

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 M-TEC  
Center, 5708 Cornerstone, Lansing, Michigan, on Saturday,  
April 12, 2008, at the hour of 9:30 a.m.

AT HEADTABLE:

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

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1 Saturday, April 12, 2008  
2 9:37 a.m.

3 R E C O R D

4 CHAIRPERSON GARDELLA: Good morning, ladies  
5 and gentlemen. My name is Bob Gardella. I am the  
6 Chairperson of the State Bar Representative Assembly,  
7 and I call this meeting to order.

8 I would first recognize Elizabeth Moehle  
9 Johnson, our Clerk.

10 CLERK JOHNSON: Good morning.  
11 Mr. Chairperson, members of the Assembly, I am pleased

12 to announce to you today that we do have a quorum with  
13 over 50 members present.

14 CHAIRPERSON GARDELLA: Thank you, Clerk  
15 Johnson.

16 Now I would introduce our Rules and Calendar  
17 Committee Chair, Scott Wolfson from the Honigman  
18 Miller firm.

19 MR. WOLFSON: Good morning, everyone. I am  
20 Scott Wilson from the 3rd circuit. I am chair of the  
21 Rules and Calendar Committee of the Representative  
22 Assembly, and the committee would like to direct your  
23 attention to the revised schedule of events for today  
24 that is at your table, and I would like to move for  
25 approval of that calendar at this time.

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1 VOICE: So moved.

2 VOICE: Support.

3 CHAIRPERSON GARDELLA: Do we have a support?  
4 Any discussion?

5 All in favor say aye.

6 Those opposed say no.

7 Any abstentions say yes.

8 The ayes have it.

9 Also, is there a motion from Mr. Debiasi, and  
10 I would state that the motion carries.

11 MR. DEBIASI: Good morning, Mr. Chairman,  
12 William Debiasi, 3rd circuit. I move for approval of  
13 the September 27, 2007 summary of proceedings.

14 CHAIRPERSON GARDELLA: Is there support?

15 VOICE: Support.

16 CHAIRPERSON GARDELLA: Any discussion?

17 Hearing none, all those in favor say aye.

18 All those opposed say no.  
19 Those abstaining say yes.  
20 And the ayes have it. The motion carries.  
21 At this time I am pleased to announce that  
22 Chief Justice Taylor has joined us to give us a report  
23 on the judiciary for Michigan. This is, I think, a  
24 first that we have had in front of the Assembly.  
25 Hopefully it will be a regular event that we have.

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1 To give you some background on Chief Justice  
2 Taylor, he is a native of Flint and was appointed to  
3 the Michigan Supreme Court in August of 1997 by  
4 Governor John Engler to fill the seat vacated by  
5 Justice Dorothy Comstock Riley. In 1998, Justice  
6 Taylor ran and was elected to fill the balance of  
7 Justice Riley's term. Justice Taylor was re-elected  
8 to a full eight-year term in the year 2000. In  
9 January of 2005, he was elected by his colleagues to  
10 serve as Chief Justice of the Court.

11 Chief Justice Taylor received his  
12 undergraduate degree from the University of Michigan  
13 and his law degree from George Washington University.  
14 After three years in the U.S. Navy, he returned to  
15 Michigan and served as an assistant prosecuting  
16 attorney in Ingham County, Michigan. In 1972, he  
17 joined the Lansing law firm which was later known as  
18 Denfield, Timmer & Taylor, where he became a partner  
19 of that firm, and he remained in private practice for  
20 approximately 20 years. In 1992, Governor Engler  
21 appointed Justice Taylor to the Michigan Court of  
22 Appeals, where he served until his appointment to the  
23 Michigan Supreme Court.

24 Chief Justice Taylor's professional  
25 activities include service on the Board of Directors

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1 of the National Conference of Chief Justices, also  
2 service on the Board of the George Washington  
3 University Law and Economics Center, which provides  
4 ethical education across the country. He also served  
5 on the Michigan Legislature's Commission on the Courts  
6 in the 21st Century and on the Michigan Board of Law  
7 Examiners. He is the co-author of a three-volume  
8 legal treatise entitled Torts, which covers personal  
9 injury law in Michigan.

10 Chief Justice Taylor has also served on the  
11 Board of Directors of the Chief Okemos Council of the  
12 Boy Scouts of America and also has served on the Board  
13 of Directors for the Michigan Dyslexia Institute.

14 At this time I would ask that members of the  
15 Representative Assembly join me in welcoming Chief  
16 Justice Taylor.

