has already been -- because it's
8 nationwide, we have a nationwide system of banks.
9 Banks are already taking those steps of providing
10 trust overdraft. It's nothing new to the banking
11 community.

12 we have adopted the rule in small firms. We
13 have a small firm of six attorneys. You know, I am
14 the one that looks at the books, I am the one that
15 checks it. It's not a burdensome thing at all from
16 that perspective.

17 with that, we will open the floor to a
18 motion.

19 VOICE: So moved.

20 VOICE: Support.

21 CHAIRPERSON BUITEWEG: We have a motion and a
22 second. Is there any discussion? I see at least one

23 Assembly member coming forward.
24 MR. BLAU: Michael Blau from the 22nd
25 circuit. Just a quick question. In the event an

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1 attorney did not give a written --
2 VOICE: Turn the microphone on, please.
3 VOICE: Or speak into it.
4 MR. BLAU: In the event an attorney did not
5 respond within 21 days to the Attorney Grievance
6 Commission, what would be the mechanism? would a
7 request for investigation automatically be sent out by
8 the commission? what would be the mechanics?
9 MR. AGACINSKI: A general rule is if we do
10 not get the answer within the first amount of time is
11 we send out a reminder notice, make some phone call
12 attempts. So it really is several efforts made before
13 we may begin a real investigation. So the deadline is
14 simply a goal, not necessarily a rigid deadline.
15 MR. BLAU: Thank you.
16 CHAIRPERSON BUIREWEG: Is there any further
17 questions?
18 CLERK GARDELLA: Bob Gardella from the 44th
19 circuit, also Assembly Clerk. I rise in support of
20 this motion. Years ago I used to be the attorney for
21 the State Bar doing the client protection fund
22 matters, filing suit against the disbarred or
23 disciplined attorneys in the state who basically have
24 stolen money from their clients over the years.
25 This is a rule that's already in place in 36

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1 states, and most, if not all, of the banks when
2 something happens like this, they call the State Bar
3 in Michigan anyway to let us know that there is a
4 problem and that there is an overdraft.

5 It's pretty rare for this to happen, and
6 someone has to be very, very desperate to let their
7 client trust account go down to something then write a
8 bad check on it. But I think that this rule will help
9 prevent a bad situation from getting worse and
10 preventing attorneys who have a gambling problem, who
11 have an alcohol addiction problem or other drug
12 problem from getting in the hole even more, and I
13 think that this rule is basically putting down on
14 paper what's already in place anyway, because the
15 banks, the national banks already call the State Bar
16 of Michigan or the Attorney Grievance Commission and
17 let them know that there is a problem here. I ask
18 that the members support this.

19 CHAIRPERSON BUIREWEG: Is there further
20 discussion?

21 It's been moved and seconded that the
22 Representative Assembly approve the proposed trust
23 account overdraft notification rule, MRPC 1.15(A), and
24 authorize the State Bar of Michigan to make any
25 subsequent editorial, clerical, or technical language

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1 changes to the proposed rule and comments that may

2 assist in effecting the intent of the proposal after
3 discussion with Michigan financial institutions and
4 others and prior to submitting the rule to the
5 Michigan Supreme Court.

6 All those in favor of this motion please say
7 yes.

8 Any opposed?

9 Any abstentions?

10 Motion carries. Thank you very much. Thank
11 you for coming today.

12 (Applause.)

13 CHAIRPERSON BUIREWEG: We do have five
14 minutes, and I am not one to squander time given our
15 time constraints, but I think everybody probably needs
16 a five-minute bathroom break before lunch. I don't
17 want anybody to be late from lunch.

18 Just one moment. I would like to, if you
19 could, just one moment, please, I am sorry. It's come
20 to my attention that the chair of our Awards and
21 Nominations Committee won't be here this afternoon, so
22 I would like to recognize Carl Chioini, thank him for
23 his service to the Assembly and have him come forward
24 and receive his plaque. Mr. Chioini.

25 (Applause.)

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1 CHAIRPERSON BUIREWEG: We are recessed. Be
2 back at 1:30 sharp.

3 (Lunch break taken 11:56 a.m. to 2:15 p.m.)

4 CHAIRPERSON BUIREWEG: I am going to go ahead
5 and reconvene the meeting at this point. I think we
6 have a quorum present. As people come back from

7 lunch, they can take their seats. I don't want to
8 waste any further time.

9 As you can see, we lost a few of the
10 panelists. Magically we have had replacements appear
11 in their stead, and so we are very thankful to Judge
12 Hammer from the Michigan District Judges Association
13 from Garden City's District Court for joining us. He
14 was given floor privileges this morning when we voted
15 in our special rules, and Judge Kent has now been
16 transferred -- I won't say demoted or promoted -- from
17 moderator to panelist from Tuscola County. I will do
18 the best I can with the moderating.

19 I would like to go ahead and continue. I
20 have been asked if we could continue with cluster (E)
21 of the proposed jury reforms, and starting with
22 2.513(F), deposition summaries, and 2.513(G),
23 scheduled experts.

24 In keeping with the special rule, I would
25 like to invite Judge Heath from Indiana to comment if

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1 he has got any experience with these two particular
2 court rules. Judge Heath.

3 JUDGE HEATH: I will make this one real
4 short. No, I don't. I have not done deposition
5 summaries, and I have not scheduled experts. We have
6 a rule, trial rule for Indiana where if the request
7 for separation is made, it must be honored. I have no
8 discretion. So separating witnesses would, I assume,
9 run afoul of the scheduling of the experts, or could,
10 and that would have to be somehow reconciled.

11 But just a comment generally, and I think

12 scheduling experts could assist in some cases, and I
13 could see where that would be helpful in some cases,
14 perhaps the discretion might be helpful.

15 I certainly personally am opposed. This is
16 just me. I am not speaking perhaps on behalf of the
17 whole Indiana Bar, but I don't like the idea of
18 deposition summaries. I believe that invades the
19 province of the fine work that the jury can do. I
20 would instruct them to treat depositions and video
21 depositions of the witnesses like any other witness.
22 So I am not real keen on it, but that's the only
23 insight I can give you.

24 CHAIRPERSON BUITEWEG: I know that the trial
25 lawyers have something to say about this. Terry and

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1 Doug, have you chosen amongst yourselves?

2 MR. SHAPIRO: I think we are both going to
3 have something to say.

4 CHAIRPERSON BUITEWEG: Go ahead.

5 MR. MIGLIO: I think it's fair to say that a
6 significant amount of time spent as a trial lawyer
7 working to elicit testimony, whether it be in a
8 de bene esse deposition or a discovery deposition from
9 witnesses, so much so that I think --

10 VOICE: I am having a hard time hearing you
11 in the back.

12 MR. MIGLIO: I was saying, a significant
13 amount of trial preparation and trial work involves
14 preparing to examine witnesses and eliciting what may
15 be de bene esse testimony from those witnesses, which
16 oftentimes can be interpreted a number of different

17 ways by the jury. It's not an uncommon practice to
18 have blowups of deposition testimony because you want
19 to make a point with the jury about the exact wording
20 of a witness' answer that's critical to your case or
21 the defense of a case.

22 Deposition summaries merely would purport to
23 gloss over what the witness has actually testified to.
24 I can't imagine in an instance that we are going to
25 summarize testimony as opposed to engage in a

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1 stipulation in open court about what somebody would
2 say or what fact was agreed upon would, in fact,
3 advance the fact finding procedure for the jury.

4 And so I cannot see how deposition summaries
5 in any way, shape, or form, except those that possibly
6 may be stipulated to by counsel to get in the record a
7 specific fact or a specific finding, would otherwise
8 be appropriate for a jury trial.

9 MR. SHAPIRO: I am going to go ahead and talk
10 about the deposition summaries and then also comment
11 on the expert witness. Can I be heard in the back?

12 First on the dep summaries, to amplify just a
13 little what Terry had to say, judging the credibility
14 of witnesses is pretty central to our system, and the
15 notion that somehow in a short, kind of clean summary
16 a jury is going to be able to determine how credible
17 that witness was in terms of the language that they
18 used, the nuances, the pace of cross-examination is
19 essentially impossible.

20 You are also in a situation where if someone
21 wants, under this rule if someone brings in a live

22 witness, they get to present that live witness for as
23 long as they want and elicit all the testimony they
24 want, but if for reasons of convenience or difficulty
25 with the expert coming to town or whatever you have to

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1 do a de bene esse dep, now you are already at a
2 disadvantage because you have to show a video or read
3 a transcript. Now you are going to be at a second
4 layer of disadvantage because the other side is
5 bringing in a live witness and you are going to be
6 reading a summary that the other side has approved.

7 It's really -- I think this is a very, very
8 bad rule, and I would note my understanding is that it
9 isn't being used in Indiana, it isn't being used in
10 any state anywhere in the country.

11 Also, who resolves the disagreements? I say
12 this is what the summary should say; defense counsel
13 says this is what the summary should say. The judge
14 has to make a ruling. There is no rule of evidence
15 for him to base his ruling on. He is not saying here
16 is the questions that can be asked or not. He is
17 saying this is an accurate reading of the deposition
18 transcript, and so you are also making the judge be a
19 determiner of facts, and she has to read the
20 deposition with a level of care that judges are not
21 required to do on a routine basis right now to make
22 rulings. They get to see the question and the answer
23 and say that's a good question, that's a bad answer --
24 that's a bad question. Now they are going to be the
25 arbiters of what is an accurate description.

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1 It surely is going to lead to lots and lots
2 of appeals. I mean, it's hard to imagine how any time
3 you lose with a deposition summary where you didn't
4 get what you wanted that you wouldn't raise that as an
5 appellate issue.

6 I am not quite sure what the upside of this
7 proposal is. I mean, I guess I agree with Terry, if
8 there is something so fundamental that the parties
9 could stipulate in evidence, we don't need this rule
10 for that. We could just stipulate that this is the
11 amount of money or this is the foundation for this and
12 so on.

13 Let me turn then to the expert witness. Many
14 of you here, I think, do do trial work, and some of
15 you probably with multiple experts, and you will know
16 what I am talking about. Some of you may not. The
17 coordination of experts in a medical malpractice trial
18 or even in another type of civil case where you have
19 multiple experts is an unbelievably difficult
20 logistical headache.

21 If you are bringing in a physician from
22 Harvard University who has to teach, who has clinical
23 responsibilities, who has administrative
24 responsibilities, and you want her to come in during
25 these three hours of the day, you may be lucky enough

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1 to set that up, or it may be that you can't do it. If
2 you want to have experts in a certain order, you may
3 be fortunate to set that up, but it's going to take an
4 enormous amount of effort.

5 This is a job, even though it has nothing
6 to do with practicing law, that I do myself in my
7 office. I can't have anyone else talking to experts,
8 setting up deposition times, because nobody is there
9 prepared really to juggle when every doctor says I
10 can't come that day, I can't come that day.

11 Now, imagine if on top of that I have to
12 coordinate with the defense experts to make sure that
13 they can come in right after my experts, and then if
14 the purpose of this whole thing is to allow
15 substantive, discrete areas of the case to be tried at
16 one time, then I have to get my expert back for their
17 rebuttal, because if they come in after the
18 defendant's case, that makes no sense. The idea was
19 to put all the evidence together on that issue.

20 So now we are looking at having doctors come
21 in for at least a day, maybe multiple days, at a cost,
22 you know, to take a medical malpractice case to trial
23 with several experts, \$50,000 is a pretty base figure,
24 and you can get a lot higher than that. Imagine if
25 you take those same experts and tell them I need you

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1 for three days. The practice simply becomes
2 impossible, but it will be done, because both sides
3 will have to meet each other -- you know, one guy ups
4 the ante, then the other has to meet them. We are
5 talking about a grossly inefficient system both

6 logistically and financially.

7 Again, I am not quite sure what the upside
8 is. I mean, Terry sits on the defense side, and I
9 don't think he disagrees with me, that this is just
10 logistically impossible.

11 In addition, you know, there is a fundamental
12 principle about the side with the burden of proof and
13 burden of persuasion going first. That's how it's
14 always been done. We don't present evidence during
15 the other side's case, and that's a real principle.
16 It's not just, you know, kind of a practical solution.
17 That's how we present evidence. If you have got to
18 prove the case, you go first. Person who wants to
19 disprove the case goes second.

