

STATE OF MICHIGAN  
STATE BAR OF MICHIGAN

MEETING of the REPRESENTATIVE  
ASSEMBLY of the STATE BAR OF  
MICHIGAN

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Proceedings had by the Representative Assembly of the  
State Bar of Michigan at Lansing Community College,  
West Campus, 5708 Cornerstone, Lansing, Michigan, on  
Saturday, April 21, 2007, at the hour of 10:00 a.m.

AT HEADTABLE:

EDWARD L. HAROUTUNIAN, Chairperson  
ROBERT C. GARDELLA, Vice-Chairperson  
KATHERINE A. KAKISH, Clerk  
JANET WELCH, Executive Director  
HON. CYNTHIA D. STEPHENS, Parliamentarian  
ANNE SMITH, Staff Member

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4-21-07

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Lansing, Michigan

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Saturday, April 21, 2007

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10:02 a.m.

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R E C O R D

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CHAIRPERSON HAROUTUNIAN: Ladies and

6

gentlemen, my name is Ed Haroutunian. I am the chair

7

of the Representative Assembly of the State Bar of

8

Michigan, and I call the meeting to order.

9

Madam Clerk, do we have a quorum?

10

CLERK KAKISH: Mr. Chair, we have a quorum of

11 over 50 members.  
12 CHAIRPERSON HAROUTUNIAN: Thank you.  
13 MR. LARKY: Mr. Chairman.  
14 CHAIRPERSON HAROUTUNIAN: Yes, Mr. Larky.  
15 MR. LARKY: Sheldon Larky, 6th circuit. I  
16 move that we adopt the revised calendar that is  
17 contained on the two pages that are on everybody's  
18 desk.  
19 CHAIRPERSON HAROUTUNIAN: The blue sheet  
20 revisions, correct?  
21 MR. LARKY: Yes.  
22 CHAIRPERSON HAROUTUNIAN: Is there support?  
23 VOICE: Support.  
24 CHAIRPERSON HAROUTUNIAN: Any discussion?  
25 All those in favor say aye.

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1 Opposed no.  
2 Abstentions say yes.  
3 The ayes have it.  
4 Krista Licata Haroutunian, do I see you  
5 rising for purposes of a motion?  
6 KRISTA HAROUTUNIAN: Yes, Mr. Chair, you do.  
7 Krista Licata Haroutunian, 6th judicial circuit. I  
8 rise to approve the September 14, 2006 summary of  
9 proceedings.  
10 CHAIRPERSON HAROUTUNIAN: Is there support?  
11 VOICE: Yes.  
12 CHAIRPERSON HAROUTUNIAN: Any discussion?  
13 All those if favor say aye.  
14 Opposed no.  
15 Abstentions say yes.

16 The ayes have it. Thank you.

17 VOICE: I would move that the items 10, 11 be  
18 moved to the morning and the lunch should be extended  
19 till 12:30.

20 CHAIRPERSON HAROUTUNIAN: I hear that. I am  
21 going to suggest this. Let's put it this way. Let me  
22 say this. I am not one to stall a meeting. It's  
23 about -- it will be 70 degrees out there today,  
24 earlier rather than later, and so what I am suggesting  
25 is we are going to move it right along.

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1 If, in fact, we get to the point where in the  
2 morning we are able to get to the items that are now  
3 scheduled in the afternoon, we will do it. On the  
4 other hand, if we can't do it because of other  
5 business, then we can't.

6 But I guess my point is to move it in the  
7 morning I think doesn't help us in that sense, and so  
8 what I would ask is, and I appreciate the motion, but  
9 I guess what I am asking is if you would be so kind as  
10 to withdraw the motion.

11 VOICE: Since the chair has been so kind, I  
12 will so move.

13 CHAIRPERSON HAROUTUNIAN: Thank you very  
14 much. I appreciate it, by the way.

15 Let me call to the podium the chair of the  
16 Assembly Nominating and Awards Committee, Elizabeth  
17 Moehle Johnson, for purposes of nominations for  
18 filling vacancies to the Representative Assembly.  
19 Elizabeth.

20 MS. JOHNSON: Thank you very much, Ed, and

21 good morning to all of you. Elizabeth Moehle Johnson  
22 of the 3rd circuit, and I am delighted to be the  
23 chairperson of the Nominations and Awards Committee  
24 today.

25 The first item of business before us is the

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1 filling of vacancies in the membership of the  
2 Assembly, and I am so pleased to tell you today with  
3 the nominations we have before us today we'll have  
4 zero vacancies and 100 percent participation in the  
5 Representative Assembly.

6 (Applause.)

7 Rule 6, Section 6 of the Supreme Court Rules  
8 allows us as a Representative Assembly to fill  
9 appointments. There are currently vacancies in a  
10 number of districts. They are in your materials, but  
11 I would like to read off the names so that the  
12 individuals can stand and so you know who they are.  
13 So if you will please stand when I read your name.

14 In the 2nd judicial circuit, Laurie Schmidt.  
15 In the 3rd circuit, Michael McClory, Andrew Dillon,  
16 Fred Hermann. James VanderRoest from Kalamazoo for  
17 the 9th circuit. In the 13th circuit Rob Witkop from  
18 Traverse City, and we are so happy to see you back  
19 again with us. Thank you.

20 Shon Cook for the 14th circuit, Muskegon.  
21 The 16th circuit, Peter Peacock, Mt. Clemens. 17th  
22 circuit, Martin Hillard of Grand Rapids. 20th  
23 circuit, Maureen VanHoven, Jenison. 29th judicial  
24 circuit, Alan Cropsey of Dewitt. 42nd circuit, Julia  
25 Close of Midland, Paul Marcela Midland. The 55th

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1 circuit Roy Mienk of Gladwin. 56th circuit Katherine  
2 Gustafson of Eaton Rapids.

3 And at this time, with the Chair's  
4 permission, I would move the filling of the vacancies  
5 with the list that has just been presented to you.

6 CHAIRPERSON HAROUTUNIAN: Is there support?

7 VOICE: Support.

8 CHAIRPERSON HAROUTUNIAN: Any discussion?

9 All those in favor say aye.

10 Opposed no.

11 Any abstentions say yes.

12 The ayes have it. Congratulations to those  
13 whose names were just called.

14 (Applause.)

15 MS. JOHNSON: You may now take your seat in  
16 your circuit. Thank you very much.

17 CHAIRPERSON HAROUTUNIAN: Thank you,  
18 Elizabeth.

19 Let me now call on Elizabeth again as the  
20 chair of Nominating and Awards to put forward to you  
21 the approval of the 2007 award recipients and  
22 resolution with regard to President Ford. Elizabeth.

23 MS. JOHNSON: Thank you very much, Ed.

24 The 2007 award recipients, the first award to  
25 be given by the Representative Assembly is the Unsung

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1 Hero Award. Let me first say we were overwhelmed by  
2 the volume of nominations and the quality of  
3 nominations. It makes me very proud of our profession  
4 to know that there are so many incredibly talented  
5 people serving us.

6 However, one name came to the top with the  
7 Unsung Hero Award. Norris J. Thomas, Jr., who has  
8 recently passed away, exemplified the characteristics  
9 of the award by service to the community and  
10 especially to the criminal community.

11 The award is given by the Representative  
12 Assembly each year to a lawyer who exhibits the  
13 highest standards of practice and commitment to the  
14 benefit of others. You will see by the information in  
15 your packets Mr. Thomas was an exceptional individual  
16 serving many underserved members of our communities in  
17 criminal law.

18 It is with a great deal of pleasure, and I am  
19 sorry that it has to be posthumously, but I now move  
20 the Representative Assembly, with the permission of  
21 the president, to award the 2007 Unsung Hero Award  
22 posthumously to Mr. Norris J. Thomas, Jr.

23 CHAIRPERSON HAROUTUNIAN: Is there support?

24 VOICE: Support.

25 CHAIRPERSON HAROUTUNIAN: Any discussion?

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1 All those in favor say aye.  
2 Opposed no.  
3 Any abstentions say yes.  
4 The ayes have it.

5 Ms. Moehle Johnson.

6 MS. JOHNSON: Thank you very much,  
7 Mr. President.

8 The next award, the Michael Franck Award,  
9 which is the highest award given by the Representative  
10 Assembly, is to an attorney who has made an  
11 outstanding contribution to the improvement of the  
12 profession, and, again, the committee's decision was  
13 very difficult. We had an incredible amount of  
14 extremely talented people, and this year we have  
15 chosen two individuals for the award, William P.  
16 Hampton and Alan D. Kantor. Both have contributed  
17 many years of service to the Bar and the public in  
18 improving the legal profession. Their contributions  
19 to both the legal community and to the community at  
20 large are vast.

21 Many of you on this body already know Alan  
22 Kantor, having served on the Representative Assembly  
23 for a number of years, and Mr. Hampton has served on  
24 many different committees in the State Bar. You will  
25 see in your materials an incredible array of

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1 recommendations by people that either they work with  
2 or have done work with. Their qualifications are set  
3 out in the materials and, quite frankly, are too  
4 numerous to mention individually, so I will not.

5 At this time, with the president's  
6 permission, I will move the acceptance of the 2007  
7 Michael Franck awards to be given to both William P.  
8 Hampton and Alan D. Kantor.

9 CHAIRPERSON HAROUTUNIAN: Hearing the motion,



10 is there support?

11 VOICE: Support.

12 CHAIRPERSON HAROUTUNIAN: Any discussion?

13 All those in favor say aye.

14 Opposed no.

15 Abstentions please say yes.

16 The ayes have it.

17 MS. JOHNSON: Thank you very much.

18 The last item I have for you this morning is  
19 a proposal for a special Representative Assembly  
20 resolution honoring the late President Gerald R. Ford.

21 You all know that Gerald R. Ford was the  
22 president of the United States and before that the  
23 vice president, and he served with distinction for  
24 many years in congress. But first and foremost in his  
25 professional career he was a lawyer, just like all of

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1 us here assembled today, so it seems fitting for the  
2 Representative Assembly, the body that represents our  
3 fellow lawyers, to honor the late President Ford with  
4 a special award, a special resolution to honor him for  
5 his special service to our state, our nation, and to  
6 us as fellow lawyers.

7 And so now with great honor I move that the  
8 Representative Assembly authorize a special award, a  
9 special resolution to the late Gerald R. Ford  
10 recognizing his service as a lawyer first and foremost  
11 and as our president to be presented in September at  
12 the State Bar annual meeting awards presentation in  
13 Grand Rapids.

14 CHAIRPERSON HAROUTUNIAN: You have heard the

15 motion. Is there support?  
16 VOICE: Support.  
17 CHAIRPERSON HAROUTUNIAN: Any discussion?  
18 All those in favor say aye.  
19 Opposed no.  
20 Any abstentions please say yes.  
21 The ayes have it. Motion carries. The  
22 resolution carries.  
23 MS. JOHNSON: Thank you very much, and I  
24 would like at this time for you to honor and recognize  
25 the Nominations and Awards Committee, and I would like

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1 the members to stand when I read your names.  
2 These individuals have contributed a lot of  
3 time and effort in getting the vacancies filled and  
4 also in meeting for these awards. John Mills of the  
5 6th circuit, Dana Warnez of the 16th circuit, Jeff  
6 Nellis of the 51st circuit, Suzanne Larsen of the 25th  
7 circuit, Krista Haroutunian of the 6th circuit, David  
8 Kortering of the 14th circuit, Michael Olson of the  
9 44th circuit, and then I would also like to give a  
10 special recognition to Kathy, to Bob, and to Ed who  
11 worked tirelessly, along with Anne Smith and the staff  
12 of the State Bar of Michigan, to get our 100 percent  
13 vacancies filled and for making these awards possible.  
14 Thank you so much.  
15 (Applause.)  
16 CHAIRPERSON HAROUTUNIAN: The committee did a  
17 real job, and, Elizabeth, thank you very much for all  
18 your work. It was most appreciated.  
19 MS. JOHNSON: You're welcome.

20 CHAIRPERSON HAROUTUNIAN: well, it's now  
21 10:16. I want you to know that my remarks are now  
22 about to start, and it says 10:40 on the agenda. I  
23 just share that with you.  
24 VOICE: Are you done?  
25 CHAIRPERSON HAROUTUNIAN: Not yet, no. I am

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1 not done, but I want to thank whoever asked that  
2 question. It was most appreciated.  
3 Let me start this way, I want to take just a  
4 few seconds for a moment of silence for the events  
5 that have taken place in another part of our country,  
6 at Virginia Tech University, and just take a few  
7 seconds and to remember these folks.  
8 (Moment of silence.)  
9 Thank you.  
10 I say that because I think we here are all  
11 lawyers, and we deal with the real law, and what we  
12 saw there was the absolute opposite of that, and so I  
13 think we should always keep that in mind.  
14 I want to welcome each of you to this meeting  
15 of the Representative Assembly of the State Bar, the  
16 final policy-making body of the State Bar of Michigan.  
17 Let me -- by the way, for those who may not  
18 be aware, Kathy Kakish, clerk; Bob Gardella, vice  
19 chairperson. On this side Anne Smith with the State  
20 Bar; Janet Welch, the executive director of the State  
21 Bar of Michigan, we will be hearing from her shortly;  
22 and Judge Cynthia Stephens, our parliamentarian. So  
23 these are the folks who are here.  
24 The new members, we had a chance to go

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1 what the Representative Assembly was all about, and  
2 what we do and the kinds of things that are results,  
3 where they go in terms of going to the Supreme Court,  
4 that is, the results of our work, and/or the  
5 Legislature.

6 Recognize that this is the 35th year of the  
7 Representative Assembly. It was formed back in 1972.  
8 There were at that time about 12,000 lawyers in the  
9 state of Michigan. Today there are about 38,000  
10 lawyers in the state of Michigan. To honor that  
11 35-year anniversary, we are going to be doing a few  
12 things this year.

13 First of all, you see in front of you the  
14 little brochures, the little brochures that kind of  
15 give you a little thumbnail sketch of the Rep  
16 Assembly. Part of that is to be able to let people  
17 know a little bit more about the Assembly. What I  
18 indicated to some of the folks at the orientation was  
19 that we needed to be able to have our profile a little  
20 higher than what it is, and I think that that's  
21 important. If you ask most lawyers in this state  
22 what's the Representative Assembly, most will say we  
23 don't know what you are talking about.

24 The goal is to be able to change that and in  
25 that process to be able to let people know who we are,

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1           what we do and the fact that we think, and hopefully  
2           it's not delusional on our part, that what we do is  
3           important for the members of the State Bar of  
4           Michigan. There is going to be an article, I think in  
5           the August Bar Journal, and someone put that together,  
6           and we'll have something there.

7                         In addition I mentioned this, the brochure  
8           that we are handing out, and we are trying to get that  
9           out to Bar associations.

10                        The third thing is that we are going to try  
11           to be able to do something at the Bar building in  
12           terms of having a, I will say, a large plaque of sorts  
13           that sets forth the various chairs of the  
14           Representative Assembly over the past 35 years, in  
15           that fashion attempt to raise the profile of this  
16           organization. You don't do it all at one time. It  
17           takes, you know, steps. You got to do it a little bit  
18           at a time, but I think that's important.

19                        Let me shift subjects a little bit. In  
20           September after the last annual meeting, as is  
21           customary, the Chair of the Representative Assembly  
22           and the President of the State Bar of Michigan, Kim  
23           Cahill, take a tour of the Upper Peninsula, and we did  
24           that, and on the tour also was Candace Crowley, State  
25           Bar staff member, and also Ron Keefe, the

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1           President-Elect of the Bar.

2                         Now, Ron is from Marquette, and we went to  
3           about five or six Bar associations throughout the

4 Upper Peninsula, and of course Ron knew everybody.  
5 Most of us we didn't know hardly anybody, but Ron knew  
6 everybody.

7 We saw Victoria Radke from Delta County. We  
8 saw Suzanne Larsen and Andrea Monnett, Monet of  
9 Marquette. I screwed that up.

10 MS. MONNETT: Monnett.

11 CHAIRPERSON HAROUTUNIAN: Monnett. Michael  
12 Pope from Gogebic, the Ontonagon district. Chris  
13 Ninomiya of Dickinson County. I didn't do a real good  
14 job when I mentioned that the last time when we were  
15 there. Chris' name -- where is Chris? I saw Chris.  
16 There you are, Chris, of Dickinson County. It was a  
17 terrific trip, had a great time, had a chance to meet  
18 a lot of people, and every place we went the members  
19 of the Bar associations from the Upper Peninsula  
20 greeted and welcomed us extremely warmly, and so I  
21 want you to know that as members of the organization  
22 that we represent that, in fact, it went well. It  
23 went well.

24 The fact that Ron Keefe attempted to drive  
25 away when we went to gas stations and leave me behind,

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1 we will let that go, we will let that go.

2 By the way, in terms of the nominations and  
3 awards, as Elizabeth Moehle Johnson mentioned, she  
4 indicated that we have a hundred percent, which I  
5 think really says a lot, and, as she mentioned, some  
6 of the folks that were very much involved, Bob  
7 Gardella, vice chair; Tom Rombach, former chair of the  
8 Representative Assembly; Bruce Courtade also I want to

9 make sure I mention. Bruce is also a former chair of  
10 the Representative Assembly.

11 Now, over the last several months we have on  
12 various list serves that I get some things came to  
13 mind, some points have been made by people, and they  
14 have been inquiries about the unauthorized practice of  
15 law and indicating that, in fact, there were things  
16 that ought to be done and, gee, I wonder what the  
17 State Bar -- this is the inquiry -- I wonder what the  
18 State Bar is going to do about that.