17 (Applause.)

18 CHIEF JUSTICE TAYLOR: Thank you. It's nice  
19 to be with you, and I appreciate the very pleasant  
20 introduction. And I also appreciate the opportunity  
21 to speak to the Representative Assembly of the  
22 State Bar of Michigan.

23 Before I begin on the substantive part of the  
24 speech, I want to thank your good friends at Michigan  
25 Government Television for providing coverage this

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1 morn ing. The Supreme Court has had a fine working  
 2 relationship with MGTV that dates back to 1996 when  
 3 Mi chi gan Govern ment Televi si on fi rst ai red our oral  
 4 argu ments and in so doi ng be came the second televi si on  
 5 sta ti on in the Uni ted States to carry live coverage of  
 6 that state's hi gh est court.

7 MGTV also col laborates with the Court on  
 8 vari ous edu ca ti onal pro jects. Most re cently,  
 9 CSI: Courts, Speed, and Im pli ca ti ons, a web cast that  
 10 we worked with them on for high school audi ences.  
 11 They are, in short, a valued partner.

12 Now, when a chief justice stands before a  
 13 group of lawyers, particularly those who represent the  
 14 orga ni zed Bar, the ex pec ta ti on is prob a bly that what  
 15 he has to say will be of in terest only to lawyers. My  
 16 re marks here today have been vari ously bil led as a  
 17 state of the judi ci a ry type of ad dress, which sounds  
 18 sweep ing but ple a san tly vague, and as a re port from  
 19 the Mi chi gan Supreme Court, which sounds rather  
 20 dreary, as though I were about to give a de tai led  
 21 ac count of how much we spent on offi ce sup plies last  
 22 year, but rather my focus this morn ing is, I hope, on  
 23 fi rst prin ci ples then duties that we owe, that is we  
 24 of the Bench and Bar, to the pub lic.

25 The State Bar of Mi chi gan was founded on the

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1 pre mi se that its hi gh est and best func ti on was  
 2 sa fe guard ing con sumers agai nst unscrupul ous or  
 3 in com pe tent purveyors of the legal ser vi ces. The  
 4 de fi ni ng eth ic of our bar was fa mous ly ex pressed by  
 5 its fi rst pre si dent Roberts P. Hud son's, "No

6 organization of lawyers can long survive which has not  
7 for its primary object the protection of the public."

8 Mr. Hudson was evidently fond of double  
9 negatives, but the central premise of a regulated  
10 organized bar is that unskilled persons practicing law  
11 pose a danger to the public, so much so that the  
12 unauthorized practice of law in this jurisdiction was  
13 criminalized by statute. So ever since the legal  
14 profession became regulated the issue of what is and  
15 is not the practice of law has plagued lawyers,  
16 nonlawyers, courts, and the legislature also.

17 Complicating matters in recent years has been  
18 the rise of the internet with its how-to web sites  
19 that report to offer do-it-yourself divorces, wills,  
20 and the like. Too, as more law firms seek to become  
21 more one-stop shops for a wide array of professional  
22 services, including investment advisors and other  
23 nonlawyers, it becomes even more critical to draw the  
24 line between what is law practice and what is not.

25 In 2003, my Court waded into this thorny

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1 issue in a case entitled Dressel versus Ameri bank. At  
2 issue in that case was whether a lender that charged a  
3 fee for completing standard mortgage documents was  
4 engaged in the unauthorized practice of law under  
5 MCL 450.681, itself a criminal statute. The Court of  
6 Appeals felt that the defendant bank was so engaged  
7 because the documents were legal in nature and the  
8 bank had charged a separate fee for preparing them.

9 Let me back up a little bit at this point and  
10 talk about what the law was up to the point that the  
11 case reached the Supreme Court.

12 In Michigan, as in a number of other  
13 jurisdictions, the approach to the unauthorized  
14 practice of law was to tell defendants effectively  
15 through our cases we will tell you whether you  
16 committed a crime after you have done it. This seemed  
17 to be troubling, I suppose for a lot of reasons, most  
18 of them facing back to due process and the Court of  
19 Appeals in noting its handling of Dressel that the  
20 statutes governing unauthorized practice of law do not  
21 specifically define the term nor had the Michigan  
22 Supreme Court defined it either. In fact, in past  
23 decisions our Court had concluded that defining the  
24 practice of law was an impossible task.