20 Say for prosecutors, I mean I doubt -- there
21 is no prosecutor on this panel, but I can't imagine
22 they would want defense experts in the middle of their
23 cases when they are seeking a conviction.

24 Also, evidentiary problems. What if my
25 expert, I have a neurologist, and he is going to

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1 testify about my client's headaches but not about my
2 client's traumatic brain injury. I have got a
3 rehabilitation doc later in my case to talk about
4 that, but the defendant is using a neurologist on both
5 issues. So I have somebody who comes in and testifies
6 on headaches. Now his expert, who is supposed to
7 testify also about TBI, comes in, traumatic brain
8 injury, but it hasn't been raised yet. It's not in
9 evidence, he can't talk about it. So does he come
10 back a second time, and so on.

11 Plaintiffs actually, I hope it wouldn't come
12 to this in terms of the rule coming into effect, but I
13 am sure that plaintiffs would become pretty conscious
14 about introducing their evidence in such a way so as
15 to make life difficult for the defense expert who gets
16 up in the middle of their case, because under the new
17 rules experts can only talk about things that are in
18 evidence, so you would be pretty careful about what
19 got in evidence before that defense expert got up.

20 So I do think it's, in all honesty, it's
21 throwing -- oh, and the panel, the idea of having
22 these judges sit around and have a panel -- I will be
23 brief. I know I have gone on. One, you know, the
24 Rules of Evidence are out the window, completely out
25 the window. What are you going to say, Here is the

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1 list of things you can't say, Doc.

2 The idea that you are going to have a neutral
3 doctor or neutral expert be the officiating person,
4 doctors did not want to sit on medical malpractice
5 case evaluation panels. They don't have the time to
6 do that sort of thing, and to find a neutral one would
7 be difficult. I mean, I have never had a doctor from
8 Michigan testify in favor of a plaintiff. I am not
9 sure where we are going to find those neutral doctors
10 to host these panels.

11 I guess I have said enough. I think the rule
12 is a very, very poor rule. It has no precedent in any
13 state. I don't know where it came from, and I think
14 it should be voted down in total.

15 JUDGE KENT: Lori, may I?

16 CHAIRPERSON BUIREWEG: Yes, you may.

17 JUDGE KENT: The only other thing that I
18 would suggest in terms of scheduling of experts is
19 that I think a mechanism already exists. It's not
20 unheard of for counsel to come to me for one reason or
21 another to ask to schedule a witness of any
22 description out of order due to scheduling reasons,
23 and we have a fairly collegial Bar in a small
24 community such as ours, but it's not at all unusual,
25 given the right set of circumstances, that counsel

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1 will stipulate to taking witnesses out of order if the
2 circumstances exist which would justify it, and I
3 respect the comments of the two speakers before me.
4 It would be very rare times when it should be done,
5 but if the circumstances exist, we can already do it.

6 CHAIRPERSON BUIREWEG: With that,
7 Mr. Rombach, do you want to go ahead and move for
8 2.513(F) so we can start the debate from the Assembly.

9 MR. ROMBACH: Yes, for purposes of the
10 discussion, I would propose that the Assembly adopt
11 2.513(F). That's going to be discussed on page eight
12 of the packet, and it will be on the yellow sheets on
13 page five. Deposition summaries. Where it appears
14 likely that the contents of the deposition will be
15 read to the jury, the court should encourage the
16 parties to prepare concise, written summaries of
17 depositions for reading at trial in lieu of the full
18 deposition. Where a summary is prepared, the opposing
19 party shall have the opportunity to object to its
20 contents. Copies of the summaries should be provided

21 to the jurors before they are read.

22 Before I seek support, I would like to
23 mention I did have some discussions at lunch with
24 representatives from the Supreme Court. They were
25 monitoring our debate this morning, and the parts that

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1 they liked the most were the insightful commentary,
2 particularly, for instance, how indigency affected the
3 rules, and the parts that they disliked, as a lot of
4 other Assembly members have voiced over lunch to me in
5 particular, is the parts of the technical amendments
6 on the wording. So perhaps we would be most useful as
7 a resource if we were to confine most of our comments
8 to the principles underlying these as we have had in
9 the past with the Rules of Professional
10 Responsibility.

11 So I seek in that light a second for this
12 proposal.

13 CHAIRPERSON BUIREWEG: Is there a second so
14 we can start discussions?

15 VOICE: Support.

16 CHAIRPERSON BUIREWEG: And discussion,
17 Mr. Miller.

18 MR. MILLER: Randall Miller, 6th circuit.
19 Let me start by keeping this short. I don't know if
20 the mike is working, but I am loud enough anyway.

21 To keep this short, I want to completely
22 mirror what Doug and Terry said, and I am just going
23 to add a few comments on top of that.

24 with regard to deposition summaries, has
25 anybody in this room ever taken the deposition of an

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1 expert and wasted time asking irrelevant questions
2 like how their family is doing? What are you going to
3 summarize? You are asking a question about their
4 background. Their background is very important to
5 establish how important their testimony is and how it
6 should be weighed by a jury. That is no an irrelevant
7 issue. You can't summarize that.

8 Then you start asking about how they treated
9 this person and what they found. That is not
10 irrelevant. It can't be summarized. What are the
11 potential issues for the patient down the road? How
12 are you going to summarize that? Deposition summaries
13 make no sense whatsoever.

14 As far as the scheduling of experts, let's
15 talk about any injury case, because if you are dealing
16 with a doctor who is treating patients that are
17 injured in one way, shape, or form all the time, they
18 are going to spend their --

19 CHAIRPERSON BUIREWEG: You can save your
20 comments for (G). We just have (F) in front of us.
21 You can save your comment for (G).

22 Any other comments for discussion, questions?

23 It's been moved and seconded that we adopt
24 2.513(F), the language that Mr. Rombach read into the
25 record, which is on page five of your yellow sheet. I

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1 am not going to read it again in the interest of time
2 since he just read it and there are no amendments or
3 anything like that.

4 So everybody in favor say yes.

5 All opposed say no.

6 Motion fails. I will have the record reflect
7 that that was unanimous. Thank you, Judge Stephens,
8 for reminding me.

9 2.513(G), scheduling of expert testimony.

10 MR. ROMBACH: To facilitate Mr. Miller's
11 discussion on the next topic, I would like to propose
12 for discussion 2.513(G), scheduling expert testimony.
13 The court may, in its discretion, craft a procedure
14 for the presentation of all expert testimony to assist
15 the jurors in performing their duties. Such
16 procedures may include, but are not limited to:

17 (1) scheduling the presentation of a party's
18 expert witnesses sequentially; or

19 (2) allowing the opposing experts to be
20 present during the other's testimony and to aid
21 counsel in formulating questions be asked of the
22 testifying expert on cross-examination; or

23 (3) providing for a panel discussion by all
24 experts on a subject after or in lieu of testifying.

25 The panel discussion, moderated by a neutral expert or

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1 the trial judge, would allow the experts to question
2 each other.

3 I would move for adoption theoretically and
4 ask for your support.

5 VOICE: Support.

6 CHAIRPERSON BUIREWEG: All right. It's been
7 moved and seconded to adopt 2.513(G). Are there any
8 comments, Mr. Miller?

9 MR. MILLER: Thank you, Madam Chair, and once
10 again, I adopt the comments of both Terry and Doug,
11 try to keep this short, and based on the resounding
12 statement made by this committee a moment ago, in fact
13 it was really short, but just point this out, just in
14 case anybody is waffling.

15 Some doctors treat a lot of people who are
16 involved in an accident in one way, shape, or form.
17 Under this rule you are going to force them into
18 courtrooms when they don't have time to go. Their
19 entire job would be testifying, theoretically, or
20 waiting out in the hallway to testify. And under our
21 rules to qualify an expert, they may no longer qualify
22 as an expert because they have spent the last year
23 sitting in courtrooms. This is absolutely
24 preposterous. Therefore, I move to strike it down
25 like last time.

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1 VOICE: Call the question.

2 CHAIRPERSON BUIREWEG: The question has been
3 called. All those favor of adopting 2.513(G),
4 scheduling expert testimony, say yes.

5 All those opposed say no.

6 Any abstentions?

7 The motion fails unanimously.

8 we will now move on to the next cluster that
9 I have been asked to deal with in this order is

10 2.513(M), comment by the judge. This is not really a
11 cluster. It's all by itself. Let me direct the
12 commentary regarding this proposal, 2.513(M), comment
13 by the judge, to the panel, and I have lost my sheet
14 as to who volunteered, so if you could just talk about
15 it. Judge Heath, do you have anything on this one?

16 JUDGE HEATH: Yes. I looked over your
17 proposed rule, and I must say that I would not want
18 the responsibility of making such comment. I would
19 not do so unless the comment itself was stipulated to
20 by the attorneys, opposing counsel.

21 Again, I don't believe we have a rule that
22 covers this, so I am just speaking on my own behalf
23 here, but I don't think it's appropriate. I think it,
24 again, invades the province of the jury to do its
25 fact-finding function, so I would, at least from my

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1 perspective, I couldn't imagine doing it.

2 I have less qualms about attorneys making
3 those statements, because I think the adversarial
4 process might take care of any potential problems
5 there, but I would not want that function as a judge.

6 CHAIRPERSON BUITEWEG: Judge Kent.

7 JUDGE KENT: I totally agree with
8 Judge Heath. In my bio I mentioned I do some
9 community theater. I have to discipline myself in the
10 course of giving instructions and so forth not to tip
11 my hand as to what I feel the merits of the case may
12 be. I am sincere when I say that. I catch myself
13 sometimes stating something with certain emphasis that
14 would suggest favoring or disfavoring one side or the

15 other.

16 That's bad enough, but if I were to comment,
17 I am sorry, what I say would be taken as gospel. I
18 don't want to be the 13th juror or I don't want to be
19 the super juror. That is not my role in the jury
20 case, nor should it become that role. It is up to the
21 jury to make the decision. It is up to the litigators
22 to make the comments on the evidence and let the chips
23 fall where they may.

24 CHAIRPERSON BUIREWEG: Judge Hammer.

25 JUDGE HAMMER: We have always had the

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1 authority to do this, but I have never done it. I
2 have never seen it done. The only thing I can bring
3 to the table in terms of discussion, I handled a
4 matter where I bound over to circuit court for trial.
5 As a district judge, I handle the preliminary
6 examination, and, quite frankly, when I heard the
7 verdict I was rather stunned at it. I mentioned it to
8 the newspaper reporter at the trial, and then she went
9 on telling me how the judge had commented on the
10 witnesses and their credibility, and it was sort of an
11 insight as to how that may have affected the outcome.

12 Like I say, I was stunned at the verdict
13 based upon the information I knew from looking at the
14 investigation reports, hearing the preliminary exam,
15 and I have to believe that had something to do with
16 it.

17 whether it was fair or not, whether the
18 result was right or not, I don't know. But that's the
19 only time I have heard of it being done in recent

20 history, in my present experience, but, like I say, it
21 did seem to affect the outcome in a way that from the
22 distance that I viewed it didn't seem quite fair, but,
23 having said that, that's the only really insight I can
24 give you from my personal experience on this rule.
25 Like I said, we have had the authority. I

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1 would not want to use it. I have never used it, and I
2 think it should be used very sparingly under very
3 limited circumstances.

4 CHAIRPERSON BUITEWEG: Mr. Rombach, would you
5 move for the adoption of this 2.513(M), please.

6 MR. ROMBACH: At the risk of submitting
7 another dead letter, I will propose 2.513(M), comment
8 on the evidence. After the close of the evidence and
9 arguments of counsel, the court may fairly and
10 impartially sum up the evidence and comment to the
11 jury about the weight of the evidence, if it also
12 instructs the jury that it is to determine for itself
13 the weight of the evidence and the credit to be given
14 to the witnesses and that jurors are not bound by the
15 court's summation or comment. The court shall not
16 comment on the credibility of witnesses or state a
17 conclusion on the ultimate issue of fact before the
18 jury. And I seek support for the purpose of our
19 discussion.