19 So of course the Bar, by the way, has done a  
20 great deal, but the officers of your organization felt  
21 that the Representative Assembly should also do some  
22 things -- and I haven't mentioned this, by the way, to  
23 some of the chairs of these committees, so they will  
24 be a little surprised, but that's okay, that's why we  
25 have meetings -- the object being to go out, secure

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1 information and come back with proposals.

2 Therefore, under our rules, as the Chair of  
3 the Representative Assembly of the State Bar, I am  
4 referring to the Hearings Committee under the  
5 leadership of Rob Buchanan, in conjunction with the  
6 Special Issues Committee, under the leadership of  
7 Steve Gobbo, to hold hearings and to use the RA  
8 discussion board on our website, to hold physical  
9 hearings also, and to be able to report, come back to  
10 us with appropriate recommendations with regard to  
11 positions that the Representative Assembly ought to  
12 take, and I am asking that that be done by our  
13 September meeting.

14 In addition -- I didn't get any response from  
15 Robert or from Steve, so I don't know.

16 MR. GOBBO: I am one step ahead of you. I  
17 already told the UPL Committee to put that on their  
18 next agenda.

19 CHAIRPERSON HAROUTUNIAN: Very good. We are  
20 all in sync. I love it.

21 In addition, in reviewing the rules of the  
22 Representative Assembly, some internal inconsistencies  
23 were found, and, therefore, I am asking the General  
24 Counsel's Office of the State Bar to review the  
25 Permanent Rules of the Representative Assembly, the

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1 Supreme Court Rules pertaining to the Representative  
2 Assembly, and the bylaws of the State Bar pertaining  
3 to the Representative Assembly and to advise the  
4 officers of the Assembly and the Chair of the Assembly  
5 Review Committee, Victoria Radke, for any internal  
6 inconsistencies and to determine if any  
7 recommendations for changes should be made at the  
8 September meeting.

9 I think that's important, and it's good that  
10 we look at them now and again, and now is as good a  
11 time as any.

12 Now, last month, I have to tell you, I share  
13 this with you, I had the privilege of presenting as  
14 the chair of the Assembly a resolution to Judge Gene  
15 Schnelz of the Oakland County circuit bench.

16 You might say, well, why? well, the answer  
17 is, Judge Schnelz was a long time member of this  
18 organization, and he served many, many years, some



19 have said several decades, as parliamentarian for the  
20 Representative Assembly.

21 Now this event was a roast and toast event.  
22 I was not, repeat not, a roaster but simply presenting  
23 the resolution as approved by the Nominating and  
24 Awards Committee, that's Elizabeth Moehle Johnson's  
25 committee.

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1 So I happened to, in my conversation I  
2 happened to mention this to someone that's just, you  
3 know, down the way from me, a fellow, you may have  
4 heard of him, a fellow named Shel Larky. I mentioned  
5 it to Shel, who said it was important to say something  
6 at the end of the resolution and the presentation.

7 So after praising Judge Schnelz for his many  
8 years on the Representative Assembly and also as  
9 parliamentarian for decades, I indicated to the crowd  
10 as instructed by Shel, that even though the Assembly  
11 had voted on that resolution 75 to 73 with two people  
12 abstaining, that nevertheless this should not detract  
13 from the import of the resolution.

14 The crowd, Shel, took the comment well, and  
15 so I say thanks, Shel. I needed that at that moment.

16 I mentioned earlier the U.P. tour and being  
17 on it with the President of the State Bar, Kim Cahill.  
18 I must tell you not only on the Upper Peninsula tour  
19 but in her traveling throughout the state of Michigan  
20 making presentations to many, many Bar associations  
21 during this time period between September and April,  
22 her presiding at Board of Commissioner meetings, and,  
23 as you all know, the officers of this organization are

24 members of the Board of Commissioners, on presiding  
25 over retreats that the Board of Commissioners may

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1 have, attending conferences, both inside and outside  
2 the state of Michigan, and representing all of us, I  
3 have to tell you we can all be extremely proud of the  
4 job that Kim Cahill is doing.

5 Members of the Representative Assembly, it is  
6 an honor for me to present to you and to introduce to  
7 you the president of the State Bar of Michigan, Kim  
8 Cahill.

9 (Applause.)

10 PRESIDENT CAHILL: Good morning everybody.  
11 It's a pleasure to be back here at the Representative  
12 Assembly. For those of you who are too young to  
13 remember, this is where I started out in State Bar  
14 work, and for those of you that are old enough to  
15 remember, I did take a look at the schedule today and  
16 I was horrified to find myself scheduled for ten  
17 minutes on the nicest Saturday of the year so far.

18 That being said, what I am hoping that we  
19 will be able to do in the time I have allotted is just  
20 for me to give you an update about what's been going  
21 on with the Bar and then to introduce our new  
22 executive director and work with her in answering your  
23 questions about anything that is of concern to you  
24 this morning.

25 I am very, very happy to be back here at the

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1 Representative Assembly. Sometimes I say it was the  
2 most fun I ever had without a safety net, and I hope  
3 that all of you will enjoy your service in the  
4 Assembly as much as I enjoyed mine.

5 Ed was right. According to Candace Crowley,  
6 I have had 68 speaking engagements at local, special  
7 interest, and affinity Bars to date, and I can tell  
8 you that no matter where I go, be it Monroe or  
9 Ironwood, from here to over here, our members have a  
10 lot of the same concerns.

11 Some of the most common themes that I hear  
12 over and over again from our members and that they  
13 place the greatest concern on are, first of all,  
14 concern about the economic conditions here in Michigan  
15 and how that affects not only their own practices and  
16 their own ability to be small business people in their  
17 communities, but how it affects their clients.

18 I think secondary to that is a concern that a  
19 lot of our members have about the changing nature of  
20 the practice, and for many of our members the practice  
21 areas that they started off in, the practice areas  
22 that were their bread and butter, just don't exist for  
23 them anymore. Two of the areas that are cited to me  
24 the most frequently are personal injury work, both the  
25 plaintiff's side and the defense thereof, and how the

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1 massive changes in the Bankruptcy Code have really  
2 eliminated that as a viable area of practice for a lot

3 of our members.

4 I think the other thing that members talk  
5 about, especially members who work in the common  
6 consumer fields, is how often folks are representing  
7 themselves nowadays and the special challenges that  
8 that presents, not only for you representing a client,  
9 but if it's a litigation matter, for the courts and  
10 the different concerns that you have there.

11 One other thing that I hear quite frequently  
12 about is how differently newer attorneys are  
13 practicing now, how many more solo practitioners there  
14 are, how difficult that makes it in terms of making  
15 sure that those folks fit into a community, have the  
16 proper mentoring, have the ability to learn how to  
17 practice in a community, and that's a concern for all  
18 practitioners. I know it's a quality of life issue.

19 The other thing that our members are very,  
20 very concerned about is the image of our profession,  
21 and they are very concerned about the relationship  
22 between the Bench and the Bar and especially about the  
23 profession's relationship with the Supreme Court, and  
24 those are all really big issues, which is why I am  
25 glad Ron Keefe, this guy here in the front row.

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1 PRESIDENT-ELECT KEEFE: I am taking notes.

2 MS. CAHILL: Taking notes, good. I think  
3 those are issues that we are always going to continue  
4 to deal with.

5 I read a letter that Abraham Lincoln had sent  
6 at one point where he talked about how different the  
7 practice of law was and he complained about how new

8 lawyers were causing problems and this advertising  
9 thing was causing problems. He was much more eloquent  
10 than I could ever be. But I thought how unusual it  
11 was, here he was in the 1850s talking about some of  
12 the same problems that we talk about today, and while  
13 I hope that we will be able to solve a lot of the  
14 problems that face the profession, I don't have the  
15 illusion that we will solve every problem. But I know  
16 that all of us working together is going to be able to  
17 provide the very best solutions that we can come up  
18 with, and that's what I am so heartened to see all of  
19 you here this morning, on this beautiful morning,  
20 choosing to devote your morning working on issues that  
21 face our profession. So thank you very much for that.  
22 with that, one of the big challenges that the  
23 Bar had to face this year was the departure of our  
24 previous Executive Director, John Berry. John went  
25 back to Florida. He made the decision in the

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1 wintertime. I will never understand why. But John  
2 went back to the State Bar of Florida, and we were  
3 very sad to see him go.

4 So we undertook a search for the best  
5 Executive Director that we could find, and I am very  
6 happy to tell you that we found her, and she was just  
7 down the hall.

8 Janet Welch, who most of you know from her  
9 service with the Bar, has recently been appointed our  
10 new Executive Director of the State Bar of Michigan.  
11 If you haven't read the press release, Janet is a Phi  
12 Beta Kappa graduate of Albion College, a Fulbright

13 scholar, a graduate of the University of Michigan Law  
14 School, and also, prior to serving as our general  
15 counsel for six years -- six, right? Six, okay. I  
16 never get the numbers right. I just say some time --  
17 she was general counsel to the Supreme Court. Before  
18 that she worked with both the House and the Senate in  
19 their Legislative Analysis Bureaus.

20 Those of us that have had the opportunity to  
21 work closely with Janet were overjoyed that she  
22 expressed interest in the job. When we started the  
23 Executive Director search, the charge was to find the  
24 very best person, and I am very confident that we have  
25 done that.

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1 So with that, I would like to ask Janet to  
2 come up and say a few words. She has a few more  
3 pertinent nuggets of information about a big issue of  
4 interest to the members, which is the proposed sales  
5 tax on services, including legal services, and then be  
6 happy to answer -- stop laughing, Senator -- we will  
7 be happy to answer any questions that you have  
8 together. Janet.

9 (Applause.)

10 MS. WELCH: Good morning. Thank you very  
11 much, Kim. Introductions like that make me very  
12 nervous, because I think one of the secrets of having  
13 a successful career is managing expectations, and when  
14 you get an introduction like that it's very hard to  
15 figure out how you can exceed expectations.

16 On the one hand I feel very comfortable up  
17 here. There are so many of you that are friends,

18 people that I have worked with. As Kim has  
19 acknowledged, I have been in the job with the State  
20 Bar of Michigan as general counsel for six years. I  
21 loved that job, so this feels very comfortable. When  
22 I worked with the court, I worked very closely with  
23 the State Bar of Michigan.

24 On the other hand, a piece of me will always  
25 be the kid from the wrong side of the tracks in

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1 Livonia. Pink collar family. No one in my family was  
2 a lawyer. No one in my extended family had even  
3 graduated from college. In my graduating class of  
4 almost 800 people, and I know this because I know the  
5 demographics of southern Livonia in 1967, one of the  
6 almost 800 graduates had a parent who was a lawyer. I  
7 am sure that's changed. And I stand before you now  
8 from that background married to a lawyer. I have a  
9 son who is a lawyer. I have a daughter who claims she  
10 will never go to law school, but she is 20 and it  
11 won't surprise me at all if she changes her mind.

12 Nelson Miller challenged me this morning to  
13 say something positive about the profession, and that  
14 is not hard to do facing all of you. I think one of  
15 the best pieces of evidence of what a wonderful  
16 profession we have is all of you sitting here in these  
17 seats on a day like this, on any day.

18 The Representative Assembly and the  
19 leadership of the Bar and the Board of Commissioners  
20 really is testimony to what the members of the  
21 profession believe about their obligation to society.  
22 The State Bar of Michigan is dedicated to serving the

23 public, to making sure that this profession is the  
24 best it can be, to making sure that all people have  
25 access to justice and that our court system is the

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1 best it can be, and I want to thank you for the role  
2 that you play and for letting me play a part to help  
3 you do that.

4 The transition I think now is to tell you a  
5 little bit about what's happened between the last time  
6 you met and today, and I have to tell you that those  
7 of us who are actively engaged in the life of the Bar  
8 experience the life of the Bar sort of as a movie, an  
9 action movie, on bad days a thriller, and we have to  
10 figure out which freeze frame moments to tell you  
11 about from meeting to meeting.

12 One of those freeze frame moments I think is  
13 me, and that's already been covered. It was important  
14 to establish leadership of the staff going forward,  
15 and I am pleased, very pleased with the Board's  
16 decision.

17 The other important events that have occurred  
18 since the last meeting and now really center around  
19 the Bar's specific activity concerning proposals on a  
20 tax on legal services, and I want to put that in  
21 context for you, because the State Bar of Michigan is  
22 limited in the issues that it can respond to, as you  
23 know, by the Keller decision and by Administrative  
24 Order of the court, so we can't leap in and as a Bar  
25 say this is how we would solve the whole budget crisis

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1 facing the State.

2 we can explain why we think a tax on legal  
3 services is the wrong way to go to be a piece of  
4 solving the problem and explain how we think that  
5 proposal impacts services, and we have been doing that  
6 in all kinds of ways, but we are very cognizant of the  
7 fact that it's not helpful simply to say no, and while  
8 we can't say do this other thing because we are  
9 constrained, we really have been working hard at  
10 challenging members to understand the magnitude of the  
11 economic difficulties facing the State and, in  
12 particular, facing our Legislature who has to figure  
13 out how to keep the State going and how to meet the  
14 needs of the population and how to make Michigan a  
15 viable economic entity.

16 In response to what's going on, we have done  
17 a number of things. Foremost among them is to keep  
18 you advised of what's going on. You are in the  
19 forefront of our outreach, and I hope you have all  
20 been getting the communications that we have been  
21 sending to you and reading them. I am going to go  
22 over some of the highlights of that in the next few  
23 minutes and update you a little bit, and you will  
24 always be the first, the first wave of who we are  
25 communicating with.

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1 In addition to that, we have been reaching

2 out to the general membership, to sections and  
3 committees in particular, because sections have a  
4 wider range of things that they can do than the Bar as  
5 a whole, and we have been actively involving local  
6 bars and affinity bars who are very interested in  
7 what's happening in the Legislature concerning the tax  
8 on legal services.

9 We have very, very vigorous lobbying efforts  
10 underway, as we have had for a couple of years as the  
11 idea of taxing legal services has been promoted. And  
12 you might think, looking at everything that we are  
13 doing, that we have a very large staff. Instead we  
14 have one very well respected governmental consultant,  
15 Nell Kuhnmuench, and one dynamic legislative and  
16 governmental person inhouse, and that is Elizabeth  
17 Lyon. I want to point her out to you, because if you  
18 have any specific questions that come up you can catch  
19 her at any time during the breaks, and if you ask  
20 questions about tax on legal services when I am done  
21 that I can't answer, then I am going to call her up.  
22 She has got the up-to-the-minute information on what's  
23 going on. But here is a general sense of what's  
24 happening.

25 The economic situation in Michigan by all

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1 accounts is deteriorating by the week. In addition to  
2 that situation, even if that weren't going on, the  
3 Legislature would have the challenge of figuring out  
4 what to do with the fact that the single business tax,  
5 which generates almost \$2 billion in revenue, is due  
6 to expire at the end of this year.

7                   The current budget deficit, without that  
8                   expiration, is at about \$900 million. That's what the  
9                   revenue estimating conference, the last one had it at.  
10                  On May 18th there is going to be another revenue  
11                  estimating conference, and no one will be surprised if  
12                  the number isn't considerably, significantly higher.  
13                  Those are big numbers.

14                  In the absence of a budget agreement before  
15                  May 1, we can expect that one very real possibility is  
16                  pro rata cuts in the school aid funding, and I think  
17                  that may be the moment at which the public wakes up  
18                  and understands that something very, very significant  
19                  is going on in the State budget.

20                  What's happened so far, on March 22nd the  
21                  Senate defeated Senate Bill 307, which was the Senate  
22                  version of the Governor's proposal to put two percent  
23                  tax on services, including a tax on legal services,  
24                  and I want to emphasize at this point that the  
25                  lobbying that we have been doing on a tax on legal

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1                  services has been only a tax on legal services. We  
2                  have not spoken to taxation of other services.

3                  The budget cuts agreed to to date have added  
4                  up to \$344 million, Executive Order 2007-3. The  
5                  Governor and the Chamber of Commerce have agreed on a  
6                  deadline of June 30th to enact the replacement to the  
7                  single business tax, and so there will be a good six  
8                  months to gear up for whatever it is that takes the  
9                  place of single business tax at the end of this year.

10                  Some possibilities for revenue enhancements  
11                  for replacements to the single business tax, the

12 Governor has a Michigan business tax plan. The Senate  
13 has passed what's called the best plan that's been  
14 revised. Some quip that the revision is the second  
15 best plan, but that's a viable alternative.

16 This Tuesday we are expecting to see the  
17 House Democratic single business tax replacement plan,  
18 and the rumor is that that will involve the complete  
19 elimination of the business personal property tax.

20 The significance of that for lawyers is that  
21 if you eliminate the personal property tax for  
22 businesses, businesses for whom that isn't a  
23 significant component of their operations can expect,  
24 if there is equivalent revenue raised by a business  
25 tax, to share more of the burden.

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1 Other possible revenue enhancements, an  
2 income tax increase has been proposed in House  
3 Bill 4500. We have also heard the possibility of a  
4 ballot proposal in 2008 for graduated income tax.

5 There has been a bill introduced by  
6 Representative Fred Miller for a six percent tax on  
7 services, on a limited set of services, which would  
8 exclude legal services. Taking the principal -- that  
9 bill represents the principle that nondiscretionary  
10 services ought not to be taxed. There is also the  
11 suggestion for a six percent tax on all services,  
12 including legal services, and that that would replace  
13 the entire single business tax and personal property  
14 tax for businesses. The tax on utilities to replace  
15 Public Act 141 of 2000, a fuel tax earmarked for  
16 roads.