25 In our 1976 decision in State Bar of Michigan

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1 versus Kramer, for example, the Court stated that the  
2 definition was impossible because under our system of  
3 jurisprudence such practice must necessarily change  
4 with the ever changing business and social order.

5 I think we all can agree that there wasn't a  
6 whole lot of guidance for lawyers or nonlawyers, but,  
7 as I said, it was felt that the task of coming up with  
8 a definition was just too formidable.

9 Accordingly, the approach up to the decision  
10 in Dressel had been for the courts to decide, as we  
11 lawyers say, on a case-by-case basis, but in the  
12 Dressel opinion, written by my colleague, Marilyn  
13 Kelly, and joined by me and four other justices, the  
14 Court departed from that approach in favor of offering  
15 some fundamental fairness and notice.

16 We held, as did the trial judge, the very  
17 talented Judge Kolenda, who has just left the bench, a

18 great loss to the bench, that the preparation of these  
19 documents was not the practice of law, but we went  
20 further, as Justice Kelly wrote, Our courts have found  
21 a violation of the unauthorized practice of law  
22 statutes when a person counseled another in matters  
23 that required the use of legal knowledge and  
24 discretion. We agree and reiterate that a person  
25 engages in the practice of law when he counsels or

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1 assists another in matters that require the use of  
2 legal discretion and profound legal knowledge.

3 This definition, she noted, maintains the  
4 integrity of the legal profession without  
5 overburdening our normal economic activities with  
6 unnecessary restrictions. Also, it provides parties  
7 with a common sense approach to conforming their  
8 conduct so as to avoid committing the unauthorized  
9 practice of law.

10 I should point out, as did Justice Kelly in a  
11 footnote, that in adopting a definition of the  
12 practice of law the Michigan Supreme Court was being  
13 consistent with the recommendations of the American  
14 Bar Association, which itself has urged each  
15 jurisdiction to do so. Such definitions should, the  
16 ABA recommended, include the basic premise that the  
17 practice of law is the application of legal principles  
18 and judgment to the circumstances or objectives of  
19 another person or entity.

20 I should also point out that our colleague,  
21 Betty Weaver, did not agree that the Court could or  
22 should define the practice of law. She took issues  
23 with the Court's departure from earlier precedent and

24 also cited the difficulty of, quote, arriving at a  
25 lasting definition, unquote, and indicated she would

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1 have preferred that the Court, quote, remain committed  
2 to our prior holdings and continue deciding these  
3 cases on a case-by-case basis.

4           Nationally we have seen other states  
5 wrestling with the question of how to define the  
6 practice of law in using the Dressel case rather  
7 widely, although their answers have varied, but the  
8 more recent attempts to deal with this question,  
9 whether by statute or court decision, seem to follow  
10 generally the ABA approach. Indeed, there seem to be  
11 only a handful of jurisdictions that continue to  
12 follow the we-will-know-it-when-we-see-it approach,  
13 and those courts continue to refuse to offer  
14 definition. Most offer at least a general definition  
15 that is consistent with the ABA approach, while others  
16 have quite detailed definitions and statutes, court  
17 rules or rules governing the Bar.

18           I think these majority jurisdictions have  
19 recognized that the case-by-case approach really has  
20 become unworkable and unfair to those who need to be  
21 able to tell what's part of law practice and what is  
22 not.

23           If potential offenders don't have at least  
24 some guidance as to what not to do, they will, of  
25 course, continue to encroach on the practice of law

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1 with unfortunate consequences for the public. At the  
2 same time, I think the Dressel approach makes it  
3 possible for nonlawyers to perform ordinary, routine  
4 business services without fear that they are going to  
5 run afoul of the criminal statute.

6 Earlier I spoke of first principles and duty,  
7 an unpopular word in this day and age. As the Court  
8 of last resort in this case and the supervising body  
9 for the state bench, the Supreme Court has numerous  
10 obligations, one of them being to give an account of  
11 its activities to the other branches and to the  
12 public. To that end, last month the Supreme Court  
13 released its annual report, which gives an overview of  
14 the Michigan judiciary's activities in 2007. And I  
15 think these accomplishments are occasion for pride.

16 Just one example, in 2007 the state passed a  
17 very stringent federal review by the Department of  
18 Health and Human Services, thanks in large part to the  
19 hard work by the Family Services Division of the State  
20 Court Administrative Office. Had Michigan failed that  
21 review, we would likely have suffered the loss of  
22 nearly \$40 million in federal child welfare funding.