20 VOICE: Support.

21 CHAIRPERSON BUITEWEG: Is there a second?
22 Okay. I heard a second. Any discussion?

23 All those in favor of 2.513(M) say yes.
24 There was discussion. I am so sorry.

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1 circuit. I don't know if my motion is proper, but
2 because there has been no information provided as to
3 the genesis of this proposal or the last proposal and
4 the Supreme Court is interested in our insightful
5 discussions, I am wondering if it would be proper to
6 request that the Supreme Court or the drafters provide
7 the Representative Assembly with where these proposals
8 came from and why we are being presented with them,
9 because I am not aware of any ABA study or any
10 empirical studies or studies or evidence or anything
11 that would cause these to be drafted. So my motion is
12 to request the Supreme Court of Michigan through the
13 chair of the Representative Assembly provide us with
14 information as to why we are looking at this issue.

15 CHAIRPERSON BUI TEWEG: That is out of order
16 just because there is a motion on the table right now.
17 We can vote on this motion and then you can --
18 Mr. Rombach would like to answer the question.

19 MR. ROMBACH: We have had discussion on where
20 this came from. Unbeknownst to me and perhaps others,
21 there is actually a Court Rule that allowed this
22 emanating from a criminal statute, so the judges do
23 have some latitude already, and this would just
24 aggrandize that, but no one could provide any
25 anecdotal evidence of this going through successfully,

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1 and, therefore, the judges have chosen not to exercise
 2 this, but that's, again, why it's being presented in
 3 this package of materials.

4 CHAIRPERSON BUIREWEG: With that, is there a
 5 motion to withdraw?

6 MR. HERRINGTON: Actually it's not. I still
 7 don't understand.

8 CHAIRPERSON BUIREWEG: I am sorry, you are
 9 out of order. I am going to have to take a vote on
 10 the motion on the floor.

11 MR. HERRINGTON: Understood.

12 CHAIRPERSON BUIREWEG: If you want to make a
 13 motion after.

14 All those in favor of 2.513(M) say yes.

15 All those opposed say no.

16 Any abstentions?

17 The motion unanimously fails.

18 MR. HERRINGTON: Well, I would like to repeat
 19 my earlier motion.

20 VOICE: Point of order, Madam Chairman.

21 MR. HERRINGTON: Can you hear me? I would
 22 like to move that the Representative Assembly, through
 23 the Chairperson, request that the Supreme Court of
 24 Michigan provide the Representative Assembly with
 25 information regarding the genesis, background, and

1 beginnings or other information regarding this
 2 proposal, why we are reviewing it.

3 CHAIRPERSON BUIREWEG: Is there a second to

4 the motion?

5 VOICE: Support.

6 CHAIRPERSON BUITEWEG: I hear support. Is
7 there discussion?

8 MR. ROMBACH: If I may, Tom Rombach, 16th
9 circuit. I believe that the court has directed us to
10 follow a rather strict time line; that public comment
11 is going to close for November 1st, and we are not
12 going to be able to even provide any discussion or
13 feedback on any direction the Supreme Court may offer
14 to us at this time. Oftentimes by the time an
15 administrative hearing would be scheduled in January,
16 that it would not be possible then for us to provide
17 meaningful input, and oftentimes the court has already
18 had internal discussions. So at that point I would be
19 very strong in my opposition for asking for any
20 further material. I believe the Assembly has spoken
21 unanimously in opposition to this initiative, and,
22 therefore, we should let our votes stand as they are.

23 VICE CHAIR HAROUTUNIAN: Ms. Buiteweg.

24 CHAIRPERSON BUITEWEG: Lori Buiteweg, 22nd
25 circuit. I rise in opposition to the motion, and the

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1 reason is because we heard from Justice Markman this
2 morning that the genesis of these proposals are from
3 many different sources and that the Supreme Court is
4 not necessarily in favor of all of them, that they are
5 looking for feedback and discussion from us, and I
6 feel that it's irrelevant where the proposal came
7 from. what we are charged with doing is letting the
8 Supreme Court know what we think about them, and I

9 don't think finding out where it came from makes any
10 difference.

11 Good job, Ed.

12 All those in favor of the motion say yes.

13 All those opposed say no.

14 Any abstentions?

15 Motion fails.

16 I am going to proceed in order at this point
17 with the 2.513(J) the cluster of proposals affecting
18 juror participation. Judge Heath from Indiana has
19 experience with a number of these: The jury view, the
20 questions from the jurors, note taking by the jurors,
21 and discussing the case before it goes to deliberation
22 amongst the jurors. So I am really grateful that he
23 has stayed this afternoon to discuss these particular
24 proposals with us.

25 Judge Heath, I am going to turn it over to

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1 you.

2 JUDGE HEATH: I thank you very much, Lori. I
3 will share with you that when I first took the bench
4 and conducted jury trials almost ten years ago, this
5 is what it was like. I read the instructions to the
6 jurors. They never saw the instructions. I didn't
7 let them take notes. They didn't take the exhibits
8 back to the jury room and so forth, and that's what my
9 mentor, a very good judge, taught me, and he gave me
10 the reasons. At the time I followed that. And I
11 would submit to you that they were still good jury
12 trials. I don't regret any of those trials.

13 But along about the second or third year and

14 going to conferences and talking to other judges and
15 so forth, I began to think that perhaps it's time to
16 move along a bit in some ways that accommodate the
17 jury, and so I began to allow, I think about my second
18 or third year, jury note taking. In fact, the bailiff
19 was instructed to supply the jurors with note pads and
20 pencils. I began to project at least on some kind of
21 screen or something the jury instructions so they
22 could read along with me, and ultimately I started
23 giving them the instructions.

24 Along came some more reforms, and one of them
25 was jury questions, and I had not been doing that, and

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1 I had some misgivings about it. I thought questions
2 would arise from the jury that would be awkward for
3 us. For example, it would be questions about
4 insurance and so forth, and so I had my reservations
5 about it. But, nonetheless, that particular one was
6 passed, and we now do that in Indiana.

7 I will share with you that I have been
8 pleasantly surprised by the jury questions. I have
9 conducted I guess probably around 15 trials, jury
10 trials, with jury questions involved now. And what I
11 have found is that it really raises the jurors'
12 attention to the trial as a very good benefit. No
13 longer do I see jurors falling asleep. They have got
14 their note pads, they have got their question forms
15 with them, and we control it I think pretty carefully.

16 In the preliminary instructions we advise
17 them as to the methodology for asking questions. It
18 occurs after the lawyers are done. They write out the

19 question. They are directed to give it to the
20 bailiff. I have the bailiff bring it to me. I review
21 it carefully. I call counsel to the bench. We look
22 over the question, and in a good many of the cases the
23 questions are insightful.

24 I have had, I can't tell you how many
25 accident cases I have had where the attorneys would

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1 forget to ask whether or not, for example, the airbag
2 deployed. The jurors always ask that. I instruct
3 them in my preliminary instructions that insurance is
4 not to be considered, and so they don't ask that
5 awkward question.

6 So the questions that I get are good. They
7 are insightful, and the process we use has been
8 successful, and it's elevated the amount of juror
9 participation, so I have been very pleasantly
10 surprised at the insightful questions, the increased
11 participation on behalf of the jurors. They feel a
12 sense of ownership in the trial. When you talk to
13 them later after the trial, I ask them did you
14 appreciate the chance to take notes and ask questions
15 and so forth, and they invariably say yes. So I
16 think, although I had reservations about the jury
17 questions, I appreciated those.

18 Was another the note taking? Note taking, I
19 have been doing that now for almost nine years, and I
20 can't imagine not giving jurors the chance to take
21 notes. I know lawyers tell me they watch for what
22 notes the jurors are taking.

23 Well, you know, if they don't have the note

24 pads, they are going to make that mental impression
25 anyway. Does it get in their way? Well, we have

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1 preliminary instructions again that deal with what we
2 tell our jurors. Let me read just part of one to you.
3 Here is my patterned instruction 1.01.

4 You may take notes during the trial if you
5 wish. Do not become so involved in note taking that
6 you fail carefully to listen to the evidence or
7 observe the witnesses as they testify.

8 Notes are not evidence in the case and must
9 not take precedence over your independent recollection
10 of the evidence. They are only an aid to recollection
11 and are not entitled to any greater weight than your
12 recollection or impression as to the actual evidence.

13 Your notes should not be disclosed to anyone
14 other than a fellow juror during deliberations. Do
15 not take your notes outside the courtroom or the jury
16 room. The court will furnish you with paper and
17 pencil. Later on I tell them I am going to collect
18 their notes and no one is going to see them. That's
19 in my final instructions.

20 So I think the instruction aids greatly, and
21 the note taking, I have never seen a juror just take
22 notes hour after hour. They don't do that. They will
23 watch things. They will take notes on exhibits that
24 they get. They will be sitting there with an exhibit
25 from the trial notebook. They will see something

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1 interesting. There will be a note they take. Or they
2 will go for an hour without taking any notes, then
3 suddenly some witness will say something interesting
4 that interests them and they take a note. So I don't
5 find it getting in the way of them listening to
6 witnesses. I think it has worked out fairly well.

7 what's another one?

8 CHAIRPERSON BUIREWEG: Discussion prior to
9 deliberations.

10 JUDGE HEATH: I was asked by Attorney Bell
11 from Indiana to pass this along to you, and it's
12 interesting. He just conducted, as you know from his
13 earlier meeting this morning with you that he had a
14 lengthy criminal trial, and in talking to some of the
15 jurors post trial he has learned that during the
16 course of that process, of that trial process where
17 they were able to discuss, that cliques were formed
18 and made it difficult for the state's case, he feels,
19 because of the cliques that were formed by virtue of
20 their ability to discuss the case. So he has great
21 reservations and apparently with good reason.

22 Now I will share my situation with you. I
23 have only had one two-week trial. Most of my trials
24 are shorter than a week, the vast preponderance of
25 them. I haven't found that to be the case in the

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1 shorter trials. They seem to appreciate the ability
2 to discuss things under controlled circumstances, and

3 we do control it as much as we can. Let me read you
4 the part of our patterned instruction that deals with
5 jurors discussing things, and here it is. This is
6 just part of our first instruction to them.

7 When you are in the jury room, you may
8 discuss the evidence with your fellow jurors only when
9 all of you are present, so long as you reserve
10 judgment about the outcome of the case until
11 deliberations begin. When you are not in the jury
12 room you must discuss the case -- I am sorry. When
13 you are not in the jury room you must not discuss the
14 case among yourself or with anyone else. And in each
15 admonition I give them before recess, I discuss that
16 with them again. I read that same admonition to them,
17 along with other things.

18 So it's kind of a drumbeat construction
19 throughout the trial. You can discuss it if you are
20 all present, but keep an open mind. That's the
21 drumbeat that gets to them.

22 So I think in short trials I didn't find that
23 clique process going on that Mr. Bell had, but I
24 wanted to pass that on to you in fairness, because
25 there could be that concern. In talking to my jurors

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1 afterwards, they do appreciate the ability to talk
2 about it.

3 The rule is a recognition of the fact that
4 your jurors are discussing the case whether you like
5 it or not and whether instructed to or not. Usually
6 if they are not sequestered they go off to lunch in
7 twos or threes here and there. They are going to

8 discuss some aspect of the case.

9 Now, some juror might say, Don't do that, we
10 can't do that, you know, and you might be successful
11 in stopping them, but I think more it's the
12 recognition that there is discussion going on. And so
13 we are trying to control it rather than let it go on
14 without some controls, and I think by and large it's
15 successful, but there is the danger pointed out by
16 Mr. Bell.

17 CHAIRPERSON BUIREWEG: The last one is jury
18 view.

19 JUDGE HEATH: I have never taken or had a
20 jury go out on a jury view. I think the ability to do
21 so, the discretion by a court to be able to do so
22 would be important. I have been out on views myself
23 as requested by attorneys in a bench trial, and I
24 think I can see where it can be very important.

25 Our rule does not allow the attorneys to

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1 discuss the matter with -- they can accompany the
2 jury, the jury can view, but they cannot make
3 discussion whatsoever with the jury during that view.
4 There was someone else here this morning talking
5 about, well, of course attorneys point things out
6 about the view, jurors have questions. Our rule does
7 not permit that.

8 CHAIRPERSON BUIREWEG: And I know that the
9 trial lawyers wanted to comment in particular on the
10 issue of jurors asking questions of the witnesses, so
11 if you would pass the mike down to them.