17                   Those are just, you know, some of what we  
18 have heard are out there. The two percent tax on  
19 services, including legal services, is always an  
20 option until there is something else that's been  
21 adopted.

22                   So we are still involved and will remain  
23 involved in explaining why we think that legal  
24 services should be considered separately, differently  
25 than services in general.

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1                   Legal services are a societal good. All  
2 people are benefited when they have access to justice  
3 and they know what their rights are and any impediment  
4 to that, we will be out there communicating what the  
5 detriment is to society.

6                   In addition to that, just in the big picture,  
7 there are many reforms to government that have been  
8 talked about. It's a time of crisis, but it's also a  
9 time of I think a lot of creativity and a lot of  
10 thought about how we can do things better. Having  
11 said that, I am not endorsing any of the particular  
12 ideas that I am suggesting.

13                   Everyone is looking at tax loopholes. People  
14 are looking at some things that I think are in some  
15 ways symbolic, legislative retirement, perks for  
16 public officials. You may have noted that cars for  
17 judges are in the cross hairs at the moment, and  
18 tipping fees, another source of revenue and changes in  
19 local revenue sharing. That's the big picture.

20                   We are looking to you as leaders in the  
21 profession to help spread the word. We are using all

22 the communication devices that we have -- the Bar  
23 Journal, the E-journal, e-mail blast -- to educate the  
24 members, but you are all our best ambassadors of the  
25 message that this is a very serious situation and

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1 lawyers, as wonderful problem solvers and great  
2 thinkers, need to be part of the solution. So that's  
3 my basic pitch, and I think we are ready to take  
4 questions if there are questions for Kim and for me.

5 MS. CAHILL: Come on, nobody wants to play  
6 stump the Bar President. Every local Bar I go to they  
7 want to play. None?

8 JUDGE STEPHENS: Welcome to sleep.

9 MS. CAHILL: None? With that, thank you  
10 again very much for all of your service. I think you  
11 can tell by Janet's presentation that, you know, we  
12 are trying to be on top of issues that are important  
13 to all of us in the profession, and I think you can  
14 see by her presentation that we are on top of the tax  
15 on legal services issue.

16 I want to encourage you, if you have  
17 questions or you have concerns, call Janet, call  
18 Elizabeth Lyon. Her cell phone is on at all times,  
19 and sometimes I call her and I go, Hang up now, okay.  
20 She can text message, but I can't, because I am old  
21 and she is not.

22 But thank you again very much for all of your  
23 service. We are only a half an hour early, Ed. So  
24 thank you very much. Enjoy the rest of the day.

25 (Applause.)

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1                   CHAIRPERSON HAROUTUNIAN: Thanks, Janet;  
2                   thanks, Kim.

3                   Okay. Moving right along. Our first  
4                   proposal is the consideration of the emeritus attorney  
5                   referral fee issue with John Kingsepp, who is the  
6                   immediate past chair of the Senior Lawyers Section.  
7                   John, I would ask if you would come forward for  
8                   purposes of presentation.

9                   MR. KINGSEPP: Thank you, Ed. Having been a  
10                  member of this august body for nine years and an  
11                  officer for three of those years, I appreciate your  
12                  commitment in time today, so I am going to contribute  
13                  to getting out of here as quickly as possible, and I  
14                  will be succinct.

15                  You have the materials, and let me just say,  
16                  the Doherty case that I cited in those materials  
17                  clearly posits the answer to the question is a receipt  
18                  of money by a referral fee the practice of law, and it  
19                  is not. The question that is propounded to you came  
20                  about as a result of a discussion with the Ethics  
21                  Committee back in 2006 in August, Senior Lawyers  
22                  Section, and it was an attempt to be thorough,  
23                  precise, as much as we could to avoid ambiguity and  
24                  confusion in addressing this issue. Hence, the  
25                  suggestion that three rules might have to be changed.

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1 I have seen Bill Dunn's communication. I  
2 think he is on board with respect to just the  
3 modifying the one rule pre-ap, and that may be the  
4 eventual decision, but we propounded, as I said, the  
5 two other rules just for clarity and to avoid  
6 confusion and ambiguity.

7 The Senior Lawyers Section doesn't see that  
8 there is a major problem. It does request your  
9 concurrence in this matter so we can proceed forward  
10 to address the issue with the Michigan Supreme Court  
11 by making the appropriate changes, and we would like  
12 your support. Thank you very much.

13 CHAIRPERSON HAROUTUNIAN: John, you are  
14 moving then that the resolution or the position be put  
15 forward?

16 MR. KINGSEPP: I am.

17 VOICE: Second.

18 CHAIRPERSON HAROUTUNIAN: There is support.  
19 And let's just be real clear, this is the ultimate  
20 question before the Assembly, but what I want to be  
21 clear about is the proposal that's in front of the  
22 Assembly, is it this proposal that you have here, this  
23 change.

24 MR. KINGSEPP: Good question. I submitted  
25 the proposed language changes merely as a matter of

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1 clarification and assistance to you in framing the  
2 appropriate resolution should you want to do something  
3 different than the proposal that's in your packet, and  
4 why I posited that was in response in part to Bill  
5 Dunn's communication.



6                   Quite honestly, I think the simple solution  
7 would be to adopt the resolution that's in your  
8 handout and then let the Board of Commissioners and  
9 the State Bar administration determine what is the  
10 appropriate suggested change to address to the Supreme  
11 Court.

12                   CHAIRPERSON HAROUTUNIAN: If you all will  
13 take a look at the salmon colored or off white colored  
14 paper that was in the handout, take a look, and you  
15 are dealing with Rule 3(F). Rule 3(F) says, Emeritus  
16 membership -- and, John, let me make sure I have said  
17 this correctly. I want to make sure. Is this the  
18 division of fees section under Rule 3(F)?

19                   MR. KINGSEPP: It's a new section.

20                   CHAIRPERSON HAROUTUNIAN: And this is what is  
21 being suggested, that is, that for the purpose of a  
22 division of fees allowed under MRPC 1.5(e) an emeritus  
23 member shall be considered to be a lawyer and the  
24 receipt of referral fees is not the practice of law.  
25 Is that the initial provision, and then do we move on

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1                   to the second and third, or is it this first one that  
2 we are looking at only?

3                   MR. KINGSEPP: I leave it to the sense of the  
4 body. As I said before, my suggestion would be to  
5 adopt really the proposal that's in your handout and  
6 leave it to the administration to determine the  
7 appropriate rule change, because I don't exactly know  
8 the politics that may be involved in dealing with the  
9 Michigan Supreme Court, although I surmise, having  
10 appeared before them before, and as a result I don't

11 know those dynamics that might come into play. So I  
12 don't want to be limited nor do I want the  
13 administration be limited with regard to what it has  
14 as an option, so that's why I suggested maybe the  
15 initial handout. This is merely a suggestion of what  
16 we perceive to be the changes that are necessary, but  
17 that's not the ultimate question once we get to the  
18 Supreme Court if you adopt the resolution.

19 CHAIRPERSON HAROUTUNIAN: Let me just make  
20 sure I understand, John. What is the resolution that  
21 we are talking about, just so I understand it, because  
22 I don't see it.

23 MR. KINGSEPP: It's the one, the emeritus  
24 members of the State Bar should be entitled to receive  
25 a referral fee so long as the emeritus members are not

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1 engaged in the practice of law, period. That's what  
2 you would be adopting, then the implementation would  
3 be in conjunction with the administration of the State  
4 Bar.

5 CHAIRPERSON HAROUTUNIAN: The resolution is  
6 as set forth in the booklet, which is what John just  
7 mentioned. Is there -- I heard a support to that.  
8 Was I correct?

9 VOICE: Yes, correct.

10 CHAIRPERSON HAROUTUNIAN: Is there any  
11 discussion?

12 VOICE: Are we supposed to go up to the  
13 microphone.

14 CHAIRPERSON HAROUTUNIAN: Please, please,  
15 come to the microphone, and please give your name and

16 your circuit, if you will.

17 MR. MCCLORY: I am Mike McClory from the  
18 3rd circuit and the immediate past chair of the  
19 Probate Estate Planning Section, and, you know,  
20 nothing is better than someone who has just looked at  
21 something and has the dangerous if their own mind, but  
22 the thing that jumped out at me just in terms of  
23 unauthorized practice of law issues that our section  
24 has dealt with, and I just want to make sure I  
25 understand the proposal is this last thing here which

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1 says the receipt of a referral fee is not the  
2 unauthorized practice of law.

3 I am not an ethics, expert, but could that  
4 possibly be opening the door for other non-lawyer  
5 groups to use that as a basis to get referral fees  
6 from lawyers? I just wanted to raise that point.

7 CHAIRPERSON HAROUTUNIAN: Let me respond by  
8 just clarifying, at least as I understand it. The  
9 proposal that was put before us and which was seconded  
10 was the following: Emeritus members of the State Bar  
11 of Michigan should be entitled to receive referral  
12 fees so long as the emeritus members do not engage in  
13 the practice of law.

14 Now, this second handout that came to us  
15 today, in my judgment if we vote on the proposal that  
16 has just been set forth, which is here on the screen,  
17 we are not voting on any of these. Why? Because this  
18 is not in front of us. This is sort of a supplement,  
19 but that's not the proposition.

20 Now, if someone wants to change the

21 resolution or to suggest that one or all of these  
22 rules be adopted in some fashion, that would be  
23 different, but what we are dealing with at this point,  
24 Mike, and it's a fair point that you have raised, is  
25 only this proposition at this moment.

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1 MR. MCCLORY: You mean we are supposed to  
2 read what's up there. The information I read in the  
3 book this week -- I am sorry to waste everybody's  
4 time.

5 CHAIRPERSON HAROUTUNIAN: No, no, no, you  
6 didn't waste any time at all. You raised a valid  
7 point, and I just wanted to make sure I said that.

8 MR. KINGSEPP: Mike, I think your point is  
9 well taken, and that's why I suggest we go with the  
10 initial language, because there are these nuances, and  
11 they are entirely appropriate, and that doesn't mean  
12 they are going to be ignored by adopting this  
13 resolution in this general format, and that's why I  
14 said, I think at other levels we have to determine  
15 exactly what the nuances are so we can address all  
16 these concerns. Thank you.

17 MR. ROMANO: Vince Romano, 3rd circuit. I  
18 only want to be sure that this body expresses its  
19 support of Bill Dunn's clarifications of the proposal  
20 and that our leadership, both elected and executive,  
21 act consistently with that expression of this body. I  
22 don't want to tie them to it, but I want to be sure  
23 that they are aware of that in some official capacity.

24 CHAIRPERSON HAROUTUNIAN: So, Vince, you  
25 would be speaking in favor of this proposal?

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1 MR. ROMANO: In favor of the proposal.

2 CHAIRPERSON HAROUTUNIAN: I just wanted to  
3 make sure that's understood.

4 MR. ROMANO: But expressing the will of this  
5 body as enunciated by Bill Dunn's clarifications.

6 MR. MILLER: Nelson Miller for the 17th  
7 circuit. Speaking in opposition to the proposal and  
8 as a recovering referer, let me just say it this way,  
9 that any time that we begin to wrestle about the  
10 language and the effect on other rules, you have to  
11 wonder if there isn't some internal inconsistency in  
12 the proposal itself, and just reading what's up on the  
13 screen there, we seem to be creating a status in which  
14 emeritus members are lawyers but not practicing law  
15 but receiving referral fees for the practice of law by  
16 another, and that in itself does suggest that there is  
17 something problematic going on here.

18 In my continuing practice of referring but  
19 not for fees clients, I do find that I am doing at  
20 least five things which sound a lot like the practice  
21 of law, and one is determining the objective of the  
22 client, the subject matter or field -- the subject  
23 matter for the client and the field in which the  
24 lawyer to whom the matter was referred would be  
25 practicing or would need to be practicing, the merit

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1 of the matter, because I am not going to send a client  
2 on a wild goose chase nor would I want to burden a  
3 practicing lawyer with a meritless claim, so I am  
4 making some evaluation of that. The language and  
5 culture of the client and the cultural competency of  
6 the lawyer to whom I am referring because, again, I  
7 don't want to make a bad match, and also the fee  
8 structure of the lawyer and the economics of the  
9 client.

10 So in making all of those judgments and  
11 making a wise referral, I think I am practicing law,  
12 and we recognize that because we recognize liability  
13 for negligent referrals, in essence.

14 And I am reminded of the need for wanting to  
15 maintain currency, not just in the substance of the  
16 law, but among the membership of the local Bar to whom  
17 you are referring cases.

18 By an instance that just happened a few weeks  
19 ago. I had a friend, a lawyer friend of mine come to  
20 see me, stopped in. I hadn't seen him for four years,  
21 and I would have referred cases to him, not knowing  
22 the changes in his life that happened in those very  
23 short four years, including that he left his law  
24 partner of 20 years, his wife of 25, died his hair,  
25 pierced his ear, and adopted a girlfriend about

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1 two-thirds his age and bought a fancy sports car.

2 Now, that doesn't mean he is not a competent  
3 lawyer, but those things would have raised enough  
4 concerns on my part had I known that they were going

5 on that I wouldn't want to refer at least certain  
6 clients to him under those circumstances.

7 So I am keeping in mind our burden to both  
8 protect the public, or our opportunity to protect the  
9 public and at the same time to protect the  
10 professionals who are a member of this profession. I  
11 am not in favor of this. I think it's an unwise idea.  
12 Instead we should just have lawyers who wish to  
13 continue to refer remain members of the Bar.

14 MR. LARKY: Mr. Chairman, my name is Sheldon  
15 Larky from the 6th circuit. I would like the members  
16 of the Assembly just to shut their eyes mentally for a  
17 moment and imagine after 30 years, maybe 40 years of  
18 practicing and having clients that maybe have been  
19 long-term clients of yours for 10, 20, 30 years and  
20 you have gotten to that point in your gray-haired life  
21 where you have decided to become an emeritus attorney,  
22 and you have had a client who has always trusted you  
23 or a friend who has always trusted you. You have  
24 gotten to that point where you are not practicing  
25 anymore, but this person comes to you for advice and

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1 consolation and counseling, and you say I don't  
2 practice anymore, but I want to refer you out to  
3 someone who I know and trust.

4 I think this is fine. I think that this is  
5 okay, and I think that we should adopt this proposal,  
6 because maybe this is the way we pay back ourselves  
7 for all the good work we have done in the past and  
8 then possibly for the clients in the future. For us  
9 to take a referral fee when we get to that emeritus

10 status I think makes sense and I am going to vote yes.

11 MR. BUCHANAN: Robert Buchanan from the 17th  
12 circuit. I guess I have a question about the  
13 proposal, which is how would it affect referral  
14 lawyers, and what I mean by that is the Sam Bernstein  
15 firm. When he becomes 70 and selects emeritus status,  
16 does it mean he can still run his television ads,  
17 solicit the referrals and earn an income that way, so  
18 in effect he is doing what he is doing now but now he  
19 is doing it in an emeritus status. I guess it's a  
20 question I have about the proposal.

21 CHAIRPERSON HAROUTUNIAN: I am going to  
22 suggest that, John, if you might be able to respond to  
23 that.

24 MR. KINGSEPP: That's an appropriate  
25 question. Again, bear in mind that there are nuances

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1 to what this proposal is, particularly in this day and  
2 age, and we were mindful of that, but it's hard to  
3 sort of indicate how are we going to translate that  
4 into language. The good thing is 3(F) does make it  
5 clear a lawyer cannot practice law, and I suppose that  
6 then becomes an issue of how much you advertise and  
7 how much money you put in do you really go over the  
8 line.

9 If you look clearly at what the court said in  
10 Doherty, it was very simple, the simple referral,  
11 receipt of money based on a referral is not the  
12 practice of law, and then it went on to define what  
13 really is the practice of law.

14 And I would suspect that when someone is



15 engaged in that type of activity as an example, that  
16 really is more than the emeritus status. That really  
17 does become close to practicing law. But it is a  
18 legitimate concern.

19 MS. PRATER: Thank you. Ann Prater from the  
20 56th circuit. I want to make a comment in regards to  
21 whether -- obviously I am nowhere near the emeritus  
22 status at any time soon, so I am probably a little bit  
23 younger to be making any comments whatsoever, but my  
24 comment is this. As far as referring attorneys being  
25 a practice of law, how is that any different from a

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1 person going to a non-lawyer and saying, Do you know a  
2 respected attorney in the community that I could go  
3 to?

4 Number two, what is it any different than  
5 going to a Yellow Pages ad and looking at it to see,  
6 let's see, I speak Spanish, I want to make sure I go  
7 to a Spanish speaking lawyer? Let's see, I am having  
8 problems with my family. I see they do family law.

9 I do not see how that is a practice of law by  
10 helping somebody select an attorney that you may or  
11 may not know whether you are a lawyer or not. That's  
12 my comment. I don't see how referring somebody as an  
13 attorney is necessarily practicing any kind of law. I  
14 don't believe you are necessarily sitting there -- it  
15 depends on the circumstances. Are you sitting there  
16 and doing a full analysis of the case, or are they  
17 saying, hey, I am thinking of getting divorced and I  
18 need a family law. I don't see how that's practicing  
19 law in any way. Thank you.

20 CHAIRPERSON HAROUTUNIAN: Any other comments?  
21 Questions?  
22 MS. LIEM: Veronique Liem, 22nd circuit. I  
23 would just point out that approving this rule might  
24 allow transfer of practice a little more easily for  
25 solo practitioners where they would work with a

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1 referral fee perhaps, to transfer may be a bit of a  
2 practice, which is easier for the larger law firms to  
3 do within the firm. So I think it would benefit the  
4 smaller firms or solo practitioners, and I would  
5 support it.