23 Another achievement, thanks to our Friend of  
24 the Court Office, Michigan ranks sixth in the nation  
25 in child support distribution and fourth in collection

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1 of past due child support. In short, the judicial  
2 branch is making huge strides in everything from  
3 technology to public education, as detailed in our  
4 annual report, and I am proud, I think justly, of the  
5 fine judges and staff throughout our state to make all

6 of this possible.

7 What you will also see, if you read the  
8 report, is that our state courts generally enjoy what  
9 we call in the judging business a clearance rate of at  
10 or near 100 percent. The Supreme Court, for example,  
11 received 2,612 files in 2007, the most received in the  
12 past five years, and disposed of 2,625, which, as its  
13 understood, is a clearance rate of over 100 percent.

14 The Court of Appeals with 7,590 new filings  
15 had 7,543 case dispositions, for a near 100 percent  
16 clearance rate, and circuit courts exceeded 100  
17 percent, with district and probate courts very close  
18 behind. I should point out that district courts  
19 experienced a significant increase in civil filings in  
20 2007 and yet still had a clearance rate of over 99  
21 percent. This is the kind of efficiency that I think,  
22 and I think you would too, that the public has every  
23 right to expect.

24 What the public also has a right to expect is  
25 the wise use of its tax dollars. So last year I went

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1 before the Annual Judicial Conference here and  
2 suggested that the state could do with fewer judges.  
3 I did not think that making that suggestion would be  
4 particularly controversial. After all, for years the  
5 State Court Administrative Office had been reporting  
6 that some courts had more judges than they needed and  
7 that those judgeships ought to be eliminated by  
8 attrition.

9 That suggestion, at least since 2002, went  
10 unheeded, as the Legislature continued to approve new  
11 judgeships without eliminating any. But last April it

12 seemed high time to bring the subject up again. Here  
13 we were, facing one of the worst budget crises in the  
14 history of state government, with Michigan's economy  
15 trailing dead last of all the states.

16 Now, the state pays an average of 157,000 per  
17 trial judge in salary and retirement costs, which is  
18 real money, even in Lansing terms. Given the  
19 circumstances, I hardly expected my remarks would be  
20 controversial, but controversial they were.

21 With the State Court Administrative Office  
22 recommendations in August of last year, reaction in  
23 the Capitol ranged from indifference to, again,  
24 outright hostility. Stymied yet again was any  
25 productive discussion on a very straightforward

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1 question, does this state have more judges than it  
2 needs and how do we determine that? Some history is  
3 helpful here.

4 Recall that in 1996 the Legislature created a  
5 Trial Court Assessment Commission directing it to  
6 study and classify the cases filed in the state's  
7 trial courts and to develop criteria for determining  
8 the relative complexity of those cases. The  
9 commission was to use those criteria to develop a  
10 formula for state funding of the courts, which, of  
11 course, ultimately did not happen. The commission's  
12 second mandate included making detailed  
13 recommendations about the number of judges needed, as  
14 the statute said, quote, to dispose of the trial court  
15 caseload in this state, unquote.

16 The commission included representatives from  
17 the circuit, probate and district courts, as well as

18 my colleague, Betty Weaver, who chaired the  
19 commission. There were, in addition, representatives  
20 of the Bar, legislators, local government officials,  
21 court administrators, and the Department of Management  
22 and Budget was represented on the commission by my  
23 wife, Lucille. In short, just about every conceivable  
24 category of stakeholder was represented at the table.

25 Now, when the Trial Court Assessment

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1 Commission presented its report to the Legislature in  
2 1998, it concluded that, and I am quoting from the  
3 executive summary here, The weighted caseload  
4 technique is the best method to measure case  
5 complexity in terms of the amount of judicial time  
6 needed to process a case from filing to disposition  
7 through all post-judgment activities.

8 Weights represent the average amount of time  
9 required to handle each type of case. The weighted  
10 formula takes into account that different type of  
11 cases take greater amounts of a judge's time. The  
12 result is an estimate of the judicial resources each  
13 court needs.

14 The case weights that the commission  
15 developed and the quantitative formula for assessing  
16 judicial need were unanimously adopted by the  
17 commission, along with the rest of the financial  
18 report. The weighted caseload approach is what has  
19 been used ever since to determine judicial needs of  
20 each court. Although such weights were updated last  
21 year based on 2006 study involving 86 Michigan trial  
22 courts, the methodology is the weighted caseload  
23 approach approved by the blue ribbon commission in

24 1998.