12 MR. SHAPIRO: I have spoken to a lot of

13 lawyers on both sides about these four particular
14 proposals, because I thought that these were the ones
15 that really went to the heart of the notion of jury
16 reform or empowering the jury, and I have heard
17 differing opinions certainly on the issue of
18 discussion and somewhat on questions. I would say
19 that overall, although, of course, always the devil is
20 in the details, the lawyers that I work with and the
21 organization that I am here to speak for in terms of
22 our preliminary views, no final views have been
23 reached yet, is that on balance all of these are
24 designed to empower and engage the jury and that
25 that's the heart of this proposal and that that's a

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1 good thing.

2 I can say from personal experience that the
3 degree -- of course, when we do mock trials before
4 cases, before actual trials, they are much shorter,
5 and that's part of the formula for keeping people
6 engaged, but we always allow note taking, questioning,
7 and discussion at various points during our mock
8 trials, and what we find there is that we are much,
9 much better informed lawyers about what's important in
10 the case to these people who are going to be deciding
11 it than we are when they are a black box.

12 And I did mention to Terry that I recently
13 lost a case where the jurors found something that they
14 were concerned about in the medical records that no
15 one had addressed. And at that point of course it was
16 too late to address it. They found it in the jury
17 room. I would much have preferred that they

18 challenged me on this item that they thought was
19 detrimental to my case than finding out only through
20 the verdict. So I think these are good and helpful
21 proposals on getting the juries more involved.

22 CHAIRPERSON BUIREWEG: Terry.

23 MR. MIGLIO: I think most of the judges that
24 I have had trials with in the last five to seven years
25 have allowed jury questions over objections of one or

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1 both of the attorneys. But I think they have handled
2 it appropriately, and I already think that there is an
3 acceptance of that particular procedure.

4 Jury view, I do not practice necessarily
5 personal injury. Usually a jury view involves a visit
6 to a plant, a visit to an office site, and I agree
7 with what Judge Giovan was saying earlier is it's
8 absolutely impossible to take a jury to a setting like
9 that and prohibit statements or any communication with
10 the jury about what they are doing there and what they
11 are seeing.

12 with respect to note taking, again, it's been
13 pretty prominent, especially in federal court trials I
14 have had. The one thing that I am adamantly opposed
15 to and have significant problems with is allowing the
16 jury to begin deliberations before they are actually
17 instructed and before deliberations are to occur.

18 we all know that it goes on. The problem is
19 if you are on the defense side, whether it is a civil
20 or criminal trial, one of the things that you strive
21 and try and make a point of during your opening
22 statement and throughout the case is that the jury is

23 going to keep an open mind until they have heard all
24 of the evidence. And if jurors are allowed to
25 deliberate before that, I feel, even though they do

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1 that, but you don't necessarily make a law breaker a
2 model citizen, even though they do that, the constant
3 focus on keeping an open mind is distracted from the
4 ability to talk about it and form opinions with your
5 co-jurors beforehand.

6 The other problem that I see with that is in
7 the instance, a lot of cases that I tried that are
8 two, three, four, five weeks long, you have jurors who
9 actually don't participate in jury deliberations
10 because they may be let go as alternates or excess
11 jurors, so you have people that may be controlling the
12 flow of the discussion, asking questions, who never
13 sit on the jury and never are a part of rendering a
14 verdict but yet who may play a role in forming those
15 opinions, and I think as much as it is possible to
16 control it, although it seems to be impossible, the
17 system that we should be describing for jurors is to
18 keep an open mind and to wait until all the evidence
19 is in before you begin to deliberate.

20 CHAIRPERSON BUIREWEG: Judge Hammer, I saw
21 your hand up.

22 JUDGE HAMMER: Just a couple observations.
23 First, with respect to jury questions, I have
24 traditionally allowed jury questions. We have the
25 authority to do it. There is a standard jury question

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1 for it, and, quite frankly, it always worked well for
2 me. They would write the question down. Typically I
3 would rephrase it but ask it in substance, unless I
4 couldn't. A lot of questions had to do with either
5 insurance or prior convictions in a criminal case,
6 such as drunk driving. I see it worked well with one
7 exception. I traditionally would ask, well, whose
8 question is this? Am I phrasing it correctly?
9 Invariably the response would be, well, all of ours.
10 We were discussing it. You know, typically we got the
11 questions after they had a break, and they discussed
12 it either at lunch or during the break.

13 So for that reason and that reason alone I
14 don't do it anymore because I feel like I am telling
15 them they can't discuss it but then inviting them to
16 discuss it and setting myself up for possibly a
17 mistrial, but except for that aspect of it I thought
18 the procedure of jury questions always worked well.

19 If we change our philosophy and allow jury
20 discussions, that takes care of that objection, but I
21 found in practice, except for that problem, it worked
22 pretty well. There weren't that many questions, and
23 usually the questions were pretty good and jurors
24 understood when I told them, I understand your
25 question may be a good question, but for evidentiary

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1 reasons I can't ask it, and they always accepted that

2 explanation, and I spoke with them afterwards, they
3 always understood why, and I explained that to them.

4 with respect to jury views, I have done it a
5 handful of times. It's always worked well. I have
6 said no a number of times. Afterwards I spoke with
7 the jurors, and they would agree it wouldn't have
8 helped at all anyway. The only change in this rule is
9 to allow the jurors rather than just the parties to
10 request a view. I don't see any problem with that.
11 We are just treating jurors as adults. They
12 understand when you say no. All you just need is the
13 ability and guts to say no, I don't think it's a good
14 idea. If I think it's a good idea, then we will do
15 it. The only change in this rule is to allow the
16 jurors rather than the parties to request it. In
17 those cases where it might be helpful, I have found it
18 works well, and I have never had a problem with the
19 court officer enforcing my rule that attorneys aren't
20 to discuss it with the jurors.

21 CHAIRPERSON BUIREWEG: Judge Kent, do you
22 have anything on this?

23 JUDGE KENT: Only on the question of jury
24 discussion. I would agree with the other comments
25 about the other issues. I agree with the comments, I

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1 believe it was Terry and Mr. Bell made about the
2 concern of prejudging a case before all of the
3 evidence is in and before the instructions have been
4 provided to the jury which give them the structure
5 whereby they are to continue their discussions.

6 I acknowledge and I have had comments from

7 both Judge Caprathe and from Judge Giovan, instances
8 where they have discovered that such discussions were
9 taking place. I don't doubt it. There are holes in
10 the dike. Rather than tearing down the dike and
11 letting the flood in, we should continue to plug the
12 holes as we can.

13 I am reminded when I was growing up and then
14 later when I was raising my kids the standard comment
15 was just because everyone else is doing it is no
16 reason to let you do it, it's not right. And that's
17 the way I feel about jury discussions during the
18 course of the trial.

19 CHAIRPERSON BUIREWEG: Mr. Rombach, if you
20 could move the for the adoption of 2.513(J), the jury
21 view, so we can get this discussion started, that
22 would be great.

23 MR. ROMBACH: Again, we are going to break
24 this down into all four proposals, so if you have
25 comments try to direct them to the proposal on the

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1 floor.

2 This first is going to be 2.513(J), jury
3 view. On motion by the party, on its own initiative,
4 or at request to the jury, the court may order a jury
5 view of property or of a place where a material event
6 occurred. The parties are entitled to be present at
7 the jury view. During the view no person other than
8 an officer designated by the court may speak to the
9 jury concerning the subject connected with the trial.
10 Any such communication must be recorded in some
11 fashion. I move for adoption of this proposal.

12 VOICE: Support.

13 CHAIRPERSON BUIREWEG: I hear a second on
14 that. Is there discussion?

15 MR. GREEN: Good afternoon. I am Robert
16 Green from the 3rd circuit. I have no objection to
17 the proposal except as it relates to the prohibition
18 of allowing someone to speak. I can recall that I had
19 a case many years ago in which the court did allow us
20 to actually go to the scene, and I think that the
21 rule, the whole purpose for the rule is to help us
22 help the jury to expand their understanding of the
23 factual situation, and in that situation the court
24 allowed the witness to testify as to the jury scene,
25 to the scene of the incident and how it impacted on

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1 the case.

2 If you restrict a witness from testifying
3 about the scene and its importance to the case, then
4 it kind of defeats the whole purpose of the rule. So
5 I have no objection to the rule except for the part
6 that prohibits the witness from testifying and
7 expanding on the importance of the jury scene, I am
8 sorry, the jury view. Thank you.

9 CHAIRPERSON BUIREWEG: Okay. Further
10 discussion?

11 MR. CHADWICK: Thomas Chadwick from the 8th
12 circuit. I would make a motion to sever this
13 proposal. The first half beginning with the words
14 "jury view," the second half beginning with the words
15 "during the view." The reason for that proposal is so
16 that we can vote on the motion regarding jury view

17 separately from the issue of communication.

18 CHAIRPERSON BUIREWEG: Is there a second to
19 that motion?

20 VOICE: Support.

21 CHAIRPERSON BUIREWEG: I have heard a motion
22 and a second. Is there discussion on that motion?

23 All those in favor of the motion say yes.

24 JUDGE KENT: A comment on that. To sever --
25 if we are going to allow jury discussion at the view,

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1 how are we going to maintain a transcript of what is
2 being said?

3 CHAIRPERSON BUIREWEG: Okay. This is just a
4 motion to sever.

5 JUDGE KENT: I am sorry. I beg your pardon.

6 CHAIRPERSON BUIREWEG: All those in favor of
7 the motion to sever say yes.

8 Any opposed?

9 Motion carried.

10 So let us first discuss the jury view. On
11 motion of either party, on its own initiative, or at
12 the request of the jury, the court may order a jury
13 view of a property or of a place where a material
14 event occurred. The parties are entitled to be
15 present at the jury view.

16 I don't believe we need further discussion on
17 that, because it's already been discussed. So all
18 those in favor of that language say yes.

19 All those opposed say no.

20 Any abstentions?

21 Motion carries, and for the record, that was

22 a very strong yes vote, although not unanimous.
23 On the second part of the (J), during the
24 view, no person, other than an officer designated by
25 the court, may speak to the jury concerning the

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1 subject connected with the trial. Any such
2 communication must be recorded in some fashion.
3 There has been a motion and a second to adopt
4 that language. All those in favor of adopting this
5 language say yes.
6 VOICE: You haven't had discussion.
7 CHAIRPERSON BUIREWEG: Well, we already had
8 discussion. All right. I have been corrected by the
9 parliamentarian. I need to call for a discussion on
10 that. Is there any discussion on that? Okay.
11 All those in favor of adopting the rule as
12 stated, the second half of it, say yes.
13 And all those opposed to adopting that
14 segment of rule (J) say no.
15 Any abstentions?
16 That motion fails, and the Assembly is not
17 adopting the second half of (J).
18 Next is (K), juror discussion.
19 MR. ROMBACH: Actually I am going to do (I).
20 I am going to try to do it in the order in which it
21 has been prescribed by the our interim rule here, so I
22 am moving for adoption of 2.513(I), that having to do
23 with jury questions.
24 The court may permit the jurors to ask
25 questions of witnesses. If the court permits jurors

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1 to ask questions, it must employ a procedure that
2 ensures that such questions are addressed to the
3 witnesses by the court itself, that inappropriate
4 questions are not asked, and that the parties have an
5 opportunity outside the hearing of the jury to object
6 to the questions. The court shall inform the jurors
7 of the procedures to be followed for submitting
8 questions to witnesses. I move for its adoption.

9 VOICE: Support.

10 CHAIRPERSON BUIREWEG: Any discussion on this
11 motion?

12 MS. KLIDA: Dawn Klida, 18th judicial
13 circuit. It is more a comment as to procedure on
14 this. If this is something the Assembly is going to
15 support, I have recently seen what can happen when the
16 procedures are not carefully monitored I guess is the
17 best way to say it. I have actually seen witnesses
18 excused but for whatever reason remain in the
19 courtroom after their testimony has been completed and
20 then a jury question was brought into play and the
21 witness had to take the stand again, and I actually
22 saw two witnesses take the stand three different times
23 for jury questions.