6 CHAIRPERSON HAROUTUNIAN: Yes.

7 MR. RAINE: Paul Raine with the 6th circuit,  
8 also on the Judicial and Professional Ethics  
9 Committee. I wanted to point out that the rule change  
10 as being requested under Rule 1.5 says that the client  
11 must be informed if such a fee is being paid. That is  
12 a bit in contradiction with Rule 1.5(e)(1), which  
13 says, The client is advised of and does not object to  
14 the participation of all lawyers involved. There is  
15 no such language in this proposal.

16 I would like to also reiterate Bill Dunn's  
17 suggestion that Rule 3(F) is really the only change  
18 that needs to be made.

19 MR. KINGSEPP: Let me just respond, if I can,  
20 on that last point. I purposely omitted the  
21 consistency, because I felt as I read the rule, if you  
22 read the original language in (e), it sort of goes, it  
23 sort of says you are practicing law because there is  
24 some connection in the continuing relationship, so I

25 didn't want that to happen. I merely posited it in

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1 that fashion to avoid that confusion.

2 MR. RAINE: So along these lines I would ask  
3 that a friendly amendment be adopted where the only  
4 change that's made here is to Rule 3(F).

5 CHAIRPERSON HAROUTUNIAN: So that you would  
6 add 3(F) to the proposal or you would suggest that the  
7 implementation of this proposal is through Rule 3(F)?

8 MR. RAINE: That the only change that be made  
9 is to Rule 3(F) and take Bill Dunn's suggestion that  
10 it be changed to say that an emeritus member as a  
11 lawyer, even though electing not to practice.

12 CHAIRPERSON HAROUTUNIAN: Is that in the form  
13 of a friendly amendment? I will tell you I am going  
14 to, and that's fine, I am going to rule that I don't  
15 accept it as a friendly amendment. I would ask that  
16 it be placed in the form of an amendment, and that's  
17 okay, and in that regard is there support for the  
18 amendment? Seeing none, the amendment dies for lack  
19 of a second.

20 MR. RAINE: Then I will obviously be voting  
21 in opposition.

22 MR. ANDREE: Gerard Andree from the 6th  
23 circuit. I would just like to have the Representative  
24 Assembly step back and just consider where this entire  
25 emeritus status came from. It wasn't based on the

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1 fact that you happened to live to be 70 years old. It  
2 was based on the fact really that there was a class of  
3 attorneys out there who were no longer practicing  
4 medicine, or practicing law -- I don't want to mix up  
5 my clients with my colleagues -- no longer practicing  
6 law, and because they were no longer practicing law  
7 found it onerous to pay the Bar dues, and that's  
8 really what we created this classification for.

9 The most important thing is that, you know,  
10 we said, okay, if you don't want to pay Bar dues but  
11 still want to be, quote-unquote, involved, you know,  
12 we will create this emeritus status for you, but you  
13 won't engage in the practice of law, but what your  
14 benefit was is that you don't have to pay these annual  
15 Bar dues anymore.

16 So now we have a situation where people say  
17 now I am emeritus and I am not paying Bar dues but I  
18 still want to make money. Now, it seems to me you  
19 just can't have it both ways. If you have got enough  
20 of a practice still, if you have got such standing in  
21 the community that people are still coming to you and  
22 looking to you as their source as an attorney, and you  
23 are, in fact, in my opinion engaging in law when you  
24 make all the analysis to find out what kind of a case  
25 the person has and who you should refer them to, then

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1 you should pay your Bar dues, and I think to propose  
2 this is for people who want to have their cake and eat  
3 it too, and I just can't believe there is that many

4 people out there that are making -- I mean, how much  
5 are our Bar dues? Are there referral fees out there  
6 that are not going to exceed a couple hundred dollars?  
7 No.

8 CHAIRPERSON HAROUTUNIAN: Thank you.

9 MR. HILLARD: Martin Hillard from the 17th  
10 circuit. I was going to make many of the same  
11 comments. No one forces you to go emeritus. You can  
12 continue to pay your dues if you want to collect the  
13 fees, and in response to the other comment, if you  
14 want to go emeritus, nothing stops you from making a  
15 referral on a gratuitous basis and not collect the  
16 fee. So make the referral free of charge or pay your  
17 dues and collect the fee. Thank you.

18 MS. VESTRAND: Joan Vestrand, 6th circuit. I  
19 want to echo the concerns that began with Nelson  
20 Miller. I just spent my whole career in legal ethics,  
21 and I appreciate the effort. I have a father who is a  
22 retired lawyer, he is 74. This may benefit him. But  
23 I think that you do have to make a choice to pay your  
24 Bar dues, then you can collect referral fees, because  
25 I think Nelson is correct, referrals can involve the

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1 practice of law. As soon as we begin to evaluate the  
2 type of matter, we are engaged in legal advice in  
3 helping them go to a specific individual for a  
4 purpose.

5 I have another concern. There is a rule that  
6 governs the sale of a law practice with regard to any  
7 lawyer who retires, and we cannot engage in the  
8 piecemeal sale of cases. And I think this rule change

9 would open a can of worms, because it would, in  
10 essence, permit lawyers to be selling cases on a  
11 piecemeal basis due to receipt of a referral fee that  
12 could be as much as one third of a fee.

13 If lawyers want to make referrals, the Bar  
14 dues are small, and then we are protected from all the  
15 issues of the possible practice of law and the  
16 prohibition against piecemeal sale of practices and  
17 the negligent referral, legal malpractice claim is  
18 still viable, which should be for the lawyer who makes  
19 the negligent referral. So I am opposed to the  
20 amendment.

21 CHAIRPERSON HAROUTUNIAN: Any other comments?  
22 John, as the proponent, I am going to give you the  
23 last crack.

24 MR. KINGSEPP: Let me say this, the last two  
25 comments, again, have legitimacy, and I am not saying

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1 that we didn't think of that. The concern, obviously,  
2 is the fact that we have a duty, any lawyer does, to  
3 the profession, to its integrity, to preserve its  
4 honesty and professionalism, and the fact that there  
5 is a referral by an emeritus attorney does create an  
6 issue that you have mentioned.

7 For instance, I will give you an example.  
8 There are large firms in which lawyers go on of  
9 counsel status, and they may elect to take an  
10 emeritus. They don't do any work, but they generate  
11 business for the firm. That is an issue, but that's a  
12 practice that occurs. If that occurs, then how do we  
13 regulate that and control it to some extent?

14                   The emeritus status allowing for referral  
15 fees with guidelines attached to it or rule amendments  
16 that preserve those guidelines is one way to assure it  
17 rather than not have anything done now and have the  
18 practice just continue without any regulation  
19 whatsoever. Thank you.

20                   CHAIRPERSON HAROUTUNIAN: Coming to the  
21 question. All those in favor of the proposal say aye.

22                   Those opposed no.

23                   Abstentions say yes.

24                   VOICE: Division.

25                   CHAIRPERSON HAROUTUNIAN: Division, that's

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1                   fair. And I would ask that it be done by the raising  
2 of hands and, Madam Clerk, could you have some tellers  
3 assist, please.

4                   CLERK KAKISH: Yes, Chair.

5                   CHAIRPERSON HAROUTUNIAN: All those in favor  
6 please raise your hand.

7                   (Hands raised and being counted.)

8                   CHAIRPERSON HAROUTUNIAN: Please lower your  
9 hands. All those opposed please raise your hands.

10                   (Hands raised and being counted.)

11                   CHAIRPERSON HAROUTUNIAN: Lower your hands.

12                   The motion is defeated on a vote of 66 to 31.

13                   MR. BARTON: Mr. Chairman, I voted in the  
14 prevailing side. I would at this time move to  
15 reconsider and refer to the appropriate committee of  
16 the Assembly. I don't think this matter was thought  
17 through sufficiently, and I believe we should still  
18 take a look at it. For that reason I move to

19 reconsider and refer to the appropriate committee.

20 VOICE: Second.

21 CHAIRPERSON HAROUTUNIAN: It's been moved to  
22 reconsider and referred to the appropriate Rep  
23 Assembly committee, and there is support. Any  
24 discussion?

25 MR. ABEL: What committee?

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1 CHAIRPERSON HAROUTUNIAN: It would be Special  
2 Issues. It would be the Special Issues Committee of  
3 the Rep Assembly. Thank you for asking, Matt.

4 Got a lot of business on your plate.

5 Any other discussion? All those in favor of  
6 the motion say aye.

7 Opposed no.

8 The noes have it. The motion is defeated.

9 MR. KINGSEPP: I want to say that while this  
10 may be disheartening, I do appreciate your comments,  
11 and I look at it this way, it's a great opportunity  
12 for the State Bar of Michigan to maintain its  
13 membership in the active section by the lawyers 70 and  
14 older paying dues, so there is an opportunity from  
15 this. Thank you very much.

16 (Applause.)

17 CHAIRPERSON HAROUTUNIAN: Okay. Moving right  
18 along. The next issue is the consideration of  
19 proposals with regard to specialized dockets, and my  
20 understanding is that Jesse Reiter and also Tom  
21 Rombach are kind of the joint proponents of this  
22 proposal. Jesse.

23 MR. REITER: Good morning everyone. I am



24           Jesse Reiter. I am the president of the Michigan  
25           Trial Lawyers Association.

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1                   We are proponents of this proposal for a  
2           couple of reasons. First of all, last year Michigan  
3           State Medical Society came out with proposed  
4           legislation that would basically abolish medical  
5           malpractice and in its place there would be special  
6           health courts. The proposal or the proposed  
7           legislation would have no attorneys, no defense  
8           attorneys, no plaintiff's attorneys, no rules of  
9           evidence, no constitutional protections, no court  
10          rules, no experts, no practice as we know it, and so  
11          we as an organization, MTLA, is against the MSMS  
12          proposal and proposed legislation.

13                  This proposal basically sets out criteria for  
14          the State Bar to object to a proposal sort of like the  
15          special health courts that the MSMS came out with.  
16          The reason we support it is because it has all the  
17          important criteria, the right to attorneys, the right  
18          to court rules, the right to evidence, and it's  
19          minimal criteria that the State Bar would consider.  
20          It doesn't mean that if these criteria are met that  
21          the State Bar would accept a proposal for special  
22          health courts or some other type of specialized  
23          docket, but we support it as an organization because  
24          it sets out those minimal criteria.

25                  If those criteria are not met, if the

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1 legislation says no attorneys for a special health  
2 docket, then the State Bar will not support it, and  
3 for those reasons that's why my organization supports  
4 this, and we are the proponents of this bill, and Tom  
5 Rombach, I believe, is also going to speak on this.

6 MR. ROMBACH: Thank you, Jesse. Again, Tom  
7 Rombach. I am actually, together with Jesse, moving  
8 actually a substitute for what's in your packets.  
9 That's in the salmon colored sheet. I just want to  
10 point out the only difference between that and what we  
11 have in the packets before you is, A, we weren't  
12 thrilled to death with some of the explanatory  
13 material that was in there. It seemed to imply that  
14 if these guidelines are met that the State Bar would  
15 support it, and, in fact, I don't hope that this  
16 proposal -- and we have added a second sentence to  
17 this -- the proposal at all in any way implies  
18 support, in fact far from that.

19 As Jesse indicated his group's opposition to  
20 one of the alternative courts that was proposed in the  
21 last Legislature, and I would point specifically the  
22 only difference, there is one word difference in the  
23 first sentence. It says, Following guiding  
24 principles, as opposed to the above guiding  
25 principles, because obviously the sheet of paper was

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1 laid out differently than your packet.

2 The only real substantive change is that the

3 State Bar of Michigan will consider supporting a  
4 proposal to create a specialized docket or court only  
5 if the following threshold standards are met, and the  
6 reason that was important, some of you may have  
7 reviewed Norm Hyman's concerns. Again, that sentence  
8 is added just to emphasize the fact that even if the  
9 guidelines are met there is no certainty of State Bar  
10 of Michigan support. That's why the word "consider"  
11 is in there, the words "only if" are in there. The  
12 idea of a threshold standard being met is in there.

13 In other words, that these are minimum  
14 requirements of any proposal that we would consider,  
15 certainly we could consider much higher requirements  
16 before it would garner our support.

17 And I think that I did have a chance to talk  
18 to Mr. Hyman about his concerns. He hasn't seen this  
19 final draft, but it is drafted in response to the  
20 concerns that he has shared with this group via his  
21 letter.

22 Secondly, his concern about the redundancy.  
23 Right now, quite frankly, the State Bar of Michigan  
24 has no policy with regard to specialized courts, and  
25 obviously as a former chair I would love to empower

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1 the Assembly and I want the Assembly to speak on this  
2 topic and give guidance to our Board of Commissioners  
3 on which I now sit. We have ten very fine executive  
4 committee members that sit on both bodies, and I am  
5 sure they will take into consideration our feelings on  
6 this, but we need to give guidance to them.

7 At the same time I am for vesting them with

8 enough discretion where they can react in a very fluid  
9 legislative environment. We just have one standard,  
10 we say this is the perfect court environment and we do  
11 nothing, we really don't have a lot of legislative  
12 credibility if we say no to everything that anyone  
13 ever proposes.

14 So we have to be engaged in the process.  
15 This allows our lobbyist to go forward. This allows  
16 our legislative liaison, who I believe Elizabeth Lyon  
17 who is here today, it allows our executive director,  
18 Janet Welch, to engage in the debate that she has had  
19 in the Legislature process for many years and for the  
20 last six years on behalf of the State Bar to engage in  
21 the discussion. To me that's the major advantage that  
22 we have here, because it's impractical for the  
23 Representative Assembly meeting only several times a  
24 year to put our imprimatur on any particular piece of  
25 legislation.

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1 That's why the Board of Commissioners makes  
2 that fluid call, but right now they have no guidance  
3 at all. Quite frankly, they could have approved the  
4 Michigan Medical Society's proposal, and I know that  
5 Mr. Hyman was particularly concerned with the proposal  
6 to do something with the land use docket, to take that  
7 out of the court system and put it into a specialized  
8 court, and that he's why you see his ire drawn to this  
9 particular proposal and, therefore, this allows us to  
10 oppose that too.

11 On the other hand, this would have allowed  
12 the Bar to engage in the treatment court, you know,

13 often referred to as the drug court concept, that we  
14 could divert people in the criminal justice system to  
15 treatment options and allow that to be done once they  
16 enter a plea to be able to do that more  
17 administratively, and then if they fall short of their  
18 contractual obligation of the court, then they would  
19 be referred back to the criminal justice process, and  
20 this would enable in those very limited circumstances  
21 for the Board of Commissioners to consider supporting  
22 that.

23 Additionally, for criminal law practitioners,  
24 for instance, there is a proposal that I am sure  
25 Senator Cropsey could tell you about that, that's

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1 coming up in front of his group that would allow  
2 diversionary program for mental health issues proposed  
3 by Liz Brader. Again that would mirror the treatment  
4 court but would be broader than that so you wouldn't  
5 have to have a drug problem, instead you could have a  
6 mental health problem and still have that type of  
7 treatment. And, again, it would allow the Bar to  
8 consider that on its merits rather than if we simply  
9 said we are opposed to any type of alternative, then  
10 it puts us in the unenviable position to have no  
11 credibility at all when we walk into the legislative  
12 process.

13 So we are trying to confine as much as we  
14 can, but this is at least a first step in  
15 consideration by the Bar to have a policy with regards  
16 to alternative courts, and, again, I think that speaks  
17 that to Mr. Hyman's concerning.

18                   And right now none of the legislative  
19 proposals that Jesse is familiar with or I am familiar  
20 with some of the alternative courts right now, to say  
21 that we are going to take these outside of lawyers and  
22 outside of our profession and outside of the court  
23 system would pass muster with these guidelines.  
24 That's why we specifically identified that the  
25 strength of our court system be the same requirements

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1           of an alternative court. And this would just allow  
2 the State Bar to be flexible, to pick and choose what  
3 legislation that we feel meets our high standards and  
4 would garner our support. So that's why I am speaking  
5 in particular in favor of this proposal.

6                   CHAIRPERSON HAROUTUNIAN: Tom, are you asking  
7 then that the proposal on the salmon colored sheets be  
8 substituted in place of that which is in the binders  
9 that the members have in front of them?

10                  MR. ROMBACH: Yes, I am, Mr. Chair.

11                  CHAIRPERSON HAROUTUNIAN: Is there support  
12 for that substitution?

13                  VOICE: Yes, support.

14                  CHAIRPERSON HAROUTUNIAN: Any discussion?  
15 This is on the question of the substitution, not on  
16 the ultimate question.

17                  All those in favor of the substitution say  
18 aye.

19                  Opposed no.

20                  Any abstentions say yes.

21                  It's substituted.

22                  Now, that being the case, is there any

23 discussion on the substituted issue?  
24 VOICE: Yes.  
25 CHAIRPERSON HAROUTUNIAN: By the way, is

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1 there a second on the proposal?  
2 VOICE: Second.  
3 CHAIRPERSON HAROUTUNIAN: Yes, please.  
4 MR. REISER: Good morning, Ed. John Reiser,  
5 22nd circuit. I am also an assistant prosecuting  
6 attorney in Ann Arbor and was an assistant prosecuting  
7 attorney in Oakland County where I was assigned to,  
8 for a while, a drug court, and in Ann Arbor we have a  
9 sobriety court, and that's for repeat drunk driving  
10 offenders. We also have a street outreach court for  
11 those who are homeless. We also have a domestic  
12 violence court. In 14-1 district court where I am  
13 usually assigned there is a special docket for  
14 sentencing students who are in college or in high  
15 school who have committed retail fraud or MIPs. It  
16 involves their parents, things like that.  
17 The concern that I have is that I don't know  
18 that any of the five courts that are specialized  
19 dockets or courts that I just spoke about increase the  
20 access to justice. The police department in our  
21 office gives them invitation, so they have the access  
22 already. So I guess that maybe it should say not  
23 hinder or shall have no detrimental effect upon the  
24 access, because that's -- my only concern is I don't  
25 want people to take a second look at the positive

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1 dockets and positive specialized courts that we have  
2 that really don't increase access, and that's my only  
3 point. I am in support of this concept and am  
4 planning to vote for it but have that one reservation.  
5 Thanks.