25 Indeed, the National Center for State Courts,

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1 which worked with the Trial Court Assessment  
2 Commission to develop the methodology, has stated that  
3 the weighted caseload approach is preferred above all  
4 others for assessing judicial workload and judicial  
5 need.

6 Now let's fast forward to 2007. As it does  
7 in every odd numbered year, the State Court  
8 Administrative Office issued its judicial resources  
9 report to the Legislature and Governor. The report  
10 concluded that ten trial court judgeships should be  
11 eliminated by attrition and did not recommend that any  
12 new ones be created. The report also determined that  
13 the Michigan Court of Appeals could run as efficiently  
14 and at less cost with four fewer judgeships and  
15 additional research attorneys. This idea, by the way,  
16 was not new. The Court of Appeals had explored the  
17 possibility as far back as 2005.

18 In September the Michigan Supreme Court  
19 issued its own recommendation regarding the reduction  
20 in judgeships, with the court voting four to three to  
21 support eliminating four judgeships from the Court of  
22 Appeals by attrition. By the same vote the Court also  
23 recommended that 20 trial court judgeships be  
24 eliminated through attrition also. The rest you know.

25 Not only did the Legislature not take any

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1 action on these recommendations, but the report was  
 2 assailed as untrustworthy, flawed, and even  
 3 politically motivated.

4 Let's clear away the smoke and see just what  
 5 the opponents of judicial reductions are saying. They  
 6 charge that the judicial resources recommendations are  
 7 based on unsound methodology, yet they can't tell you  
 8 exactly what is wrong or how they would measure  
 9 judicial need in any nonsubjective way. Some of them  
 10 even serve on the Trial Court Assessment Commission  
 11 and approved the very method they now condemn.

12 Two, it seems that the methodology is found  
 13 to be flawed only when SCAO recommends eliminating  
 14 judgeships. Few find criticism with the State Court  
 15 Administrative Office's report when the recommendation  
 16 is to create judgeships. In fact, in the last four  
 17 years five new judgeships have been added and nine  
 18 part-time probate judgeships were converted to  
 19 full-time based on the SCAO recommendations. But when  
 20 SCAO suggests that a court could do with fewer judges,  
 21 now that's when the Judicial Resources Report is  
 22 either attacked or ignored.

23 Although SCAO recommended eliminating five  
 24 judgeships in the 2003 report and four in the 2005  
 25 report, those recommendations were not adopted by the

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1 Legislature, and of course the 2007 Judicial Resources  
 2 Report was, likewise, ignored.

3 Those who oppose judicial downsizing also  
 4 argue that any savings from eliminated judgeships  
 5 would be minimal, because the judicial branch

6 represents such a small part, less than one percent of  
7 the overall state budget. Well, it's quite true that  
8 our budget is very small compared to the rest of the  
9 state government. This argument is one that only a  
10 bureaucrat could love. Most taxpayers would, I think,  
11 not share the perception that \$157,000 per trial judge  
12 or around \$400,000 for Court of Appeals judges is  
13 small change. I think they would expect us to save  
14 where we can so as to better put the savings towards  
15 areas of real need and promise, such as areas that are  
16 underjudged, mental health courts, drug courts and the  
17 like. Many of these will go unfunded as things now  
18 stand.

19 With regard to the Court of Appeals, it's  
20 argued that despite the drop in filings over the years  
21 we simply are not yet at the point we can reduce the  
22 size of the bench without serious, even Draconian,  
23 consequences, such as long-term delays. My answer is  
24 let's look at the numbers.

25 In 1992 the Court of Appeals had 13,352

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1 filings. In 2007 the court saw 7,590 new files. That  
2 is a drop of 43 percent. So if we are not able to  
3 consider reducing the court size now, when? What's  
4 the magic number? Fifty percent fewer filings, 60  
5 percent?

6 It's not just the present numbers but also  
7 history that's instructive here. What to make of the  
8 fact that in 1988 with 18 judges and 17 fewer staff  
9 attorneys the Court of Appeals received 8,545 filings  
10 and decided 8,508 cases, over 900 more than the  
11 28-judge court decided in 2007. And in 1990 when

12 total filings reach 12,369, the then 24-judge court  
13 decided 10,504 cases, almost 3,000 more than the court  
14 decided with 28 judges in 2007. Are we to just ignore  
15 these facts, pretend they have no bearing on the  
16 present?