24 So I guess my concern is is that along with
25 this rule there should be some very specific

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1 procedures so that you don't have that. I mean,
2 that's, you know, that's a lot of stress on the
3 witness, not to mention the attorneys themselves
4 having to scurry and go back and forth for that. So
5 that's my comment.

6 CHAIRPERSON BUITEWEG: Is there other
7 discussion regarding questions from the jury?
8 Judge Heath.

9 JUDGE HEATH: I share your concern. Our
10 pattern, I think, addresses it. Did I read the
11 pattern for asking questions to jurors before?

12 CHAIRPERSON BUITEWEG: The parliamentarian
13 says yes.

14 JUDGE HEATH: We tell them after the
15 examination by attorneys, as it's concluded, that's
16 the time for them to ask the questions. So I think
17 that our jurors are made to know right upfront when
18 the appropriate time for asking is. And I tell you
19 what happens in practice is sometimes the judge
20 forgets, you know. The witness is done, the attorneys
21 are done, and you have been practicing law for umpteen
22 years, you are not used to jurors asking questions,
23 you are excused. Then all of a sudden some juror's
24 hand will go up, oh, yeah, and then the judge is red
25 faced, I am sorry, I forgot. Please.

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1 So that's as bad as it gets for me anyways
2 when a juror is about halfway out of the chair. So we
3 get them back in, the jurors ask the questions. And
4 then one thing I forgot to mention to you that really
5 happens too in practice is I make sure in my court,

6 although this is not addressed in the pattern, that if
7 the attorneys want follow-up questions after the juror
8 questions, I permit that, and then I ask one more time
9 of the jurors, Do you have any further questions?

10 So that's how the process, when you really
11 get going and into it, really takes form.

12 CHAIRPERSON BUIREWEG: Judge Hammer.

13 JUDGE HAMMER: One quick observation. I
14 think the concern of the speaker was very well placed.
15 This rule seems just to empower us to do this. The
16 procedures we follow are pretty much incorporated in
17 the standard jury instruction we already have, which
18 says at the end of the witness' testimony.

19 It seems like it would be very unusual to
20 call a witness back from the courtroom. Again, that's
21 always at the discretion of the judge. Taking
22 witnesses out of order, I suppose witnesses could
23 always be called back. If it was a compelling
24 question, you could call a witness back just as you
25 would an attorney thought of a question later on.

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1 But, again, that's just how the rule would be
2 administered rather than the substance of the rule.

3 My experience is that it worked well, but I
4 never had a juror come and say I would like to ask a
5 question of somebody who testified yesterday or
6 something like that. Then it's a question of fairness
7 for the judge, which you are always able to do, even
8 if an attorney thinks of a question later. It doesn't
9 happen very often, and I can't envision a circumstance
10 where I would allow it, but things like that could

11 happen, but just because it could happen doesn't mean
12 that this is a bad idea.

13 MR. CROSS: Cecil Cross, 6th circuit. I rise
14 in opposition to this motion. Jury questions open the
15 door for information that either the adversary did not
16 bring up and maybe should have, opens the door for
17 them to strengthen their case, and it also ignores the
18 fact that the attorney, the opposition attorney who
19 didn't want this question asked and didn't ask it him
20 or herself now has the door opened for the jury to ask
21 this question and have that information presented to
22 them.

23 We have an adversary system. This does not
24 increase the possibility of that adversary system for
25 each attorney to fulfill their responsibility to

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1 present evidence. The jury is to decide the case on
2 the evidence presented, not on the evidence that they
3 would like to have had presented but on what is
4 actually presented.

5 This ignores that procedure, and I ask you
6 not to vote for this motion.

7 CHAIRPERSON BUIREWEG: Is there any other
8 further discussion?

9 It has been moved and seconded that we have
10 MCR 2.513(I) regarding jury questions. All those in
11 favor of adopting this court rule please say yes.

12 All those opposed say no.

13 Any abstentions?

14 All right. I could not tell. I am sorry. I
15 am going to have to have yeses please stand and

16 tellers take a vote. I am very sorry. You were all
17 good about not yelling, but I still couldn't tell.
18 (Vote being taken.)
19 You can sit down, and if you voted no, please
20 stand up.
21 The motion carries 60 to 40. You may be
22 seated. Thank you, tellers.
23 Mr. Rombach, now I would like you to take
24 over.
25 MR. ROMBACH: I would next like to move for

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1 consideration by the Assembly for 2.513(H), and that
2 is on note taking. It's page nine in your pre-printed
3 materials, and it's on page six of your yellow
4 missalettes here.

5 The court may permit the jurors to take notes
6 regarding the evidence presented in court. If the
7 court permits note taking, it must instruct the jurors
8 that they need not take notes and that they should not
9 permit note taking to interfere with their
10 attentiveness. If the court allows jurors to take
11 notes, jurors must be allowed to refer to their notes
12 during deliberations, but the court must instruct the
13 jurors to keep their notes confidential except to
14 other jurors during deliberations. The court shall
15 ensure that all juror notes are collected and
16 destroyed when the trial is concluded. I move for its
17 adoption.

18 VOICE: Second.

19 CHAIRPERSON BUITEWEG: Any discussion?

20 VOICE: Call the question.

21 CHAIRPERSON BUITEWEG: I have to take vote on
22 calling the question. All those in favor of calling
23 the question say yes.

24 MS. KIRSCH-SATAWA: I couldn't get here fast
25 enough. Lori.

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1 CHAIRPERSON BUITEWEG: The question has been
2 called, and the motion to call the question passed.

3 All those opposed say no to calling the
4 question.

5 VOICE: No.

6 CHAIRPERSON BUITEWEG: Okay. Well, now I
7 can't tell. I am sorry. It had to be a two-thirds
8 vote, you are right, so motion fails. Let's have the
9 discussion.

10 MS. KIRSCH-SATAWA: Thank you. Lisa
11 Kirsch-Satawa, 6th circuit.

12 VOICE: Can't hear you.

13 MS. KIRSCH-SATAWA: Lisa Kirsch-Satawa, 6th
14 circuit. I would make a friendly amendment to
15 strike -- wait a minute -- the portion of the proposal
16 that says that the notes will be destroyed. I would
17 ask that that be amended to have language that they
18 would be preserved for purposes of appeal.

19 CHAIRPERSON BUITEWEG: Is there a second to
20 the motion? Is there a second?

21 VOICE: It was a friendly.

22 CHAIRPERSON BUITEWEG: I know it was a
23 friendly amendment. Judge Stephens and I had a
24 conversation at lunch. According to our
25 parliamentarian, there really is no such thing as a

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1 friendly amendment. I am going to ask that if you
2 want to change the court rule that you make a motion
3 to change it so that I can tell, not have it be in
4 Mr. Rombach's hands whether or not the language gets
5 changed. If you want to make a motion, you can make a
6 motion, but as the chair I am not going to have any
7 more friendly amendments. It's just too difficult to
8 deal with.

9 So, Ms. Kirsch, would you like to make that
10 motion?

11 MS. KIRSCH-SATAWA: Sure. I would move that
12 section (H) be amended in the last sentence to read,
13 "The court shall ensure that all juror notes are
14 collected and preserved for purposes of appeal when
15 the trial is concluded," which in essence just strikes
16 "destroyed" and adds that other phrase.

17 CHAIRPERSON BUITEWEG: Okay. So do all of
18 you have your yellow piece of paper in front of you,
19 because you have got to get your pen out. You have to
20 be scribes and you have to cross out the word
21 "destroyed" and you have to insert "preserved for
22 purposes of appeal." Could I have it quiet, please.

23 MR. ANDREE: Point of order. You don't cross
24 it out until the motion.

25 CHAIRPERSON BUITEWEG: Just for your own

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1 edification. You don't have to cross it out.

2 That is the motion. Is there a second to the
3 motion?

4 VOICE: Second.

5 CHAIRPERSON BUIREWEG: Is there any
6 discussion on the motion?

7 All those in favor of the motion say yes.

8 JUDGE KENT: I withdraw. No comment.

9 CHAIRPERSON BUIREWEG: All those in favor of
10 amending sub (H) as indicated say yes.

11 All those opposed say no.

12 Any abstentions?

13 Okay. The motion fails.

14 Now back to sub (H) without the amendment, so
15 erase what you crossed out. Hopefully you were using
16 a pencil.

17 Is there any, is there any further
18 discussion?

19 All those in favor of adopting MCR 2.513(H)
20 say yes.

21 Any opposed.

22 Abstentions?

23 That passed unanimously. The last one in the
24 cluster.

25 MR. ROMBACH: I now move for adoption of

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1 2.513(K), juror discussion. After informing the
2 jurors that they are not to decide the case until they
3 have heard all the evidence, instructions of law, and
4 arguments of counsel, the court may instruct the

5 jurors that they are permitted to discuss the evidence
6 amongst themselves in the jury room during the trial
7 recesses. The jurors should be instructed that such
8 discussions may only take place when all jurors are
9 present and that such discussions may be clearly
10 understood as tentative pending final presentation of
11 all evidence, instructions, and argument. I move for
12 its adoption.

13 VOICE: Support.

14 MR. POULSON: Madam Chair, procedural
15 question.

16 CHAIRPERSON BUITEWEG: Yes, Mr. Poulson.

17 MR. POULSON: Barry Poulson, 1st. I think I
18 would like to move that we do this motion by doing it
19 in the following way, that we have the favorable
20 comments made and then we vote and then that will give
21 us a flavor of getting only half the case out in front
22 of us and making the decision, which is really what
23 this is.

24 (Applause.)

25 CHAIRPERSON BUITEWEG: The chair recognizes

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1 that as sarcasm.

2 MR. POULSON: well, in that case it's
3 withdrawn.

4 CHAIRPERSON BUITEWEG: Any additional comment
5 or questions?

6 MR. BARTON: Bruce Barton, 4th circuit. I
7 had an experience of serving on a jury, and based on
8 that experience I am opposed to this motion. The
9 other jurors knew I was an attorney. That came out in

10 voir dire and couldn't be avoided.

11 I pretty much had my mind made up, without
12 expressing it, after the first witness. I am sure
13 that if we had discussed it in the jury room I would
14 have influenced the other jurors and probably the
15 following witnesses would not get as much credence.

16 The other thing about that I am opposed, but
17 I should also tell you something else about that
18 experience. It was a civil case, damage case. First
19 thing the jurors asked me when we started
20 deliberations was, How much money do we have to give
21 the plaintiff so the lawyer won't get it all?

22 CHAIRPERSON BUIREWEG: Is there any further
23 discussion? All right.

24 All those in favor of adopting MCR 2.513(K)
25 say yes.

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1 All those opposed say no.

2 Any abstentions?

3 That was unanimously failed.

4 we are almost done, and at this point I think
5 Judge Heath needs to leave. Is there anything, Judge
6 Heath, that you would like to talk about the interim
7 commentary or opening statements before you leave?

8 JUDGE HEATH: Now, this is interim commentary
9 by the attorneys?

10 CHAIRPERSON BUIREWEG: That's correct.

11 JUDGE HEATH: As you know from previous
12 comments, I was pretty much opposed to a judge doing
13 that. I have less problems with the adversarial
14 process continuing it. To me it's almost like

15 argument, interim argument.

16 I think the adversarial process will take
17 care of problems that could arise with it. I realize
18 there will be other objections that people will
19 mention today, but I just want you to know I
20 personally have less problem with this one than I
21 would with the judge commenting.

22 And what's the last one?

23 CHAIRPERSON BUIREWEG: Opening statements,
24 which I don't think you have any.

25 JUDGE HEATH: We have opening statements.

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1 CHAIRPERSON BUIREWEG: That you don't --
2 there is no option to defer them?

3 JUDGE HEATH: There is -- yes, I believe
4 there is. My understanding is, but I have never had a
5 civil trial where opening statements were not made by
6 both sides.

7 CHAIRPERSON BUIREWEG: Are there other
8 panelists that would like to -- and let me just say,
9 Judge Heath, if you have to leave, please feel free,
10 and thank you. Could we just give a round of applause
11 to thank you, Judge.

12 (Applause.)

13 JUDGE HEATH: I am going to the University of
14 Notre Dame's campus to the University Club to have
15 dinner tonight with the sports information director,
16 so if there is anything you want me to pass along. I
17 will say, Go blue.