6 MR. ROMBACH: If I may respond to  
7 Mr. Reiser's concerns. The reason that that has to be  
8 here is that the State Bar can only speak, under the  
9 Keller decision, to certain requirements of certain  
10 types of legislation, so if you want to strip that  
11 language out, then what happens is that it limits our  
12 ability to speak on the topic. So there are certain  
13 words, according to Administrative Order issued by the  
14 Supreme Court, certain goals that we need to achieve,  
15 and that would be one of the goals that was stated in  
16 the Administrative Order. That's why it's there.

17 Secondly, to address your substantive  
18 concern, John, it would be that beauty is in the eyes  
19 of the beholder. I would certainly say that by having  
20 these additional designer courts that you have that  
21 that increases our access to justice as a concern.  
22 The reason you have designer courts is because you  
23 believe that the goal of justice is being achieved by  
24 there. So, in other words, it would increase that  
25 access to that inevitable goal, and, therefore, that's

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1 how would I define it fitting within those



2 characteristics.

3 Again, I am trying to give some discretion to  
4 our decision makers to be able to pick and choose the  
5 requirements, and so, literally, that's why that one  
6 is there. Although I understand your argument that it  
7 may not hinder access, I believe it actually increases  
8 access to that goal that we are all trying to achieve  
9 of being justice, so I can simply define it as  
10 allowing for that.

11 JUDGE KENT: Wally Kent of the 54th circuit.  
12 I call your attention to Mr. Hyman's remarks. He has  
13 covered this beautifully. I find myself in total  
14 agreement with what I understand to be his points and,  
15 most specifically, that if we pass this as drafted we  
16 would be opening the door to new administrative  
17 courts.

18 I didn't practice administrative law. I  
19 recently had the occasion to preside over an appeal  
20 from the Department of Human Services' administrative  
21 court, and I was appalled at what I saw in the record  
22 of that court's proceedings.

23 I saw what Mr. Hyman does not mention  
24 specifically but what appeared to me to be blatant  
25 cronyism and an absolutely total disregard for due

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1 process. And I have the deep and abiding feeling that  
2 if we open the door to any more administrative courts  
3 we are going to see more of the same. That, indeed, I  
4 think is the reason for the opposition to the health  
5 court.

6 The only way to avoid it, I believe, and to

7 serve the purpose of the motion is to delete entirely  
8 the language "or courts" and, therefore, to propose  
9 that we go on record that when considering support or  
10 opposition to proposals to create specialized dockets.  
11 That way we do not open the door to administrative  
12 courts being created and, furthermore, we preserve the  
13 right of the public who appear before the courts to  
14 appear before a magistrate who is answerable to the  
15 electorate and not to some appointing authority.  
16 Thank you.

17 CHAIRPERSON HAROUTUNIAN: Thank you, Judge.

18 MR. ROMBACH: If I may, because I think he is  
19 suggesting that we amend this. Judge, in all due  
20 respect, I don't want an administrative court either,  
21 and I concur with your thought process.

22 MR. LARKY: Mr. Chairman, point of order.

23 CHAIRPERSON HAROUTUNIAN: Yes.

24 MR. LARKY: Mr. Rombach is giving speeches.  
25 we should have the right to talk, and he can respond

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1 later, but that's not the rule.

2 MR. ROMBACH: Again, I would defer. If he is  
3 proposing an amendment, I just wanted to address  
4 whether it's a friendly amendment or not, Shel.  
5 That's what I was trying to do. Otherwise I won't  
6 speak.

7 JUDGE KENT: I am proposing a friendly  
8 amendment.

9 MR. ROMBACH: That's why I wanted to speak to  
10 it.

11 MR. LARKY: I would second it.

12 CHAIRPERSON HAROUTUNIAN: I would consider it  
13 a friendly amendment, so I am going to ask the maker  
14 whether or not he considers it a friendly amendment.

15 MR. ROMBACH: No, I don't, and I just wanted  
16 to explain why if you would so allow me, Mr. Chair.

17 Again, I am sorry I cut through the procedure  
18 too quickly, and Mr. Larky rightfully called me on  
19 that, because I am not trying to get into a  
20 point/counter point.

21 The reason why I need court in there is  
22 because we are talking in legislative terms. As,  
23 again, a legislator could tell you, that's how they  
24 define the stuff when they come in with the  
25 legislative process, so if I take out court, it

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1 necessarily precludes us from engaging in that  
2 discussion. Because, for instance, I don't consider  
3 this mental health diversion program a court, but the  
4 Legislature considers it a court, and, therefore, we  
5 have to deal in their terms to be able to engage in  
6 their process, and that's what I am trying to do.

7 So I understand your differentiation, Judge,  
8 between courts and dockets. I don't think anyone, and  
9 I can only speak for myself on the Board of  
10 Commissioners, wants to green light some type of  
11 administrative system replacing our court system, but  
12 I need court in there in order to deal substantively  
13 with the Legislature when they propose court.

14 The same thing with treatment court, that's  
15 considered a treatment court. It's not considered a  
16 treatment docket, so if anyone that's a proponent of

17 the drug court or the treatment court has to have  
18 court in this proposal in order to deal with it,  
19 otherwise you are going to disqualify the State Bar  
20 from engaging in that discussion, and that's the  
21 reason I am against it.

22 I am a hundred percent in favor of your  
23 observation, and I want to preclude that. The problem  
24 is I don't know how else to draft it to enable us to  
25 engage in the discussion. That's why I don't consider

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1 it friendly.

2 MR. REITER: And, Judge, just to add to that,  
3 my organization is a hundred percent against these  
4 courts and special health courts, and we have talked  
5 about this a lot among our past presidents and  
6 officers. We wouldn't be supporting this proposal if  
7 we didn't think it was the most effective way for the  
8 Bar to get involved and object to proposals like this.  
9 But we are 100 percent against this type of thing.

10 Also, I agree with Mr. Hyman in that respect.  
11 I just think this is the best way to set a minimal  
12 criteria and standards for the Bar to get involved.

13 MR. BUCHANAN: Mr. Chair, Robert Buchanan  
14 from the 17th circuit. I support this proposal. I  
15 think what the proposal is doing is, in essence,  
16 allowing the Bar to have a voice in these efforts by  
17 the Legislature to impose legislation, give us special  
18 dockets. I can say I am a civil litigator. I think  
19 this affects us maybe more than the criminal docket.  
20 And, for example, I think we have had the experience  
21 where I work, everyone believes we are out there

22 filing frivolous lawsuits, and, frankly, in my years  
23 of practice I don't think I have seen a frivolous  
24 lawsuit, and if it is it's thrown out. But the public  
25 believes that, and they talk to the Legislature, and

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1 the Legislature, therefore, tries to pass legislation  
2 dealing with the perceived problem that doesn't exist.

3 I think this proposal gives the State Bar the  
4 ability to speak on these issues and to have a  
5 position. Basically, because of Keller, it allows  
6 them to say, no, we don't agree with this proposal,  
7 or, if you are going to do it, this is how it should  
8 be structured. So it's basically just giving the  
9 State Bar, our organization of lawyers, a voice in  
10 this legislation. It's not saying that we want this  
11 stuff. It's not saying we want these special dockets,  
12 we want these special courts; it's just saying as a  
13 Bar we want the ability to have a voice in it and  
14 either take a position in favor of it or against it,  
15 and I think for that reason I am in support.

16 CHAIRPERSON HAROUTUNIAN: Any other  
17 discussion with regard to the amendment? There is an  
18 amendment on the floor, and the amendment is add the  
19 word "s" after the word "dockets" in the second line  
20 and delete the word "or court." That was the  
21 amendment that Judge Kent put on the floor, and it was  
22 seconded.

23 Any other discussion on the amendment?

24 Seeing none, all those in favor of the  
25 amendment say aye.

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1 All those opposed to the amendment say no.

2 Any abstentions say yes.

3 The noes have it. The amendment is not  
4 passed. We are now on the main motion. Any other  
5 discussion?

6 MR. ANDREE: Gerard Andree from the 6th  
7 circuit.

8 I suppose this would be a request for a  
9 friendly amendment. I am concerned about the word  
10 "guarantee." A specialized docket or court should,  
11 one of the things, guarantee constitutional rights.

12 First of all, I think our rights are  
13 guaranteed by the Constitution, but aside from that,  
14 every court, or at least in all the metropolitan  
15 areas, we all are familiar with small claims courts  
16 where, for example, there is no right to trial by  
17 jury, there is no right even to counsel, and it would  
18 seem that by approving this we would be telling the  
19 courts that have small claims courts that want to have  
20 them to increase access to justice and improve the  
21 function of the courts that they can't do that anymore  
22 because they don't guarantee a right to trial by jury  
23 or a right to counsel.

24 So I would move that instead of using the  
25 word "guarantee constitutional rights" that perhaps a

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1 word I would suggest substituting it by saying  
2 "consider constitutional rights," or I would be open  
3 to any other word other than something that says  
4 guarantee that is going to do away with specialized  
5 courts that we have already. Small claims courts  
6 there is no right to trial by jury, and workers'  
7 Compensation or juvenile courts, things like this. So  
8 if we are going to come down and say we won't support  
9 any kind of specialized dockets or courts unless they  
10 guarantee trial by jury, you know, this is going to be  
11 an unintended consequence that I would like to nip at  
12 the bud.

13 CHAIRPERSON HAROUTUNIAN: Is there support?

14 VOICE: Support.

15 CHAIRPERSON HAROUTUNIAN: It's been moved and  
16 supported that the word "guarantee" be deleted and the  
17 word "consider" be inserted. Any discussion on that  
18 amendment?

19 Seeing none, all those in favor say aye.

20 Opposed no.

21 The noes have it. The amendment is defeated.  
22 We are back on the main motion.

23 MR. WEINER: I guess after reading  
24 Mr. Hyman's docket, the thing that he says that comes  
25 out to me most often, and I do a lot of administrative

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1 law, I deal with a lot of specialized issues, is the  
2 idea of general judges. I would really like to see  
3 something like this where we promote on these  
4 specialized courts or specialized dockets, would  
5 promote at least a rotation of the elected judges

6 through there so that a judge doesn't get on there for  
7 five, ten years and do the same thing day in/day out,  
8 and that would really address Mr. Hyman's issue.

9 I would like to see that, and I don't know  
10 how it would be worded, but I would like to see an  
11 amendment to that effect. I hope that helps, but I am  
12 really for general. You want me to make a specific,  
13 just say put another bullet point in where we promote  
14 the idea of generalist judges and generalist elected  
15 judges or something like that.

16 CHAIRPERSON HAROUTUNIAN: If you have more  
17 than six words, it needs to be in writing. If you can  
18 say that in six words.

19 MR. WEINER: This is the first time I have  
20 seen Mr. Hyman's letter, so I don't have that here,  
21 but I would like to put something like that forward.  
22 Other than that, I can't support. It does promote  
23 generalist judges.

24 CHAIRPERSON HAROUTUNIAN: You have got six  
25 words you can put together?

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1 MR. WEINER: Let's just say "promote the use  
2 of generalized judges."

3 CHAIRPERSON HAROUTUNIAN: Okay. Promote --

4 MR. WEINER: Of generalist judges.

5 CHAIRPERSON HAROUTUNIAN: Promote the use of  
6 generalist judges.

7 MR. WEINER: Period. I would like to see  
8 something like this in here just because of  
9 Mr. Hyman's comments.

10 CHAIRPERSON HAROUTUNIAN: Is there support to



11 the amendment?

12 VOICE: Support.

13 CHAIRPERSON HAROUTUNIAN: Did somebody say  
14 support?

15 VOICE: Support.

16 CHAIRPERSON HAROUTUNIAN: Any discussion on  
17 the amendment? Judge Kent.

18 JUDGE KENT: Wally Kent, 54th circuit. As  
19 much as I favor the thought process of the former  
20 speaker, I am afraid we are going to clutter this with  
21 too much, and I think it's covered under the improve  
22 the functioning of the courts. I think we can do very  
23 well without it, and there are debates to be had  
24 whether we should have rotation or not. If that's his  
25 purpose, I oppose it for a number of reasons that are

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1 not now relevant. But I think we are just going to  
2 clutter the resolution if we start adding bits and  
3 pieces, and I think it's well covered already, and,  
4 therefore, I oppose the amendment.

5 VOICE: Call the question.

6 MR. ROMBACH: As an advocate, I want to have  
7 a word on there, and I believe that I am entitled to  
8 it. I share Judge Kent's concern here. This has been  
9 a pretty carefully balanced and carefully negotiated  
10 compromise here, and I don't want to run afoul the  
11 judges, because right now they do have a lot of  
12 community specialized dockets already as far as civil  
13 and criminal judges or domestic judges, and they  
14 rotate according to their own rules, and I know that  
15 Judge Kent, in fact, has his own probate docket. So I

16 don't want to impose a different layer of requirement  
17 on something that, on a proposal that is sight unseen.  
18 That's why I would respectfully speak against. I  
19 think you understand the intent, Mr. Hyman's intent  
20 and our intent, but that's why I really can't add it  
21 right now. I don't know the nature of the proposal.

22 CHAIRPERSON HAROUTUNIAN: If there is no  
23 other discussion on the amendment, and the amendment  
24 is to add the words "promote the use of generalist  
25 judges."

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1 All those in favor of the amendment say aye.  
2 All those opposed no.  
3 Any abstentions say yes.  
4 The noes have it. We are back to the main  
5 motion.

6 MS. MCQUADE: Good morning, Barbara McQuade,  
7 3rd judicial circuit.

8 I have maybe just a question that I hope can  
9 alleviate some of the concerns that have been  
10 expressed about small claims court, workers'  
11 compensation, et cetera.

12 The word "create," does that mean that this  
13 is intended going forward only and not to undo any  
14 courts that currently exist and are functioning well?  
15 This is just about creating new courts looking  
16 forward, so passing this proposal would not undo the  
17 work that's currently going on in small claims court,  
18 is that correct?

19 MR. ROMBACH: Yes.

20 CHAIRPERSON HAROUTUNIAN: That was the

21 shortest thing I have ever seen.

22 MR. CROPSEY: Thank you. Let me argue in  
23 favor of the --

24 CHAIRPERSON HAROUTUNIAN: Please give your  
25 name.

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1 MR. CROPSEY: Alan Cropsey from the 29th  
2 circuit. Let me argue strongly in favor of this  
3 resolution. With the Legislature, the way it's now  
4 constituted and under term limits, now more than ever  
5 before the Bar association needs to be there giving  
6 guidance when these type of issues come up, because  
7 most legislators, especially in the State House of  
8 Representatives, they aren't there for more than six  
9 years now, and if they aren't coming in with a legal  
10 background, they have no idea when they first get  
11 elected and only a glimmer of the idea by the time  
12 they leave on protecting people's rights and stuff.

13 So this, however the final form is, something  
14 like this needs to be done so the Bar association can  
15 become much more involved in the Legislature process  
16 when these issues come up.

17 MR. BARTON: Bruce Barton, 4th circuit. I  
18 don't have an amendment friendly or otherwise. I do  
19 have a question for Tom Rombach that has come up in  
20 the far corner of the room. I think I understand the  
21 proposal, but I am not sure.

22 There is a difference in the language between  
23 the lead paragraph, which talks about support or  
24 opposition to proposals, and the following paragraph,  
25 which talks about consider supporting a proposal. Is

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1 that language intentional, and would you explain it,  
2 please.

3 MR. ROMBACH: Yes, Bruce, it is. I am glad  
4 you were considerate enough to bring that up.

5 what we wanted to do is propose that there is  
6 a threshold standard, again, I think Mr. Hyman was  
7 doing that in his letter, that this standard has to be  
8 surpassed in order for the State Bar to consider  
9 supporting it. Then we could still pick and choose,  
10 as the State Bar has done traditionally and as is our  
11 current policy, what we may or may not oppose.

12 One thing, we don't want to require  
13 opposition on behalf of the State Bar, because that  
14 may elevate, as I am sure the senator would speak to,  
15 that may elevate just a vexatious proposal into the  
16 public dialogue. So we don't want to have to oppose  
17 things because they violate all these criterion,  
18 because half -- well, far more than half of the  
19 proposed legislation is never even considered  
20 seriously, and, therefore, we don't want to be in the  
21 trick bag to have to oppose something. So that's why  
22 only the support language in the criterion was given  
23 for support.

24 Again, it's only supposed to be a threshold.  
25 we can require whatever we want going upward beyond

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1 that, and we didn't think we needed any criterion to  
2 oppose it, because if they don't meet these, we could  
3 choose to oppose or we could choose to ignore or  
4 remain silent in that regards. That's intentional.  
5 But thank you for pointing that out.