18 CHAIRPERSON BUIREWEG: My parliamentarian is
19 out of order.

20 would any of the other panelists like to
21 comment on the cluster (D) interim commentary by
22 lawyers or opening statements?

23 JUDGE HAMMER: With respect to the opening
24 statements, I think it would be a good idea to give
25 jurors more information upfront instead of having them

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1 guess throughout the trial as to the burdens of proof
2 and some of the elements of the alleged crime. I have
3 no experience with it, obviously none of us do, but I
4 think that might be a good idea and might work, and I
5 would like to see at least it be given a try.

6 As to the interim commentary, of course I am
7 a district judge. Sort of the nature of my trials are
8 relatively short. I really don't see the need for
9 them. I think they are sort of like an update when
10 you are watching a program to be continued later. You
11 have a long trial and the jury has to be updated as to
12 what they have already heard. I have got no
13 experience with it, none us do here in Michigan.

14 I would tend to disagree with the judge from
15 Indiana. I think if one was given it should be given
16 by the judge, and that should be something prepared,
17 and counsel be given the opportunity to object, akin
18 to the opening instructions or the preliminary
19 instructions in a jury case where the judge summarizes
20 each side's arguments.

21 I always try to avoid that. I would rather
22 not do it, but I do give a rather brief summary of
23 what each side's case is, with the attorneys' consent,
24 and see if they object to it, rather than have interim

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1 one more time, and I think the only need would be in a
2 long trial where the jury sort of loses track of
3 where they are.

4 Once again, I have got no experience with it.
5 I am a little skeptical. One of my observations
6 during the course of a number of these proposals are
7 perhaps we should have a set of rules that are options
8 in complex litigation and perhaps a long, complex
9 trial, something like that might be useful. I think
10 it would be good to have the judge do it with the
11 understanding that each party could have some input as
12 to what was said. That's just an observation.

13 JUDGE KENT: The longest trial I ever had
14 with a jury, I think Judge Hammer was counsel for the
15 Attorney General on that case. I would not have
16 minded if he had made some comments during the
17 interim, but his opposing counsel probably would have
18 used it as the opportunity to become the 13th juror
19 once again or else the extra witness without
20 portfolio, and I am afraid that to hear from counsel
21 or the bench commenting on evidence during the midst
22 of the trial would unduly delay the trial and possibly
23 confuse, rather than enlighten, the jurors. I think
24 we would be far better to maintain our present
25 practice and to reject this proposal.

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1 MR. MIGLIO: I would agree with the two
2 judges. The interim commentary, the jury trial system
3 is presently set up to have an opening statement which
4 by law is supposed to be a full and fair accounting
5 with what the facts are. I really don't understand
6 what a judge might construe or opposing counsel might
7 construe as being his interim commentary, which
8 neither falls in the category of an opening statement
9 or closing argument, and I don't understand why or
10 under what circumstances it would be allowed at
11 appropriate junctures in the trial.

12 There are plenty of times in longer cases
13 where the judge may give an opportunity for some
14 clarification that's agreed upon through a statement
15 by the judge that both parties have stipulated to, or
16 in some instances -- I mean, we have all tried cases.
17 There is more than enough commentary that goes on
18 between the two counsel during the course of the case
19 to make their case to the jury, and allowing this kind
20 of discretion for something that's called interim
21 commentary, which really has no connection to opening
22 and closing arguments, I think is a serious source of
23 danger for extending the trial and getting into
24 arguments and so forth.

25 And aside from that, the first instruction

1 out of the judge's mouth usually is that whatever the
2 lawyers say isn't evidence anyway, so it's of no
3 consequence to pause to listen to what the interim

4 commentary is.

5 MR. SHAPIRO: I have one very brief comment.
6 My only comment would be that the rule as drafted
7 doesn't really tell us what it is, and so it's
8 difficult to support it, even if in theory there might
9 be appropriate times or at least with stipulation of
10 the parties perhaps, but the rule does seem to be a
11 bit sparse for introducing a new concept.

12 CHAIRPERSON BUI TEWEG: Okay. Mr. Rombach, if
13 it's okay with you, I am going to appoint you as a
14 very temporary parliamentarian so our parliamentarian
15 can speak on this issue, unless there is any objection
16 by the Assembly. She asked to speak. Is there any
17 objection?

18 JUDGE STEPHENS: Just very briefly. I have
19 actually had what might be described as interim
20 commentary in a case which lasted for two months.
21 About one month in half the case went away. At that
22 point permission was given for very brief opening
23 statement-like commentary on the case that was left
24 for the jurors to consider so they didn't have to
25 think about the other five counts that were gone.

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1 At this point when we do a bifurcated trial
2 where issues of damages, liability and damages are
3 separated or a case where it is a complex case and a
4 portion or substantial portion of the case goes away
5 at some point during the course of the trial, there is
6 no explicit authority for the court to allow lawyers
7 to address the jury. This is loosey goosey, I agree,
8 but it does begin to speak to the issue of giving the

9 court the discretion based upon the exposition of the
10 case as it has been presented to the triers of fact to
11 allow for some interim argument and/or opening
12 statement.

13 CHAIRPERSON BUIREWEG: Thank you. Is there
14 any other further comment or discussion or questions?
15 Let's have the motion.

16 MR. ROMBACH: I am now moving for adoption of
17 2.513(D) interim commentary. Each party may, in the
18 court's discretion, present interim commentary at
19 appropriate junctures of the trial. I move for its
20 adoption, Madam Chair.

21 CHAIRPERSON BUIREWEG: Is there second?

22 VOICE: Support.

23 CHAIRPERSON BUIREWEG: Any discussion?

24 All those in favor of the motion say yes.

25 All those opposed no.

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1 Any abstentions?

2 The motion fails substantially.

3 Next and last.

4 MR. ROMBACH: Finally, Madam Chair, I move
5 for adoption of Rule 2.513(C), opening statements.
6 Unless the parties and the court agree otherwise, the
7 plaintiff or the prosecutor, before presenting
8 evidence, must make a full and fair statement of the
9 case and the facts the plaintiff or the prosecutor
10 intends to prove. Immediately thereafter or
11 immediately before presenting evidence the defendant
12 may make a similar statement. The court may impose
13 reasonable time limits on the opening statements.

14 Move for its adoption.
15 CHAIRPERSON BUIREWEG: Is there a second?
16 VOICE: Second.
17 CHAIRPERSON BUIREWEG: Any discussion?
18 All those in favor of 2.513(C) say yes.
19 All those opposed say no.
20 Any abstentions?
21 Motion carries.
22 Okay. That completes our jury reform section
23 of the agenda. We have been asked by the proponents
24 or obtained agreement of the proponents of numbers
25 11 -- I am sorry, 10 -- oh, I am sorry. Okay. Panel

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1 members, you are dismissed, and thank you.
2 (Applause.)
3 CHAIRPERSON BUIREWEG: I am so worried about
4 getting you all out of here by 4:00 as the agenda
5 promises. I have got to slow down.
6 The proponents of numbers 10, the emeritus
7 attorney referral fee, and the Patient Compensation
8 Act, which is 11, and numbers 13 and 14 have all very
9 graciously agreed to defer those proposals to our next
10 meeting, and it will be up to your next chairperson
11 whether he chooses to request a special meeting to
12 deal with the matters that we didn't have time for
13 today.
14 I am going, because I think it will be
15 extremely brief to take the very last action item that
16 we have on the agenda, and then we are going to elect
17 the clerk and pass the gavel, and we will get out of
18 here as close to 4 as we can.

19 Does anybody object to deferring those action
20 items that I just brought forth? Okay.

21 So, Ms. Stangl, if we could have you come up
22 and handle number 12, consideration of the proposed
23 amendments to SCAO forms MC-13 and MC-14, and I would
24 like you to please look for the green sheets at your
25 desk. They are slightly different than the ones in

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1 your packet. Those are the ones we will be voting
2 upon. Ms. Stangl.

3 MS. STANGL: Thank you, Madam Chair, Terri
4 Stangl from the 10th circuit. This pertains to what
5 is the green item in your packet. It is a proposed
6 change in MC-13 and 14, which are the garnishment
7 forms used by the SCAO. This is prompted by the fact
8 that under federal law there are certain kinds of
9 federal benefits, particularly Social Security and
10 SSI, which are exempt from garnishment.

11 Under the current practice, when a creditor
12 serves the garnishment form on the bank, they may note
13 if there is funds there and they are held pending a
14 determination of what kind of funds are there. What
15 this rule would require of the financial institution
16 to do is check off if the sole deposits are one of
17 those exempt federal funds. That would allow a person
18 who lives only on that money in many cases to be able
19 to use the money to pay their bills. This would not
20 apply in any instance where the funds were comingled,
21 and banks generally have these federal deposits, which
22 have to be deposited in the bank, coded so they can
23 tell at a glance what's the source of those funds.

24 So this would streamline the process for the
25 bank, it would make it clear upfront to the creditor,

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1 and the defendant, if that is their source of income,
2 and they have no choice but to deposit it in the bank,
3 could have access to it as they are required under
4 federal law to pay the bills. So the forms are
5 amended to have that disclosure stated clearly by the
6 bank. So would I move for the adoption of the
7 proposal stated in your green papers.

8 VOICE: Support.

9 CHAIRPERSON BUIREWEG: Any discussion?

10 MR. BIEBERICH: Kent Bieberich of the 37th
11 circuit. My only concern is that, in fact, Social
12 Security funds are not always exempt. They are
13 subject to child support obligations, and while the
14 Friend of the Court will usually do that, it is
15 possible to opt out of that system, and my concern is
16 there is nothing on here that would inform the bank
17 that's what's going on. So, in fact, child support
18 obligations, Social Security is not exempt from those.
19 It's also not exempt from federal tax liens, which I
20 realize is a different issue, but this form just seems
21 to indicate Social Security is exempt, period, and
22 that's just not the case. So my concern would be it
23 doesn't make provisions for collecting child support
24 from Social Security, which is allowed. Thank you.

25 CHAIRPERSON BUIREWEG: Are there any other

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1 comments or questions? You have the last word, Terri.

2 MS. STANGL: I think that's a valid point. I
3 mean, normally social security is garnished at the
4 time it's paid out and it comes off the top. I would
5 be happy to include in the recommendation that there
6 should be some accommodation for that, but I think the
7 general, particularly for SSI, still holds.

8 we could do it in two parts. Could we vote
9 on SSI first? Since I think that's the clean one for
10 the SSI, do we take that first, and then we vote on
11 social security.

12 So I would move that the forms be amended to,
13 including the federal funds that are entirely exempted
14 for all purposes, which would include SSI as a first
15 motion.

16 VOICE: Support.

17 CHAIRPERSON BUIREWEG: Any discussion on
18 that? Understanding another motion will follow.
19 Victoria.

20 MS. RADKE: No, I have a comment on something
21 else though. We just got this. I just finished
22 looking at it. There is something else there that
23 doesn't belong there.

24 CHAIRPERSON BUIREWEG: Well, if it's
25 pertaining to this motion, then go ahead and make your

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1 comment.

2 MS. RADKE: Unemployment compensation

3 benefits are also to be available for child support,
4 so that should be another one that's not exempt.

5 MS. STANGL: Well, the only ones that we are
6 seeking to exempt by this rule from disclosure is the
7 federal benefits. That was the only ones that we were
8 seeking to do. We are not trying -- every other pot
9 of money is debatable, so that would be under the
10 current process. The only thing this would do is
11 where there is a disclosure on there they would say
12 this is a federal benefit, and they list four kinds --
13 railroad retirement, Social Security, SSI -- and what
14 I was limiting it to initially on this motion is just
15 SSI. I am not going to anything else.

16 MS. RADKE: And I understand that, but
17 unemployment compensation benefits specifically
18 references MCR 421.30, and that's state benefits.

19 MS. STANGL: Right. The list of benefits on
20 there put the defendant on notice of what may be
21 objectionable. That is not a -- the bank would not be
22 releasing those funds. They could still hold those
23 until there is a hearing, which is the current
24 practice now

25 CHAIRPERSON BUIREWEG: Is there any further

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1 discussion?

2 MR. BARTON: Bruce Barton, 4th circuit.
3 Maybe I missed something, but you are talking banks.
4 Are you talking only nonperiodic garnishment?

5 MS. STANGL: We are only talking -- yes,
6 garnishment of accounts, we are only talking a
7 straight garnishment of an account, not a periodic

8 garnishment of wages or income. We are only looking
9 at what sits in the bank account.

10 MR. BARTON: Have you come up with a new form
11 for that, or are you going to use the generic form?

12 MS. STANGL: The forms are attached on the
13 green one with some suggested additional language that
14 would simply modify the current one so that the bank
15 could say the source of these funds are only from one,
16 in this case, in this motion right now, SSI. In that
17 case the bank would be free to release the funds
18 because they are entirely SSI. The nonfunds on here
19 would be still held for the amount of the judgment,
20 And then if the defendant objects there would be a
21 hearing, which is what happened in the current
22 process.

23 MR. BARTON: My question is -- you keep
24 talking about banks. Garnishments apply to a lot of
25 other accounts and/or money other than banks. Is this

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1 limited to banks, and, if so, how is it limited on the
2 standard form?

3 MS. STANGL: It's limited because the only
4 kind of entity where SSI or Social Security are
5 deposited directly, it applies only to direct
6 deposited federal benefits, so the only organizations
7 that would have that would be a bank or a credit
8 union, so that's the only entity, garnishee defendant,
9 who would then honestly disclose that the deposits in
10 the account are solely consisting of the federal
11 benefits.

12 CHAIRPERSON BUITEWEG: Are there any other

13 further questions on this?

14 It's been moved and seconded. Why don't you
15 read the language.

16 MS. STANGL: Should the SCAO garnishment form
17 MC-13 and 14 be revised to include a provision that
18 expressly directs a bank or financial institution to
19 protect SSI from garnishment.

20 CHAIRPERSON BUIREWEG: All those in favor say
21 yes.

22 All those opposed say no.

23 Any abstentions?

24 Motion carries.

25 Is there another motion?

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1 MS. STANGL: The other motion would be to
2 cover the other forms of income, which would be the
3 railroad retirement and Social Security benefits and
4 the Veterans black lung, so this one should be SCAO
5 garnishment form M-13 and garnish form M-14 be revised
6 to include a provision that expressly directs a bank
7 or financial institution protect exempted income from
8 garnishment. Excuse me, that would be the other
9 forms, not the exempted income, but the other, I
10 explicitly would list those other three. To protect
11 Social Security, Veteran's black lung, and railroad
12 retirement benefits.

13 CHAIRPERSON BUIREWEG: Is there any
14 discussion regarding that rule?

15 All those in favor of the motion say yes.

16 All those opposed say no.

17 Any abstentions?

18 Motion carries.
19 Okay. You know, I am going to take an
20 opportunity at this moment to make my opening remarks.
21 JUDGE STEPHENS: Those are called interim
22 commentary.
23 CHAIRPERSON BUIREWEG: Yes, this late stage
24 in our -- it is 3:50 and I am making my opening
25 remarks. This is a bit strange, but our debate on the

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1 jury proposals needed to occur at the inception of the
2 meeting, thereby causing the opening remarks and other
3 remarks from our State Bar staff to be delayed till
4 this afternoon. I don't think anybody will disagree
5 with me that it was certainly worth accommodating that
6 schedule, as the resulting debate was, without a
7 doubt, very valuable. And I hope that the Supreme
8 Court will find our comments, questions, and positions
9 helpful in making decisions about the future of our
10 jury system here in Michigan.

11 As you know, these proposals were published
12 less than two months ago. It took a great deal of
13 collaboration and timely efforts to pull together our
14 panel of experts. Our State Bar staff has been very
15 helpful to us all year long, but the efforts to help
16 us pull off this particular meeting were over the top.

17 So with that in mind, Ed and Bob and I would
18 like to show our gratitude to Anne, who was our go-to
19 person, with a little gift that will come in handy in
20 the future. Anne.

21 (Applause.)

22 CHAIRPERSON BUIREWEG: At some point -- All

23 of you know I am big on follow-up. I would like you
24 to just, in all of your spare time, take a look at tab
25 number one, which shows the tracking of our proposals.

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1 If you recall, that was delivered to you for the first
2 time at our meeting in April, and we are going to
3 continue having the chart updated for you.

4 I was extremely pleased to see that the
5 adoptions we passed regarding the domestic relations
6 Court Rules in April have already been assigned an
7 administrative number by the Supreme Court. So I
8 think we are definitely seeing an improvement in the
9 area of follow-up.

10 we have already seen other incredible results
11 from our April meeting in terms of the proposal we
12 passed on the National Conference of Commissioners for
13 Uniform State Laws. Our State Bar general counsel,
14 Janet Welch, attended the NCCUSL annual meeting in
15 July. She is going to report to you regarding this
16 meeting in a few moments. It will be a very short
17 report, I promise you, and you can see it in your pink
18 sheets that you have in front of you.

19 I have already read the report, and I can
20 truly say that if we had accomplished nothing else
21 during this past year, if we hadn't even dealt with
22 jury reform which we did this morning, that alone
23 would have made your time and your efforts this year
24 on the Assembly completely worthwhile, but add to this
25 the many other things that we have accomplished, and

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1 you will see you can't deny that the Representative
2 Assembly is invaluable to our membership.

3 we have certainly proven that -- I just don't
4 know how our membership could ever do without it. The
5 Assembly has adopted proposals with great potential
6 for positive, wide-reaching results for the legal
7 profession, and I am very confident that our incoming
8 State Bar, our new State Bar President, Kim Cahill, is
9 going to continue forging the excellent relationship
10 that Tom Cranmer has been building with the Supreme
11 Court over the past year and in that process
12 heightened awareness of the relevance and helpfulness
13 of the Assembly to the Court and to the Bar members
14 across the board.

15 And, speaking of excellent relationships with
16 the court, we also owe a great debt gratitude for that
17 to your departing Executive Director John Berry. He
18 has such enormous breadth of experience with Bar
19 associations around the country, and we have grown as
20 a result of that. We appreciate all the insight he
21 has brought our way.

22 At this time I am going to propose the
23 adoption of a resolution commemorating John's
24 retirement from the State Bar of Michigan. So, John,
25 if you would come up here.

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1 This says, The Representative Assembly of the

2 State Bar of Michigan expresses its respect and
3 appreciation to John T. Berry for his service to the
4 lawyers, the judiciary, the courts, and the public of
5 Michigan. John T. Berry brought more than 20 years of
6 experience and his reputation as an expert in ethics
7 and professionalism when he arrived at the State Bar
8 of Michigan in 2000. He applied his skills to improve
9 the vision and structure of our association, the
10 engagement of our members, and the institutions that
11 connect us, and the programs we deliver to lawyers and
12 the public we serve.

13 Most importantly, John T. Berry used his
14 expertise to unite us as an integrated Bar dedicated
15 to the advancement of justice in Michigan.

16 Be it resolved that many thanks, much
17 appreciation, and repeated well wishes be conferred on
18 John T. Berry for his contributions to the legal
19 profession and the greater public during his tenure as
20 executive director of this Bar association,
21 unanimously adopted by the Representative Assembly of
22 the State Bar of Michigan, September 2006, Lansing,
23 Michigan.

24 May I have a motion to adopt this resolution?

25 VOICE: So moved.

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1 CHAIRPERSON BUITEWEG: And a second?

2 VOICE: Second.

3 CHAIRPERSON BUITEWEG: All those in favor.

4 MR. BERRY: I will be extremely brief, but I
5 want to share for maybe two or three minutes my
6 thoughts about leaving, particularly the Rep Assembly.

7 It's tough enough to talk about leaving your friends
8 on the staff and on the board that I serve.

9 I have to first talk about people, and to the
10 left of me, Lori and Ed and Bob, and I don't know if
11 Tom is still here or not, all the leaders of this
12 organization. When I came here, much good had been
13 done by the Rep Assembly, but a great challenge was
14 before the Rep Assembly about your role, your
15 existence, whether or not you were still relevant, and
16 I think Justice Markman today made it very clear that
17 you are very relevant. And during the time I have
18 been here, instead of focusing maybe on the small
19 things, you focused on such things as a dues increase
20 and what it was to be used for, a strategic plan, jury
21 reform, ethics rules which will affect this entire
22 profession and which you know are close to my heart,
23 and you did it in a professional way with hard work.

24 I have got to share with you, you have no
25 idea -- I think you may think you do -- of the work of

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1 the people up here, people like Anne and the staff and
2 Nancy, but particularly people like Lori when they are
3 working night and day, from early morning to late
4 hours to try to formulate a lot of issues into
5 something that is easily digestible that allows you to
6 make major decisions.

7 I am not going to, because of the length of
8 time that you have had to work today, go over the
9 things about the Bar, where we were, where we are. I
10 just hope this, I hope you think the Bar is better
11 than it was five and a half years ago, and if it was,

12 it was because of you, it was because of a Board that
13 made very tough decisions and important decisions, and
14 I guess always closest to my heart is the staff.

15 They served me through some very tough times
16 making tough decisions with a lot of tough changes.
17 We made changes in staff, and we made changes in the
18 organization.

19 I leave you with this. I didn't know much
20 about rep assemblies. In fact, there aren't many rep
21 assemblies left. In fact, I was supposedly an
22 organizational expert when I came here, and I said,
23 what in the world are we doing with a 120-member
24 commission, assembly? And I have watched you, I have
25 watched you work hard, and I have watched you improve

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1 and grow. And from Florida, from the work that I do
2 there, the good thing about the internet is I can
3 watch everything you do, and I can't wait to see the
4 things that you do in the future.

5 I want to thank you on behalf of my wife Barb
6 for the kindness you have shown us, for the support
7 you have shown us, and I am going to miss you a lot.

8 Final comment. When you think about leaving
9 from one great challenge to another, I compare it to
10 when I brought Dawn from Texas here, who is another
11 wonderful example of new blood in our Bar, it's sort
12 of like you grab ahold of a tree, not wanting to leave
13 and not wanting to go, and your feet are running as
14 fast as you can to new challenges. I guess that's
15 what I am sort of facing. Thank you. God bless you,
16 and I look forward to keeping in contact with you in

17 the future.

18 (Applause.)

19 CHAIRPERSON BUIREWEG: We passed our
20 resolution regarding NCCUSL in April. Part of it was
21 that Janet or the person designated by the Bar would
22 come back and report to us about their annual meeting,
23 and we have Janet Welch here to do that. Janet.

24 MS. WELCH: Thank you, Lori. I am here at
25 your direction. She has already pointed out to you

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1 that you have a pink sheet that is the formal report
2 that you directed me to give to you at your last
3 meeting. It is a synopsis. It is complete, but user
4 friendly, and I direct you to it.

5 when you made the decision to have the State
6 Bar formally participate in the National Conference of
7 Uniform State Laws, you connected this Bar and the
8 state more firmly to a body of knowledge and an
9 expertise that is part of a national conversation
10 about the development of the law and about how
11 important issues are evolving.

12 I am going to ask Nancy Brown very quickly as
13 a visual to scroll through three documents that show
14 you already what the State Bar is doing behind the
15 scenes in response to your direction.

16 we have cataloged all of the Uniform State
17 Laws that have been adopted in Michigan and how that
18 compares to other states. We have cataloged all of
19 the Uniform State Laws that Michigan has not adopted,
20 and more importantly we have identified the sections
21 and the committees that have an interest in the

22 subject matter of those Uniform State Laws, and we
23 will be facilitating the consideration and the
24 participation of those sections and committees with
25 the substance of those acts.

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1 And, in addition, we have identified the
2 drafting efforts of NCCUSL that are underway that have
3 yet to lead to the consideration of Uniform State Law,
4 the enactment of Uniform State Law, so that Michigan
5 lawyers can be more directly involved in what NCCUSL
6 is producing in the future. So already in just in a
7 few short months we have got boots on the ground and
8 we are making progress on that.

9 what you have given, I think, to your fellow
10 lawyers and to the Legislature and to the public is a
11 gift, and as a personal recognition of that gift as a
12 lawyer and as general counsel and as a member of the
13 public, I want to thank you, and it is my gift to you
14 to give you back the balance of the ten minutes that I
15 have on the agenda.

16 (Applause.)