6 CHAIRPERSON HAROUTUNIAN: Bob.

7 MR GARDELLA: Bob Gardella from the 44th  
8 circuit and Vice Chair. I also rise in favor of the  
9 proposal as it stands. It's important to keep it as  
10 is, and I reiterate what Senator Cropsey had said is  
11 that when -- and, by the way, I would add that we are  
12 very fortunate during this term of the Assembly that  
13 we have not only judges who have traditionally served  
14 on the Assembly but we have two of the most powerful  
15 legislators in Lansing now that serve on our  
16 committee. Senator Cropsey is the Senate Majority  
17 floor leader and also Andrew Dillon, the Speaker of  
18 the House, is member of our Assembly, and we are very  
19 fortunate to have that linkage to our system of  
20 government here with us.

21 But the reason I am standing here talking now  
22 is that Janet Welch, our executive director, and also  
23 Elizabeth Lyon, they have an important duty as the  
24 ambassadors, not only for the Bar's philosophy, but  
25 also for the Constitution and other principles that

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1 are so important. Very few members of the Legislature  
2 are attorneys, and so the non-attorneys will often  
3 come to the State Bar saying what do you think, is  
4 this legite, is this appropriate, and we have to have

5 the guiding principles that are in this proposal, in  
6 the substitute proposal, and also we have to have the  
7 backup that not only do these representatives of the  
8 State Bar, our executive director, and our  
9 governmental relations director, it's not just their  
10 philosophy. It's backed up by the entire Bar. This  
11 is what we think needs to be done. This is the  
12 foundation for these types of specialized type dockets  
13 or specialized courts within an existing court system.

14 So it's important all the wording stay the  
15 same so that we cover all of the particular scenarios.  
16 Dockets and courts are important so that the Judiciary  
17 Committee on the other legislative committees can see  
18 that this is what we want, this is what we demand, and  
19 this is what the rights of citizens demand, so I would  
20 rise in favor of this.

21 CHAIRPERSON HAROUTUNIAN: Thank you. Any  
22 other discussion?

23 MS. FERSHTMAN: Julie Fershtman, 6th circuit.  
24 Before we bring this to a vote, I would like to pose a  
25 question to Mr. Rombach. And that is, before we came

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1 here today this docket, this proposal and all the  
2 other ones, were submitted to special purpose Bars,  
3 local Bars, other Bar organizations, and I am  
4 wondering what the other groups have said about this  
5 proposal. It seems very good, very general, and I  
6 recognize that Mr. Reiter represents a special  
7 interest within the Bar. I would like to know what  
8 other Bar associations think about this.

9 MR. ROMBACH: Quite frankly, the only

10 evidence I have of feedback is anecdotal in nature.  
11 Mr. Hyman had put something in writing, so I  
12 communicated directly to him, and I think we all do in  
13 our representative capacity talk to our friends, talk  
14 to our colleagues at the local Bar level, but I don't  
15 have anything to give to the Assembly that's official  
16 doctrine or from any particular committee or any  
17 section that I know of taking any action.

18 So, you know, I guess is silence consent or  
19 silence objection. I know that Jesse has been the  
20 lead on this, and he may be able to add more.

21 MR. REITER: When this proposal came out last  
22 year, MSMS's proposal, and I can't speak to this  
23 proposal, but in terms of MSMS'S proposal for special  
24 health courts, Michigan Trial Lawyers Association was  
25 against it, Michigan Defense Trial Counsel, the other

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1 side of the coin, was 100 percent against it. There  
2 was an article in Lawyers Weekly I think in September  
3 where I don't think there was any support among any  
4 trial organization that was asked to comment on this.  
5 So both the plaintiffs and the defense attorneys were  
6 definitely against the special health courts.

7 MR. EVANS: Tom Evans 5th circuit. I am a  
8 prosecutor, and I am in court nearly every day, and I  
9 am going to wind up asking a question, but -- you know  
10 what, I can move these things.

11 I see that there is already the existence of  
12 many special courts, and the judges within the laws as  
13 they currently sit right now are able to, at least in  
14 the criminal sense, they are able to force folks to

15 engage in therapeutic remedies rather than just  
16 locking them up and so forth, and seeing as how a lot  
17 of those, the judges have the power to give those  
18 therapeutic remedies already, I am not really keen on  
19 falling over myself to provide additional legislation,  
20 at least in the area that I practice, but you have to  
21 play the terrain that you are on.

22 So my question to either one of the speakers  
23 is what do you think will happen if we don't endorse  
24 this proposal and sort of will we have to sit out, or  
25 is it an inevitable that there is going to be

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1 legislative changes and we should sort of, you know,  
2 draw a marginal line and at least jump in at a point  
3 we think is appropriate and stay? Thank you very  
4 much.

5 MR. ROMBACH: I think your point is well  
6 taken. We are not trying to take away discretion from  
7 the local judiciary to craft sentences as they feel  
8 appropriate for rehabilitative reasons, for punishment  
9 reasons, or for anything else, but we are trying to  
10 allow the State Bar to engage in this discussion in  
11 the Legislature, and right now we have no stated  
12 policy.

13 So if, particularly an interested legislator  
14 comes to us or what if it's one of our best friends  
15 and say how can we help you out, right now the State  
16 Bar only has the option of remaining silent, which  
17 allows anything else to happen without our input,  
18 which is a huge problem, or if something comes up  
19 that's particularly pernicious and it comes to our



20 attention quickly enough and we were able to get our  
21 group together fast enough -- this group is simply not  
22 nimble enough to do that, nor is perhaps the Board of  
23 Commissioners, then we vacate our ability to formulate  
24 the questions.

25 And we know as trial advocates that if we get

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1 to ask the questions, well, we get the answers we want  
2 back, and this let's us to have opportunity to ask  
3 some of the questions and have some of the resource  
4 responsibilities on these topics. Otherwise we just  
5 forfeit that to somebody else, and potentially some of  
6 those other folks are not working in the best interest  
7 of our clients or not working in the best interests of  
8 our association, and, therefore, I am not willing to  
9 seed that ground. And right now probably by our  
10 silence and our absence we have seeded that ground,  
11 and I believe that on margin this would be an  
12 improvement in that regards. And, again, that's why  
13 we are doing this now.

14 MR. GOBBO: Mr. Chairman, Stephen Gobbo from  
15 the 30th circuit. I have one concern and basically  
16 one only issue to address perhaps in some language,  
17 and that's the right to an appeal in terms of any  
18 decision that's made by one of these specialized  
19 dockets or courts. I am suggesting that perhaps under  
20 not unreasonably limit a defendant's or plaintiff's  
21 ability to represent his/her case to add the  
22 additional language "and not limit an appeal right,"  
23 and that perhaps will take care of some of the other  
24 concerns that I have heard earlier.

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1 accept that as a favorable, a friendly amendment, as  
2 long as the makers take it as friendly.

3 MR. ROMBACH: If I may, Steve, would it be  
4 possible that you would allow us to insert that assist  
5 his right to counsel, a trial by jury and right of  
6 appeal, could we put it under the enumeration of  
7 rights, or do you feel strongly about putting it where  
8 you suggested?

9 MR. GOBBO: Tom, I am not strongly opposed to  
10 putting it in another area, but the way that that  
11 section reads in terms of guaranteed constitutional  
12 rights, I don't know if there is a specific right to  
13 appeal as opposed to the right to counsel and trial by  
14 jury. So I would not be opposed to moving it up under  
15 that section, and if you wanted to move it under that  
16 section, you might want to indicate a court appeal  
17 right to make it specific that it's not being appealed  
18 to some administrative body.

19 MR. ROMBACH: Again, I think your point about  
20 constitutional rights is well taken, and I stand  
21 corrected there. Jesse and I certainly don't have any  
22 opposition. We would consider that a friendly  
23 amendment if you were to include that under the  
24 defendant's and plaintiff's ability to represent his  
25 or her case.

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1 MR. GOBBO: In order to keep within the  
2 six-word limit, that's why I came up with that,  
3 otherwise I would have inserted the word "court"  
4 before "appeal."

5 CHAIRPERSON HAROUTUNIAN: Is there support  
6 for that amendment?

7 VOICE: Support.

8 CHAIRPERSON HAROUTUNIAN: Is there discussion  
9 on the amendment? I am sorry, it's a friendly  
10 amendment. Pardon me. I stand corrected.

11 Please go ahead.

12 MR. CROSS: Cecil Cross, 6th circuit. I move  
13 the question.

14 CHAIRPERSON HAROUTUNIAN: Let's not go  
15 through two votes, if we may. Any other discussion?

16 MR. CRAMPTON: Jeff Crampton from the 17th  
17 circuit. I would like to add a friendly amendment to  
18 insert the word "court" before "appeal." One word.

19 CHAIRPERSON HAROUTUNIAN: Is that a friendly  
20 amendment?

21 MR. ROMBACH: Certainly.

22 CHAIRPERSON HAROUTUNIAN: To me it is. And  
23 not limit a court appeal.

24 Okay. You have the proposal in front of you  
25 as amended in a friendly manner.

1 All those in favor of the motion say aye.  
2 Opposed no.  
3 Any abstentions say yes.

4 The ayes have it. The proposal is passed.  
5 (Applause.)

6 CHAIRPERSON HAROUTUNIAN: well, folks we are  
7 now seven minutes past our time frame, and I am going  
8 to suggest that -- Anne, is the lunch upstairs?

9 Right now our schedule says to come back at  
10 12:45. Go have lunch, come back at 12:45. I think  
11 that probably sits well. It gives us a little bit  
12 less than 45 minutes, but I think we stay on schedule.  
13 And so let's do that, and so we will recess until  
14 12:45. Thanks. And let's be back promptly at that  
15 time so we can just keep moving forward.

16 (Lunch break taken.)

17 CHAIRPERSON HAROUTUNIAN: Ladies and  
18 gentlemen, are we ready to rock and roll? well, we  
19 are going to get started.

20 Next item is consideration of proposed  
21 adoption of MCR 2.519 pertaining to Special Masters.  
22 Let me call forward a member of the Civil Courts and  
23 Procedures Committee and also a member of the  
24 Representative Assembly, Dan Quick.

25 MR. QUICK: Good afternoon, everybody.

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1 Pleasure to be here on behalf of Civil Procedure and  
2 Courts Committee chaired by Ron Longhofer.

3 The first matter that the committee  
4 recommends to the Representative Assembly is adoption  
5 of MCR 2.519 governing the appointment of masters.  
6 This rule is based on Federal Rule 53 in large part.  
7 The key provision which we stress in the materials and  
8 which I stress to you is that this is a tool to be

9 given to the parties and to the court but only when  
10 all parties agree to it. So there is no potential of  
11 a judge delegating his or her authority to a third  
12 party and, hence, depriving the parties of their day  
13 in court against their will.

14 In taking a broader look at this, special  
15 masters have been a very useful tool to parties in a  
16 variety of different sorts of litigation, and this can  
17 be very complex commercial litigation where there are  
18 constant discovery disputes which require a lot more  
19 hand holding than perhaps the court wants to give or  
20 all sorts of other venues. Again, once there is  
21 consent of the parties and obviously the courts, then  
22 this rule would come into effect.

23 The gist of the rule is to provide a series  
24 of best practices so that both the parties and the  
25 court have thought through the key issues of the

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1 appointment of a master before the order is made. So  
2 they go through their duties, the compensation, the  
3 authority, and very much like a magistrate in federal  
4 court, should anybody take issue with the finding of a  
5 master on any particular issue, the circuit court then  
6 would be able to review that under sub Rule (F).

7 The committee believes that this is the  
8 adding of an arrow to the quiver of judges and  
9 attorneys who appear before them and will be a useful  
10 addition to the Court Rules.

11 CHAIRPERSON HAROUTUNIAN: Dan, I take it that  
12 you are moving for the adoption of this proposal with  
13 regard to Rule 2.519?

14 MR. QUICK: So moved.  
15 CHAIRPERSON HAROUTUNIAN: Is there support?  
16 VOICE: Support.  
17 CHAIRPERSON HAROUTUNIAN: Discussion?  
18 MR. LARKY: Mr. Chairman, Sheldon Larky, 6th  
19 circuit. I have given our transcriber an amendment.  
20 I would like to move that -- I move that the words,  
21 quote, only with the consent of the parties and then  
22 only, end of quote, be deleted from proposed Rule MCR  
23 2.519(A)(1).  
24 VOICE: Support.  
25 CHAIRPERSON HAROUTUNIAN: Is it only with the

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1 consent of the parties and only?  
2 MR. LARKY: Then only. Since there has been  
3 support, the reason I am asking for it is this would  
4 be -- if we adopt the rule as proposed before my  
5 amendment, this would be the only rule in the entire  
6 Court Rules where the parties and only the parties  
7 themselves have the right to dictate what's going to  
8 happen. In other words, all the other Court Rules,  
9 all the other Court Rules don't require the consent of  
10 the parties as a mandatory predicate.  
11 Secondly, I am a full-time mediator and  
12 arbitrator, and I have probably been a master or  
13 special master probably maybe a dozen times. It's a  
14 good, as you say, it's a good quiver within the  
15 judicial system to have masters, and I like the idea  
16 that we finally have a proposed rule that will set out  
17 the duties and responsibilities of the masters.  
18 Secondly, the Federal Rules don't require the

19 consent of the parties. The Federal Rules, if we are  
20 mimicking the Federal Rules, the Federal Rules allow  
21 the court on its own, sua sponte, to do this. Now, I  
22 know the opposition. The opposition is special  
23 masters create additional expense. That's the major  
24 reason why there is opposition to special masters,  
25 because parties sometimes get in situations where

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1 there is, for want of a better term, a rich party and  
2 a poor party and a rich party could literally control  
3 by use of a special master and take litigation to new  
4 financial heights, and I understand that, and that  
5 could be abusive, but I think that we should adopt my  
6 proposal for the reason that it allows courts to  
7 inherently have the right to decide if a master is to  
8 be used.

9 If you don't get the consent of one party, it  
10 may in fact prolong litigation, rather than speed up  
11 litigation. So I am asking for the adoption, that the  
12 Assembly adopt my proposal.

13 CHAIRPERSON HAROUTUNIAN: Shel, thank you. I  
14 heard the amendment, and I heard support, and we are  
15 into discussion on the amendment. Dan, did you want  
16 to comment?

17 MR. QUICK: Just briefly. One aspect of the  
18 proposal which I failed to highlight is that we are  
19 suggesting that this be adopted on a trial basis to be  
20 administered in the manner by the Supreme Court, and  
21 the reason for that is that this is a departure in  
22 practice in the state courts and that there has been  
23 some case law on this, some of which you may be

24 familiar with, Borsman (sp) decision, for example,  
25 which struck down in certain context a certain

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1 courts's ability to appoint a master and have him or  
2 her do particular duties.

3 In response to the amendment, I will share  
4 with you some of the debate that took place at the  
5 committee level, and it was, as counsel states, there  
6 is a concern here that this is a tool that should only  
7 be done once all parties agree. We have courts and  
8 judges for a reason, and that is where the cases ought  
9 to be decided in the first instance.

10 Now, if there are particular circumstances in  
11 a case that counsel go towards a special master, then  
12 everybody should be on the same page as to that, and  
13 then this provides, I think, some much needed guidance  
14 in that regard, but there was hesitation to give  
15 courts in all circumstances abilities to appoint that  
16 over the objection of counsel, and I think given that  
17 this is being recommended on a pilot basis that this  
18 particular issue being a situation where it's done  
19 only by appointment of counsel or stipulation of  
20 counsel.

21 CHAIRPERSON HAROUTUNIAN: Any other  
22 discussion on the amendment?

23 MS. LIEM: Veronique Liem for the 22nd  
24 circuit. I just have a question. Is there anything  
25 in the rule, I don't see it, that speaks of the

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1 qualifications of a master, of a special master, and  
2 if yes, where is it, and if not, why not?

3 MR. QUICK: There is nothing in the rule  
4 speaking to in a positive fashion their  
5 qualifications. There is a disqualification provision  
6 under (A)(2) for having an interest.

7 I believe the reason that there is no such  
8 provision is that it would be awfully difficult to  
9 craft such a rule that would have general application  
10 to all different circumstances. And given that it is  
11 by stipulation of the parties, I think the thought is  
12 that the court and the parties would be able to select  
13 someone that they were qualified, but that's all I can  
14 share on that.

15 MR. NEUMARK: Fred Neumark, 6th circuit.  
16 while I supported Mr. Larky's amendment for purposes  
17 of discussion because I think it's quite important  
18 that we do discuss the financial aspects of this  
19 proposed Court Rule and Mr. Larky's amendment, I do  
20 rise in opposition to it for the reason that it is  
21 expensive, it could be very expensive and for  
22 basically the same reasons that Mr. Larky gave, that  
23 one side with money can turn this thing into an  
24 extremely expensive proposition for the other side who  
25 has no money. It's something that I believe consent

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1 is required, and, in fact, the little A speaks to  
2 consent.

3                   So I don't see where Mr. Larky's amendment  
4 would help this situation, but I do believe that if  
5 there could be some limit to the amount of money that  
6 a master can charge or that a court can limit it to,  
7 court knowing the situation between a party with money  
8 and a party without money can limit the amount that  
9 could be charged by a master, perhaps that would work.

10                   CHAIRPERSON HAROUTUNIAN: Thank you,  
11 Mr. Neumark. You are not suggesting an amendment, are  
12 you?

13                   MR. NEUMARK: No, not myself.

14                   MR. LOOMIS: Daniel Loomis, 35th circuit.  
15 The comment was made that this is on a pilot program  
16 basis, but the proposal before us doesn't say that.  
17 It says we are going to adopt this rule on masters.  
18 Perhaps a friendly amendment above MCR 2.519 masters  
19 rule should be adopted on a pilot program basis, that  
20 that would be added to the proposal, and I offer that  
21 as a friendly amendment.