17 CHAIRPERSON BUIREWEG: Thank you, Janet. And
18 now that I am on my way out, I can tell you all that
19 it so happens that my husband Tom is a National
20 Uniform Law commissioner. Some of you may know that.
21 I went to the annual meeting with him as a spouse
22 guest. Sometimes he comes to things with me as the
23 spouse guest, sometimes I go to things with him as the
24 spouse guest. This time I was his guest down in
25 South Carolina, and Janet was there. She was there at

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1 every morning when the meeting started, she was there
2 every night when the meeting ended. They had
3 committees that met. She worked her tail off, and I
4 don't even know that her feet hit the beach once the
5 whole time she was there. So I can attest she worked
6 very hard, and I think she enjoyed it because she felt
7 she was with her kind.

8 And somebody who can give our boots some
9 traction, we have here, I would like to recognize
10 Senator Al Cropsey, Chairperson of the Senate
11 Judiciary Committee, has joined us today. He is
12 seated in the 29th circuit for Clinton County. I
13 would like to welcome him. He is going to join our
14 Assembly at the next meeting. Senator Cropsey.

15 (Applause.)

16 CHAIRPERSON BUIREWEG: We are now going to
17 move along to nomination and election of the Assembly
18 clerk, number 15 on your agenda. We have received one
19 application for clerk from Kathy Kakish, and do I have
20 somebody to move for the nomination of Kathy Kakish?

21 MS. JOHNSON: Elizabeth Johnson, 3rd circuit.
22 I move the nomination of Katherine Kakish for the
23 position of clerk of the Assembly. She is an
24 assistant attorney general and has been with the
25 Representative Assembly for three years, and I would,

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1 in keeping with our time sharing initiative here,
2 direct you to her resume that's in your booklet, and I
3 move for her nomination.

4 VOICE: Second.

5 CHAIRPERSON BUIREWEG: Is there any
6 discussion? Are there any other nominations from the
7 floor? All right.

8 All those in favor of electing Kathy Kakish
9 for the clerk of the Representative Assembly please
10 say yes.

11 Any opposed.

12 Abstentions.

13 The motion carries. Congratulations, Kathy.
14 (Applause.)

15 CHAIRPERSON BUIREWEG: We now need to
16 recognize the outgoing chairs of the committees, and,
17 Ed, if we could have you call them off. We have that
18 still. I can do it if you want. I will hand out the
19 plaques, and we'll have you come forward if you
20 chaired a committee.

21 VICE CHAIR HAROUTUNIAN: Carl Chioini, who
22 was the chair of the Nominating and Awards Committee,
23 was already given his award, but I wanted to mention
24 his name.

25 Michael Pope, chair of the Rules and Calendar

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1 Committee, Michael.

2 (Applause.)

3 VICE CHAIR HAROUTUNIAN: Tom Rombach, chair
4 of the Special Issues Committee.

5 (Applause.)

6 VICE CHAIR HAROUTUNIAN: Steve Gobbo, chair
7 of the Hearings Committee.
8 (Applause.)
9 VICE CHAIR HAROUTUNIAN: Kathy Kakish, chair
10 of the Drafting Committee.
11 (Applause.)
12 VICE CHAIR HAROUTUNIAN: Rob Buchanan, chair
13 of Assembly Review.
14 (Applause.)
15 CHAIRPERSON BUIREWEG: Without those
16 committees -- I haven't spent much time telling you
17 all that they have done for us this year, but suffice
18 it to say that we couldn't have gotten things done
19 without them. They have had a number of innovative
20 ideas. Kathy responding to drafting request within
21 five, six-hour turnaround time. She has just been
22 amazing, and all the committee chairs have just done
23 such a super job for us this year. So we couldn't do
24 it without them.
25 We also have certificates for Representative

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1 Assembly members who are leaving us because they are
2 term limited. So I am going to read their names, and
3 then if you could, after the meeting is over, come
4 forward and receive your certificate. Brian Ameche,
5 John Dewane, Douglas Hamel, David Haron, David Lady,
6 Gary Peterson, Michael Riordan, Sharon Noll Smith,
7 Tom Rombach, John Stempfle, and Stephen Taratuta, Mark
8 Teicher, and Francisco Villarruel.
9 Thank you to all of you for your service on
10 the Assembly, and why don't you stand so we know who

11 you all are.

12 (Applause.)

13 CHAIRPERSON BUIREWEG: All right. I think it
14 is time to turn over the gavel at long last. Is there
15 anything else I forgot, because I am not sure my head
16 is clear right now.

17 Ed, come forward. We are going to have Judge
18 Zahra, the chief judge pro tem from the Michigan Court
19 of Appeals, is going to swear you in.

20 VICE CHAIR HAROUTUNIAN: Let me also call on
21 my wife, Susan Licata Haroutunian, who is a member of
22 the Representative Assembly, and also my daughter,
23 Krista Licata Haroutunian, who is also a member of the
24 Representative Assembly, to come forward.

25 JUDGE ZAHRA: Do you solemnly swear --

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1 MR. HAROUTUNIAN: I do solemnly swear --

2 JUDGE ZAHRA: -- that I will support the
3 constitution of the United States --

4 MR. HAROUTUNIAN: -- I will support the
5 Constitution of the United States --

6 JUDGE ZAHRA: -- Constitution of the State --

7 MR. HAROUTUNIAN: -- Constitution of the
8 State --

9 JUDGE ZAHRA: -- and the Supreme Court Rules
10 concerning the State Bar of Michigan --

11 MR. HAROUTUNIAN: -- and the Supreme Court
12 Rules concerning the State Bar of Michigan --

13 JUDGE ZAHRA: -- and that I will faithfully
14 discharge --

15 MR. HAROUTUNIAN: -- and that I will

16 faithfully discharge --
17 JUDGE ZAHRA: -- the duties of chair of the
18 Representative Assembly --
19 MR. HAROUTUNIAN: -- the duties of chair of
20 the Representative Assembly --
21 JUDGE ZAHRA: -- State Bar of Michigan --
22 MR. HAROUTUNIAN: -- of the State Bar of
23 Michigan --
24 JUDGE ZAHRA: -- according to the best of my
25 ability.

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1 MR. HAROUTUNIAN: -- according to the best of
2 my ability.
3 (Applause.)
4 CHAIRPERSON HAROUTUNIAN: Thank you. I want
5 to thank Susan, thank Krista, and there is -- as I
6 think John mentioned, John Berry mentioned, you know,
7 the officers do a lot of work. Bob Gardella as the
8 clerk, myself as the vice chair, but this past year
9 Lori Buiteweg has really done a tremendous job.
10 These jury reform issues that have come, they
11 came pretty fast, pretty hard, and it called upon
12 someone to really spearhead the organization of
13 bringing together experts, not only in this state but
14 in other states, like Indiana, which, of course, I
15 suspect that you agree with me that their presence is
16 really invaluable, and that's because of Lori
17 Buiteweg. And so I would certainly indicate and ask
18 that we recognize our Past Chair, Lori Buiteweg, with
19 regard to all of her efforts.
20 (Applause.)

21 CHAIRPERSON HAROUTUNIAN: And I will share
22 with you the obligatory plaque that honors Lori as
23 Representative Assembly Chairperson, in appreciation
24 for distinguished service in the Assembly, the State
25 Bar, and all Michigan lawyers, September 14, 2006.

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1 (Applause.)

2 PAST CHAIRPERSON BUITEWEG: I am going to
3 have to hang this on a stud. It's really heavy.

4 You know, I just, I just want to make just a
5 closing quick comment about how appropriate it is that
6 I think we do this changing of the guard in September.
7 It is a month of change. Children are returning to
8 school, we have bid farewell to summer, we say hello
9 to fall.

10 In my own life I experienced major change in
11 September when my son Michael was born on September
12 17th. His birthday is the day after tomorrow. No,
13 three days from now. And the reason I may be seeing a
14 little bit off key right now is because I was up all
15 night because my sister delivered a baby this morning
16 at 3:30, and right here in Ann Arbor, and so, you
17 know, it was just -- it's another thing. It's just a
18 time of change. It wasn't expected to happen until
19 Friday. I thought we would make it through the
20 meeting, but we didn't. I got the call at 12:30 last
21 night that it was time, and I went over to her house
22 and stayed with her four-year-old until we got the
23 call that the baby was here, everything was okay. We
24 are thrilled to have a new little niece, Isabella, and
25 she is seven pounds on the nose and just cute as a

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1 button. My sister is doing great.

2 So I wasn't going to sleep last night anyway
3 about the agenda we had today, so I figured it didn't
4 matter I was up all night because of the baby. So it
5 is really a big time of change. And I have got to
6 tell you this, this is just amazing. She had her
7 first child during the September 2002 Representative
8 Assembly meeting. Is that -- something is going on
9 there.

10 But as I reflect upon the past year, I did
11 manage to come up with a couple do's and don'ts for
12 Ed, Bob, and Kathy. I will leave you with these
13 thoughts, although you don't need any help from me.
14 Your new officers are going to make you proud. Ed is
15 attentive and energetic; Bob is thoughtful and kind;
16 Kathy is precise and hard working. You are in
17 excellent hands, but here are my suggestions. Okay.

18 Do hire a landscaping service, because you
19 won't have time to mow or plow. If you already have
20 such a service, hire an online bill paying company so
21 you don't have to pay your own bills every month.
22 Your time is precious. Spend it on things that matter
23 to you. Spend your time on your family, your
24 profession.

25 Don't worry about making a fool of yourself.

□

1 Have faith that your ideas and your questions are
2 shared by others. Do temper your fervor for positive
3 change with your inner voice of reason, and perhaps
4 most importantly do take care of yourselves. Take the
5 time to exercise, eat right, because you don't have
6 time to get sick if you don't. And that's the mom in
7 me coming out.

8 Do continue to forge good relationships with
9 the State Bar staff, for your success depends in great
10 part upon them. Don't plan on increasing your
11 billable hour goal for the next 12 months. Ed and
12 Bob, you have been terrific supporters and helpers and
13 I couldn't have done it without you. And, as you
14 know, I have given you each something that I hope you
15 will keep and remember me by forever. So thank you
16 very much for all your support.

17 CHAIRPERSON HAROUTUNIAN: This is from your
18 firm, your law firm, a dozen roses, and we want to
19 give that to you along with a card.

20 PAST CHAIRPERSON BUIREWEG: I will tell you
21 what, you can't do something like this without a
22 supporting firm, and the ladies at Nichols, Sacks,
23 Slank, Sendelbach & Buiteweg are incredibly
24 supportive. All of us believe strongly in the
25 importance of doing volunteer Bar association work,

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1 and I guess my only request to all of you is if you
2 have any power within your own firms to encourage it,
3 to give some kind of credit so that if people don't
4 meet a billable hour goal because they are doing work

5 for the Bar association that they don't get penalized,
6 that they don't miss out on a partnership opportunity
7 because of it, because this work is so valuable to the
8 profession and our 38,000 members. So thanks to the
9 partners. Thanks to everybody.

10 (Applause.)

11 CHAIRPERSON HAROUTUNIAN: Before we adjourn,
12 just two quick comments. One is I wanted to thank
13 Court of Appeals Judge Brian Zahra for being here to
14 swear me in. Thank you, Brian, I appreciate that.

15 Secondly, I want to take this opportunity to
16 thank Judge Cynthia Stephens for her assistance in
17 terms, not only of acting as the parliamentarian, but
18 in terms of her assistance in organizing and
19 focusing our attention with regard to these jury rules
20 and how to deal with them. Because I have to tell
21 you, when they all get thrown at you and you don't
22 quite know how to be able to organize them, you do
23 need assistance, and I will tell you that Judge
24 Stephens really did a wonderful job in that regard,
25 and I just want to make sure we thank her.

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1 (Applause.)

2 CHAIRPERSON HAROUTUNIAN: Do I hear a motion
3 to adjourn?

4 VOICE: So moved.

5 (Proceeding adjourned at 4:16 p.m.)

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1 STATE OF MICHIGAN)
2 COUNTY OF CLINTON)

3 I certify that this transcript, consisting
4 of 190 pages, is a complete, true, and correct transcript
5 of the proceedings of the Representative Assembly on
6 Thursday, September 14, 2006.

7

8 September 26, 2006

Connie S. Coon, CSR-2709
5021 West St. Joseph, Suite 3
Lansing, Michigan 48917

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