22                   CHAIRPERSON HAROUTUNIAN: I consider that a  
23 friendly amendment. I want to ask the maker of the  
24 motion. It's considered to be a friendly amendment.

25                   Let me point out, by the way, that in the

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1                   booklet under 2.519 masters, the reference is to pilot  
2 program, just to make sure I have said that. I  
3 recognize the fact, however, that the question  
4 presented -- but that's fine. I don't think that's a  
5 concern. And so that's being taken as a friendly  
6 amendment.

7                   MR. REISER: John Reiser, 22nd circuit.

8 VOICE: Point of order.  
9 CHAIRPERSON HAROUTUNIAN: Yes.  
10 VOICE: You can't add a friendly amendment  
11 while there is an amendment discussion on the floor.  
12 CHAIRPERSON HAROUTUNIAN: Absolutely correct.  
13 Absolutely correct, and thank you very much for that  
14 point of order.  
15 The pending motion on the floor is that we  
16 delete the words "only with the consent of the parties  
17 and then only" -- did I get that correct?  
18 VOICE: Yes.  
19 CHAIRPERSON HAROUTUNIAN: We are going to  
20 come back to this point, but continued discussion on  
21 this amendment.  
22 MR. GREEN: I am Rodrick Green from the 3rd  
23 circuit. I rise in opposition to the amendment. I  
24 know that typically a master's authority is binding as  
25 well as the expense. I think it would be a hardship

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1 upon the parties if they would be forced into a  
2 masters situation without consent, only on the judge's  
3 ruling, and principally because of the binding nature  
4 of the master's authority and the expense that would  
5 be forced upon a party, I oppose the amendment.  
6 CHAIRPERSON HAROUTUNIAN: Thank you. Any  
7 other discussion on the amendment?  
8 Seeing none, all those in favor of the  
9 amendment to delete the words "only with the concept  
10 of the parties, and then only" say aye.  
11 Those opposed say no.  
12 Any abstentions say yes.

13                   The noes have it. The amendment fails.  
14                   There was a proposal for a friendly amendment  
15 here with regard to adding the words "as a pilot  
16 program basis" in the question presented. Is that  
17 friendly amendment still there?  
18                   MR. LOOMIS: Yes.  
19                   CHAIRPERSON HAROUTUNIAN: It's still being  
20 accepted as a friendly amendment?  
21                   MR. QUICK: Yes.  
22                   CHAIRPERSON HAROUTUNIAN: Okay. It's there.  
23                   MR. REISER: John Reiser, 22nd circuit once  
24 again. With respect to being a pilot program, should  
25 we add a sunset clause such that -- I guess what if we

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1                   don't like it? What if it doesn't work but we are  
2 stuck with it because we call it a pilot program, but  
3 the Supreme Court, who ultimately decides what the  
4 MCR's are going to be, believes it, and so I am  
5 wondering if there shouldn't be the last sentence say  
6 the following preceding provisions expire whatever it  
7 is, date you want to pick, January 1st, 2007, 2009, so  
8 we are not stuck with it if the lawyers don't think it  
9 works. That's my only point.

10                   CHAIRPERSON HAROUTUNIAN: I can't speak for  
11 anybody else's experience -- let me just respond to  
12 that. I can't think of anybody else's experience in  
13 that regard. I don't know that I have ever seen a  
14 court rule that said it was going to expire or sunset.

15                   MR. REISER: So is it really a pilot then?  
16 Let's just not call it a pilot program. Let's call it  
17 a program, unpiloted. Just kidding on that.

18 CHAIRPERSON HAROUTUNIAN: John, that may be  
19 the way it is anyway. Are you suggesting an  
20 amendment, by the way?  
21 MR. REISER: Go ahead.  
22 MR. LARKY: No, no, no.  
23 MR. REISER: Sheldon, you know so much more  
24 than me.  
25 I guess my concern is that it's permanent

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1 without intending it to be permanent unless we specify  
2 the date that we want it to expire or some sort of  
3 review process to trigger whether or not the Bar  
4 thinks it worked and helped us. That's my only  
5 motive.

6 CHAIRPERSON HAROUTUNIAN: Can you say it in  
7 six words?

8 MR. REISER: Oh, no.

9 CHAIRPERSON HAROUTUNIAN: Do you have an  
10 amendment that you would like to proffer at this time?

11 MR. REISER: Preceding provision shall expire  
12 on, pick a date. No, I can't.

13 CHAIRPERSON HAROUTUNIAN: What date would you  
14 pick?

15 MR. REISER: I will let someone else who has  
16 given more thought about the date.

17 MR. RADKE: Mr. Haroutunian, Victoria Radke,  
18 42nd judicial circuit. I rise in opposition to  
19 removing the word pilot program from this proposal for  
20 the reason that it's not for us to decide. It's for  
21 the Supreme Court to decide when the pilot program  
22 ends and whether or not they are going to promulgate

23 this as a permanent rule, and they will give it enough  
24 time as they think that it needs to work out whatever  
25 bugs, and what we are doing here is just advising them

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1 that we would like to see this as a proposed rule, and  
2 we would like them to promulgate it as a pilot  
3 program, so I rise in opposition to removing the word  
4 "pilot program" from this proposal.

5 CHAIRPERSON HAROUTUNIAN: Thank you. Judge.

6 JUDGE KENT: Wally Kent, 54th circuit. In  
7 response to your comment about not remembering pilot  
8 programs from the Supreme Court, Janet's memory will  
9 be better than mine, but certainly the unified trial  
10 courts have been piloted, and there has been a lot of  
11 input. They have not been forced on us. I find  
12 myself in disagreement with the Supreme Court as often  
13 as I do agreement, but I do trust that they would be  
14 very insightful in working with us, very cooperative  
15 in working with us in testing something this radical  
16 before they would commit to it on a permanent basis.  
17 So I don't see that we need to delete the pilot  
18 program. I think it might be helpful to them to  
19 understand that we would like to test it before we  
20 commit to it.

21 CHAIRPERSON HAROUTUNIAN: Thank you.

22 MR. LARKY: Mr. Chair, Sheldon Larky, 6th  
23 circuit. I am going to vote against these additional  
24 words. The reason I am going to vote against it is  
25 because we have had masters in this state. We have

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1 had masters for years in this state. All we are doing  
2 is asking the court to adopt a proposal that finally  
3 solidifies, solidifies what masters should be and how  
4 they should be and the terms and conditions of the  
5 masters. And we are asking the court to accept a  
6 federal rule, which makes sense, and for us to say  
7 that we should use this as a pilot program, those of  
8 us who practice long enough have seen the masters  
9 being used in the court system, and so we accept it as  
10 a reality. Let's just make sure that we put it in  
11 specific terms so that there is guidelines to  
12 establish it. So I am going to vote no as to the  
13 addition of these four words.

14 CHAIRPERSON HAROUTUNIAN: Any other  
15 discussion?

16 Seeing none -- we are not voting. I am  
17 sorry.

18 MR. GOBBO: Are we on the amendment still?

19 CHAIRPERSON HAROUTUNIAN: well, there is no  
20 amendment. This is a friendly amendment, so it's a  
21 part of the actual motion, and, therefore, we are not  
22 going to be voting on an amendment. We are going to  
23 be voting on the main motion.

24 MR. GOBBO: Stephen Gobbo from the 30th  
25 circuit. For most of my professional life prior to

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1 going to law school, for lack of a better term, I was

2 incarcerated. I worked for the prison system in  
3 New York, New York, Michigan, and Federal Bureau of  
4 Prisons, and I have had the experience of operating  
5 under a special master appointed by the Federal  
6 Courts, and the major concern that I would like to  
7 just pass along if this were to be adopted in its  
8 present form is that the special master kind of takes  
9 on a life of its own and the durational aspect of a  
10 special master, I think, would have to be included in  
11 this proposal for me to vote in favor of it, and it's  
12 a different durational issue than the one that my  
13 colleague, John Reiser, raised initially about  
14 earlier.

15 It's the length of time that the special  
16 master would be delegated to operate under the court  
17 in order to resolve whatever the issue is, because in  
18 the situations that I have seen the Federal Courts  
19 have appointed people that have served as their law  
20 clerks with no qualifications in the specific area,  
21 particularly in the specialized area such as prisons,  
22 have just allowed the special master to run for years  
23 and years with no resolution of the issues that if  
24 they had come before the court in the firsthand  
25 situation probably could have been resolved. And I

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1 don't know if that's from lack of wanting to deal with  
2 the issue, high level of docket cases or what, but the  
3 fact is that's the experience that I have seen, and I  
4 will vote against this unless it has some type of  
5 qualifications enabled into this for appointment of  
6 the master.



7                   The one issue that I would like to address  
8                   with that is that this, as written, it basically says  
9                   that the parties can consent to the appointment of a  
10                  master, but it doesn't necessarily say who that master  
11                  is going to be. So I think that's one area that would  
12                  have to be changed, and then some type of time  
13                  limitation on how long the master can deal with a  
14                  particular subject before maybe giving somebody an  
15                  appellate right to kind of eliminate the process and  
16                  basically get out of that process.

17                  CHAIRPERSON HAROUTUNIAN: Thank you.

18                  MR. ELKINS: Michael Elkins from the 6th  
19                  circuit. I rise to a different point. I refer the  
20                  Assembly to MCR 2.519(C)(2) and the master's authority  
21                  provision where (2) says that the special master may  
22                  recommend a contempt citation against a party.

23                  Contempt, of course, is inherently within the  
24                  court's power. I think it's really unusual, based  
25                  upon the masters I have seen in my practice, for a

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1                  judge who appoints a master not to take a  
2                  recommendation as almost a mandate. I would prefer  
3                  the word was "request" or "seek" a contempt citation  
4                  as oppose to "recommend," recommendation being more of  
5                  a binding.

6                  CHAIRPERSON HAROUTUNIAN: So you are looking  
7                  at (C)(2).

8                  MR. ELKINS: (C)(2). Replace the word  
9                  "recommend" with "seeking" contempt.

10                  CHAIRPERSON HAROUTUNIAN: The maker does not  
11                  look at that as a friendly amendment, so if you would

12 like to amend that.  
13 MR. ELKINS: Make it an amendment.  
14 CHAIRPERSON HAROUTUNIAN: Is their support?  
15 VOICE: Support.  
16 CHAIRPERSON HAROUTUNIAN: Any discussion with  
17 regard to the amendment, which is delete the word  
18 "recommend" and insert the word "seek" in (C)(2).  
19 All those in favor of the amendment say aye.  
20 Opposed no.  
21 Got to have a division. I am sorry, I need a  
22 raising of hands for those who are in favor of the  
23 amendment.  
24 (Hands raised and being counted.)  
25 CHAIRPERSON HAROUTUNIAN: Please put your

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1 hands down. Those opposed please raise your hands.  
2 (Hands raised and being counted.)  
3 CHAIRPERSON HAROUTUNIAN: Thank you. Please  
4 lower your hands. The amendment fails 33 to 58.  
5 We are back on the main motion. Any further  
6 discussion?  
7 VOICE: Call the question.  
8 MR. HERMANN: Fred Hermann, 3rd circuit.  
9 Couple comments and a question. First of all, I favor  
10 this, having been through this situation in the past  
11 with commercial parties who desperately desire to have  
12 a special master appointed but because of the status  
13 of the case law feared that ultimately the findings of  
14 the special master would be questioned on appeal and,  
15 therefore, in some cases elected not to have a special  
16 master appointed and in the cases where we did go

17 ahead and have one appointed were nervous throughout  
18 the entire course of the litigation as to what would  
19 happen on appeal with the findings of the special  
20 master.

21 The fact that the parties need to consent to  
22 this I think is a very important part of this, because  
23 I appreciate that in other cases the cost burden may  
24 be significant for parties and, therefore, it should  
25 not be something the court can do without the consent

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1 of the parties. There are many cases where parties  
2 desperately desire to have a special master because it  
3 does increase the efficiency of the litigation. I am  
4 in favor of it for those reasons.

5 I do raise two questions. Perhaps Mr. Quick  
6 can respond to them.

7 I vaguely recall that there was some proposal  
8 made years ago to have such an amendment to put in  
9 this type of Court Rule, and I am wondering if we  
10 could have some comment on the status of that prior  
11 attempt at amendment.

12 The second question I have, and this raises a  
13 concern and a possible inconsistency between the  
14 language of sections (A) and (C) with respect to the  
15 purpose for which the master is appointed and then the  
16 master's authority under (C). Specifically my concern  
17 would be in (A)(1). Under scope, (a) says, Perform  
18 duties consented to by the parties, which in my view  
19 would encompass virtually anything that the parties  
20 consented the special master to be allowed to do, and  
21 then under (C)(1)(a), it says, unless the master is

22 appointed otherwise, the master may regulate all  
23 proceedings.

24 And my concern is, I assume we are not trying  
25 to give special masters the authority to conduct, for

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1 example, jury trials, but you could read this language  
2 as allowing the parties to consent to that, and I  
3 wonder if we should clarify between (a) and (c)  
4 specifically what the limitations of the special  
5 master would be versus what the parties will be  
6 allowed to consent to have the special master perform.

7 MR. QUICK: Thank you for your comments. The  
8 only thing I can say in response to that is I have a  
9 hard time imagining how the parties and the court  
10 would together all sign on an order that gave the  
11 special master authority to preside over a jury trial,  
12 but I don't -- I guess this is, and that and other  
13 comments are part of the reason why we suggest this as  
14 a pilot program, so that these sorts of issues can be  
15 thought through as it's administered by the Supreme  
16 Court and if there are tweaks that need to be made,  
17 but I don't see an easy fix there to satisfy that.

18 CHAIRPERSON HAROUTUNIAN: Let me just add  
19 something. I will just add something in terms of  
20 looking at it, and that is in (A)(1)(a), it says,  
21 Perform the duties consented to by the parties. In  
22 (C)(1)(a) it says, unless the appointing order directs  
23 otherwise, a master may regulate all proceedings.

24 To me what that says is if you are going to  
25 put an order together, you have to be extremely

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1 specific with regard to what one does or what one does  
2 not do. Now, that's to me, as I read it, just in  
3 terms of looking at the words. Mr. Larky.  
4 MR. LARKY: Mr. Chairman, Sheldon Larky, 6th  
5 circuit. I move that we delete the words "as a pilot  
6 program" from this proposed rule.  
7 VOICE: Support.  
8 CHAIRPERSON HAROUTUNIAN: Is there support?  
9 VOICE: Support.  
10 CHAIRPERSON HAROUTUNIAN: Any discussion?  
11 All those in favor of deleting the words "as a pilot  
12 program" from the rule say aye.  
13 Those opposed say no.  
14 Any abstentions say yes.  
15 The noes have it. The amendment fails.  
16 Back to the main motion. Any further  
17 discussion?  
18 All those in favor of the motion say aye.  
19 Those opposed say no.  
20 Any abstentions.  
21 Congratulations, Mr. Quick. The proposition  
22 passes.  
23 (Applause.)  
24 Moving right along to the last item on our  
25 agenda, proposed amendments to Michigan Court Rules

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1 2.301, 2.302, 2.313, 2.401, and 2.506 electronic  
2 discovery rules, and let me ask Mr. Dan Quick to  
3 address that.

4 MR. QUICK: Let me reiterate this is the last  
5 item on our agenda today.

6 (Applause.).

7 MR. QUICK: The assemblage here may have  
8 varying degrees of exposure and familiarity with  
9 electronic discovery issues. Let me try to summarize  
10 by saying this: It is here. The Court Rules being  
11 proposed do not usher in, they simply attempt to deal  
12 with its presence manifest increasingly through all  
13 aspects of civil litigation.

14 It is time to catch up, in the assessment of  
15 the committee, to help out parties and the courts in  
16 dealing with some of the issues that are unique to  
17 electronic discovery and the fact that our society has  
18 advanced such that so much information is stored  
19 electronically rather than in paper form.

20 Obviously this is the trend, both in business  
21 and in the courts. The Federal Rule amendments went  
22 into effect on December 1, 2006 and were broader than  
23 some of the rules or the rules that are before you in  
24 terms of proposed changes to the Michigan Court Rules.

25 I think generally the gist of the rules fall

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1 into two main categories. One is to try to handle  
2 some of the substantive issues that come up with  
3 electronic discovery, and I will walk through very  
4 briefly some of the highlights of these rules, but  
5 issues about preservation, issues about inadvertent

6 disclosure, issues about burdens on third parties who  
7 are subject to a subpoena are some of the substantive  
8 issues that are sought to be addressed here and that  
9 have issues unique to some degree when dealing with  
10 electronic information.

11 The other is what I call the raising of the  
12 flag concern. Electronic discovery and how clients  
13 are storing and potentially seeking discovery of  
14 electronic information is something that ought to be  
15 thought about early and expressly by the parties in  
16 litigation. In the Federal Rules, for example, it has  
17 been incorporated that it is mandatory that this be  
18 discussed in Rule 26(F) meet and confer and in Rule 16  
19 scheduling conference, early scheduling conference  
20 with the court.

21 We obviously do not have those sorts of  
22 analogous early mandatory conferences under the  
23 Michigan Court Rules, but these rules do suggest that  
24 those considerations be taken into account when a  
25 scheduling order is put together and I think by their

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1 very presence within the Court Rules will assist  
2 parties, counsel and the court in identifying earlier,  
3 rather than later, the presence of potentially thorny  
4 issues and handle them early before they become more  
5 of a problem.

6 walking very quickly through some of the  
7 highlights of the rules, on the very first page,  
8 2.302(B)(5) addresses the preservation obligation for  
9 electronically stored information, and essentially  
10 what this says, and this is an analog to the Federal

11 Rules, it says if you have a reason to believe that  
12 information may be relevant you cannot let it be  
13 deleted off of your computer, you cannot go out there  
14 and shred electronic evidence. It isn't very  
15 different from the Enron or the Arthur Andersen sort  
16 of situation.

17 In terms of limitations on discovery of  
18 electronic materials, the next subsection addresses  
19 this and permits a party, obviously, to raise issues  
20 about burden and how reasonable it would be to have to  
21 produce the sort of electronic information being  
22 sought, and the rule sets up the procedure by which  
23 the court can weigh both considerations and as part of  
24 that, under the prevailing Federal case law, they  
25 would also consider things like cost, who is going to

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1 pay for what may be a very expensive process of  
2 digging stuff out of backup tapes, et cetera.

3 Subsection 7 deals with the inadvertent  
4 information, inadvertent production of privileged  
5 information. This is particularly a concern in  
6 electronic cases in, obviously, more large cases where  
7 there would be a tremendous dump of electronic files  
8 produced to the other side, and it would be impossible  
9 on a practical basis to do what we all do in smaller  
10 cases where you are literally going through every  
11 piece of paper and making sure there is nothing in  
12 there that truly is your work product.

13 This was a grave concern as electronic  
14 discovery developed in the Federal Courts, so this  
15 proposal was adopted in the Federal Courts to deal



16 with that situation and creates a burden, once the  
17 other side who has received information, once they  
18 have been notified, you know, Bates number 6,000,023  
19 was actually a work product memo, it governs what they  
20 have to do with that and how it cannot be used on  
21 going forward in the litigation.

22 2.313 is an analog and needs to be read  
23 together with 2.302(B)(5) and basically recognizes  
24 that there is a balancing act. It does not try to  
25 resolve the balancing act, but recognizes that there

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1 is one between the reality that electronic discovery,  
2 electronic information is constantly being overridden  
3 or destroyed as a part of normal IT policies on one  
4 hand and on the other that once there is something put  
5 at issue parties who are the owners of electronic  
6 information cannot be permitted to turn a blind eye.  
7 They have to take affirmative steps to put a  
8 litigation hold on to somehow corral that information  
9 so it will be available for the discovery process.

10 Briefly on 2.506 some of these same  
11 provisions are incorporated to give rights to third  
12 parties who may be subject to subpoenas asking for  
13 electronic information. There is a provision dealing  
14 with the form in which that information may be asked  
15 to be produced and a similar provision is addressed  
16 above regarding potential burden objections to that.

17 In summarizing these rules, I repeat that  
18 this is not really a change in practice in the  
19 committee's estimation. It would simply add greater  
20 certainty and clarity than the vacuum created by the

21 current Court Rules which do not address these  
22 situations, and I think that there is some great merit  
23 in permitting the state lawyers and judges to take  
24 direct guidance from the much faster developing case  
25 law in the Federal Courts on these issues, and that

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1 case law is far from settled and continues to be  
2 debated and grow, and I think it's a good thing that  
3 we would all be able to take advantage of that. So I  
4 would move for adoption of these rules.

5 CHAIRPERSON HAROUTUNIAN: It's been moved  
6 that the rules be adopted. Is there support?

7 VOICE: Support.

8 CHAIRPERSON HAROUTUNIAN: Any discussion?

9 MR. POULSON: Barry Poulson, 1st circuit.  
10 Nearly a lawyer, as you know, about 40 years in the IT  
11 business, and I recognize concerns related to 2.506  
12 subpoena (A)(2), somewhat mitigated by (3), in terms  
13 of the forms that could be required.

14 Now, I began computing when floppy disks were  
15 this big and that big and that big and that big, and  
16 now it's my little necklace I wear that has my storage  
17 on it.

18 But there are major issues that can relate to  
19 the production of data in this form or that form and  
20 the ability to specify that it must be in this form or  
21 that form. Objections can be raised in (3), somewhat  
22 the situation when I asked my father about our corn  
23 picker wearing out, and he said, well, don't worry  
24 about the corn picker wearing out, worry about the old  
25 farmer wearing out who knows how to run the corn

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1 picker and fix it. And this concern relates to data  
2 which has an astonishingly long potential life span.

3 And so I would suggest that we consider and I  
4 would possibly offer an amendment that says that the  
5 responding party may at their discretion -- this is  
6 obviously more than six words and would need to be  
7 written out, but I will mention this as part of the  
8 discussion -- that the responding party may at the  
9 party's discretion provide the requested information  
10 on eight-and-a-half-by-11 paper in 12-point font with  
11 one inch margins, because you can swamp a respondent  
12 with a carefully worded data processing inquiry, which  
13 I am beginning to get ready to draft after reading  
14 this article here, because you can create obstacles  
15 here that are unmanageable in terms of the lay person  
16 who simply thinks it's data as being out there as  
17 data. It's not. It's in a million different forms.

18 So we should be cautious with this. I know  
19 the feds have done it one way, but the feds don't care  
20 how much money they spend, but this is a different  
21 question, and I would just raise this as a caution  
22 only.

23 CHAIRPERSON HAROUTUNIAN: Thank you.

24 MR. QUICK: And I appreciate that you are  
25 framing that as a comment. Let me share with you some

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1 of the issues I am familiar with that took place, and,  
2 obviously, when the Federal Rules were changed this  
3 was subject to great debate. Stony Conference put  
4 together a very thick set of comprehensive materials  
5 to go to law professors and practitioners from around  
6 the country on this.

7 This is, I think, mainly designed to address  
8 the situation where a lot of electronic data can  
9 create output in multiple formats. You can spit out  
10 the data in three different software programs or  
11 obviously in a hard copy. In certain context there is  
12 a value to the litigants having access to the actual  
13 electronic version in a particular format, and, as you  
14 say, if there is an issue on burden, we simply can't  
15 do it way X anymore because that software is obsolete,  
16 then that's obviously a legitimate concern under  
17 (A)(3) which permits that be to a reasonable  
18 objection. If the parties really want it in some  
19 obsolete format then the court is going to tell them  
20 then they can pay for it.

21 MR. POULSON: I take that as a partial  
22 response. It may be the case, and I learned to  
23 program on Xerox computers and computers that you have  
24 never even thought were computers, and that's a  
25 concern over time, because data persists and it exists

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1 in a variety of format.

2 If you allow the respondent the ultimate  
3 fallback position of simply providing it on a piece of  
4 paper, then you protect from potential abuses that

5 could expound litigation that would go on for years  
6 about deck ten tapes with this tape and that tape and  
7 things I have stored in my barn for my grandchildren  
8 to sell some day.

9 It's not as simple as just say put it out in  
10 Novell format when you are a Novell guy retired 17  
11 years. So I would think that we would strongly  
12 consider that the backup position for any such  
13 response be eight-and-a-half-by-11, et cetera. Thank  
14 you.

15 CHAIRPERSON HAROUTUNIAN: Thank you. Any  
16 other comments? Any other discussion? Yes.

17 MS. MURPHY: Susan Murphy, 4th circuit.  
18 Having been under a deadline to create a record  
19 retention policy dealing with electronic technology,  
20 e-mails, et cetera, by the December 1st deadline,  
21 something that struck me when I read this was I recall  
22 during my training and preparing that that there is a  
23 Federal, under the Federal Rule there is a rather  
24 strong sanction by way of a jury instruction for  
25 inappropriate destruction, so I would like you to

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1 discuss what, if anything, was discussed as to that  
2 issue. And under 2.313 you only indicate that they  
3 may not impose sanctions under the section, but there  
4 is no discussion as to what sanctions could be  
5 imposed.

6 MR. QUICK: well, let me respond this way: I  
7 think under 313 that the court is going to retain  
8 general discretion to impose any sanction that it  
9 deems sufficient to address the impropriety, which can

10 take the form of a jury instruction or a whole host of  
11 other things.

12 I am not, off the top of my head, familiar  
13 with the Federal provision that you are referencing  
14 that you are saying specifically calls out a potential  
15 jury instruction, but to the extent that that was  
16 considered by the committee, I think it's felt that  
17 the general broad powers under 313 are sufficient to  
18 give the court the discretion.

19 CHAIRPERSON HAROUTUNIAN: Any further  
20 discussion?

21 MR. ELKINS: Michael Elkins, 6th circuit. I  
22 draw attention to 2.302(B)(5), which seems to make a  
23 party a guarantor of what may or may not be something  
24 that may or may not lead to evidence which may or may  
25 not be admissible in the future. The language says,

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1 Or reasonably should know may lead to the discovery of  
2 admissible evidence. I would delete "or reasonably  
3 should know."

4 Certainly if a party knows during litigation  
5 that something is evidence or believed evidence,  
6 that's one issue, but something that in hindsight may  
7 have been led, may have been seen to have led to  
8 admissible evidence later on. Hindsight is very  
9 clear. Making that assessment in the middle of the  
10 day without knowing where the case is going to go or  
11 what may or may not be relevant down the road and what  
12 may or may not be admissible down the road makes the  
13 party a guarantor of anything that's taken care of. I  
14 think that it's as written putting the party at risk

15 for an unknown contempt.

16 CHAIRPERSON HAROUTUNIAN: Is there support?

17 VOICE: Support.

18 CHAIRPERSON HAROUTUNIAN: Any discussion on  
19 the amendment? All those in favor of the amendment?

20 MR. WEINER: I don't know if I would delete  
21 that total section. I might change it to say "or  
22 reasonably should anticipate" instead of deleting it  
23 completely, but I agree with the issue of hindsight  
24 and imposing sanctions for something that somebody may  
25 or may not know but reasonably should anticipate.

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1 CHAIRPERSON HAROUTUNIAN: Did you give us  
2 your name?

3 MR. WEINER: Jim Weiner, I am sorry, 6th  
4 circuit.

5 MR. QUICK: Frankly, I think that this is  
6 already the law. If you reasonably should have known  
7 not to destroy a piece of paper, whether or not your  
8 actual knowledge at the time isn't going to matter,  
9 you are going to be sanctioned for it should it get  
10 shredded in the middle of a case, and I think under  
11 the case law generally as developed in the state and  
12 federal that this is the standard, and so for that  
13 reason I don't think it's appropriate to take that  
14 language out.

15 MR. BUCHANAN: Rob Buchanan from 17th  
16 circuit. I would move in opposition to the amendment.  
17 Obviously proving that the person knew that it would  
18 lead to discoverable evidence I think shouldn't be the  
19 standard. It should be what the current law is, which

20 is should they have known. Now you have to prove that  
21 they did know, so I would be in opposition to it.

22 CHAIRPERSON HAROUTUNIAN: Any other  
23 discussion with regard to the amendment? All those in  
24 favor of the amendment to delete the words "or  
25 reasonably should know" say aye.

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1 Those opposed say no.

2 Anyone abstaining say yes.

3 The noes have it. The amendment fails. We  
4 are back on the main motion.

5 MR. POULSON: I propose the following  
6 amendment to (2)(a), respondent may elect print  
7 media --

8 CHAIRPERSON HAROUTUNIAN: Wait, wait, wait,  
9 wait. What rule are we referring to?

10 MR. POULSON: I am in the discovery rule, the  
11 one 2.506(A)(2)(a). I am proposing the following  
12 words being admitted (2)(a), adding as a proposed  
13 amendment somewhere below it, Respondent may elect  
14 print media response, then we can decide.

15 CHAIRPERSON HAROUTUNIAN: Party may -- we  
16 need your name also.

17 MR. POULSON: I am sorry. Same as it was  
18 before, Barry Poulson.

19 CHAIRPERSON HAROUTUNIAN: You know that and I  
20 know that. The court reporter doesn't know that.

21 So the words are, A party may elect.

22 MR. POULSON: Can't be a party, because then  
23 that's seven words, but respondent.

24 CHAIRPERSON HAROUTUNIAN: Respondent may



25 elect print media response. Is there support for that

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1 amendment?

2 VOICE: Support.

3 CHAIRPERSON HAROUTUNIAN: Is there any  
4 discussion with regard to that amendment. Yes, sir.

5 MR. HAMPTON: Jeff Hampton, 17th circuit. I  
6 would oppose that amendment because I can see that  
7 leading to even bigger abuses of well-to-do parties  
8 printing out hundreds of thousands, if not millions,  
9 of pages of documents. I then as a two-man law firm  
10 have to go rent a warehouse somewhere and pay somebody  
11 to scan it in order to search it, because if I don't  
12 get it electronically I can't search it, and that's  
13 the entire point of getting electronic discovery  
14 electronically.

15 CHAIRPERSON HAROUTUNIAN: Thank you.

16 MR. HILLARD: Martin Hillard, 17th circuit.  
17 I agree with the previous comments, but also I don't  
18 know as if this amendment is necessary, because if you  
19 read the second sentence of (2), if the subpoena does  
20 not so specify, the person responding to the subpoena  
21 must produce the information in a form or forms in  
22 which the person ordinarily maintains it, or in a form  
23 or forms that are reasonably usable.

24 It would seem to me that a printout, other  
25 than perhaps in your objections, would be a form

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1 that's reasonably usable and, therefore, it's already  
2 an option to produce it in printout form.

3 CHAIRPERSON HAROUTUNIAN: Thank you.

4 MR. POULSON: My amendment specifically  
5 addresses the first sentence which says if the  
6 subpoena specifies the form to be Novell, 4.02,  
7 whatever the file format, backup, or who knows, then  
8 at least the responding party has the solution my  
9 small one-person law firm could do, which is I have a  
10 printer, and I don't have to hire some retired person  
11 to come forward. So I am only addressing if the  
12 subpoena doesn't specify, fine. But if it does  
13 specify and I can't deal with the burden that it gives  
14 me in information processing terms, then at least I  
15 have a fallback position that let's me respond without  
16 being sanctioned for not having an arcane expert on  
17 whatever arcane format was asked for.

18 CHAIRPERSON HAROUTUNIAN: Thank you.

19 JUDGE KENT: Wally Kent, probate judge,  
20 Tuscola County, 54th circuit.

21 Can't we solve the problem by adding to the  
22 end of the first sentence "subject to objection"? A  
23 subpoena may specify the form or forms in which  
24 electronically stored information is to be produced  
25 subject to objection. Doesn't that resolve the issue?

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1 CHAIRPERSON HAROUTUNIAN: well, we can't --

2 JUDGE KENT: You have a motion on the floor.

3 I cannot offer a motion now, but I am suggesting this

4 motion for amendment be defeated, then I would move  
5 that as a substitute.

6 CHAIRPERSON HAROUTUNIAN: Understood.

7 MR. POULSON: Poulson, 1st circuit. I would  
8 suggest I will withdraw my motion and let the judge's  
9 suggestion be considered. That's a better way.

10 CHAIRPERSON HAROUTUNIAN: So you will accept  
11 that as a friendly amendment to your amendment?

12 MR. POULSON: By removing mine.

13 CHAIRPERSON HAROUTUNIAN: Done. Okay. Any  
14 more -- we are going to add, we are going to not have  
15 that. We are going to add the words after the first  
16 sentence in (2) "subject to objection." Any  
17 discussion on the amendment?

18 All those in favor of the amendment say aye.  
19 Opposed no.  
20 Abstentions say yes.  
21 The amendment passes. We are on the main  
22 motion. Any other discussion?  
23 All those in favor of the motion say aye.  
24 Those opposed say no.  
25 Those abstaining say yes.

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1 The proposition passes. Thank you,  
2 Mr. Quick.  
3 (Applause.)  
4 CHAIRPERSON HAROUTUNIAN: Now before we  
5 adjourn, a couple of things. Number one, attendance  
6 slips, they are being passed out now. Please sign  
7 them and turn them in to either Anne Smith at this  
8 corner or Kathy Kakish at this corner.

9                   There are also mileage vouchers in your  
10 package, and you can fill those out. You don't have  
11 to do it right this minute. You can, but you can send  
12 them to Anne Smith. The address is there.

13                   VOICE: What's the rate per mile?

14                   CHAIRPERSON HAROUTUNIAN: 48.5. Anne, is  
15 that what you said? 48.5.

16                   In addition, I want to thank Anne Smith. I  
17 want to thank Nancy Brown for her assistance. I want  
18 to thank Connie Coon, our court reporter, as well as  
19 Judge Cynthia Stephens, our parliamentarian for today.

20                   Finally, I want to thank all of you for going  
21 through this process. You have really done a heck of  
22 a job. We are about 12 minutes over, but you are all  
23 to be congratulated with regard to the thought  
24 process, the effort, the attempt to put together  
25 something that when we send to the Supreme Court for

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1                   the court's evaluation that we'll have a good work  
2 product.

3                   Any other business to come before the group?

4                   If not, I would entertain a motion to adjourn.

5                   VOICE: Motion.

6                   CHAIRPERSON HAROUTUNIAN: Is there support?

7                   VOICE: Support.

8                   CHAIRPERSON HAROUTUNIAN: All those in favor  
9 say aye.

10                   Opposed no.

11                   Those abstaining say yes.

12                   The ayes have it. We are adjourned.

13                   (Proceedings concluded at 1:43 p.m.)

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REPRESENTATIVE ASSEMBLY

4-21-07

1 STATE OF MICHIGAN    )  
2 COUNTY OF CLINTON    )

3                   I certify that this transcript, consisting  
4 of 126 pages, is a complete, true, and correct transcript  
5 of the proceedings and testimony taken in this case on  
6 Saturday, April 21, 2007.

7  
8 May 7, 2007

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Connie S. Coon, CSR-2709  
832 North Washington Avenue  
Lansing, Michigan 48906

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