17 Here is the cold hard truth. This state  
18 continues to endure a fiscal crisis. The most  
19 optimistic forecasts are that it will take several  
20 years for us to see real improvement in Michigan's  
21 economy. Michigan citizens are walking away from  
22 their homes because they just can't sell them in this  
23 market. We all have friends and family who are  
24 finding themselves jobless perhaps for the first time  
25 in their careers.

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1 No one can expect that state government will  
2 be rescued by a sudden surge in revenue. Why then  
3 should we take the position that the number of state  
4 judges is up for discussion? It's understandable that  
5 any court faced with a reduction will be unhappy about  
6 the prospect. But a knee jerk insistence on the  
7 status quo will only result in an ever larger state  
8 judiciary and not necessarily better public services.  
9 The choice is too often presented as an either/or,  
10 maintain the status quo or suffer loss of public  
11 services.

12 But the choice is not that simplistic.  
13 Losing a judge does not, for example, necessarily mean  
14 that a magistrate will have to be hired at local  
15 expenses to take up the slack. Concurrent  
16 jurisdiction, which allows courts to more easily share  
17 caseloads and judicial resources, is just one option

18 for efficiently managing trial courts.

19 It's easy to evade the hard work of reform  
20 and ignore harsh facts by dismissing the  
21 Supreme Court's recommendations as unsound or  
22 politically motivated, but that is exactly how the  
23 opponents of judicial downsizing and those who are  
24 interested in exploiting that opposition for their own  
25 ends have brought the debate to a screeching halt. I

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1 think that knee jerk reaction has done the tax paying  
2 public an enormous disservice. They deserve better  
3 from us, the Bench and the Bar. I hope that perhaps  
4 with your aid the discussion can move forward. Thank  
5 you very much for having me.

6 (Applause.)

7 CHAIRPERSON GARDELLA: Chief Justice Taylor  
8 many, many thanks for being here today and giving your  
9 state of the judiciary address. We appreciate it.  
10 It's very informative, and we hope this can be a  
11 regular occurrence for us. So thank you.

12 We will take a 15-minute break at this point  
13 and then be back in the room to carry on with  
14 business.

15 (Break was taken 10:06 a.m. to 10:29 a.m.)

16 CHAIRPERSON GARDELLA: So we can keep on  
17 schedule, I would like to resume the meeting at this  
18 time. Our main goal today is to keep on track of our  
19 schedule and hopefully keep ahead of schedule so  
20 everyone can get back home and enjoy their Saturday.

21 The next item on the agenda here is the  
22 Chair's remarks, and I have sort of a collage of  
23 different things to address with you, not just one

24 topi c.

25 The first item that I wanted to address is

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1 that since our last meeting in Grand Rapids, which by  
2 the way was a wonderful event, and hopefully people  
3 had a good time there in Grand Rapids last September,  
4 but since that time we have encountered some very sad  
5 news. Kim Cahill, our former Representative Chair  
6 during the 1999-2000 year and our State Bar of  
7 Michigan President during the 2006-2007 year, died  
8 after a short battle with cancer in January of this  
9 year.

10 When I was first elected to the  
11 Representative Assembly in 1999, Kim was the incoming  
12 chair of the Assembly. Kurt Schnelz at that point was  
13 passing the gavel to Kim, and I can remember Julie  
14 Fershtman was getting elected as clerk at that meeting  
15 over in Grand Rapids, and it was my first encounter  
16 with the Representative Assembly. And knowing Kim as  
17 the incoming chair, she had endless energy, at that  
18 time as the Rep Assembly Chair, and then also as your  
19 State Bar President, and she was simply a dynamo in  
20 terms of her energy to get around the state and speak  
21 and communicate the role of lawyers in society.

22 She would speak to a variety of groups, to  
23 elementary school children in the first grade, to  
24 senior citizen organizations, to a variety of  
25 different Bar organizations and special interest

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1 groups and just did a wonderful job. I saw her on the  
2 stump many times, and she had an extra challenge  
3 because we had the tax on legal service issue, and she  
4 probably had maybe double the usual engagements  
5 because of that issue that was of great concern to  
6 lawyers.

7 Her leadership helped keep the State Bar of  
8 Michigan responsive to the needs of everyday lawyers,  
9 and she generously gave of her time while also  
10 operating a small firm in Oakland County with her  
11 sister Dana Warnez, who is seated here today in the  
12 front row, and also her mother, Florence Schoenherr,  
13 who also was there and helped Kim carry on her  
14 responsibilities. And our thoughts of Kim and our  
15 gratitude go out to Kim and her family and Dana at  
16 this time of grief.

17 And I would also like to point out that some  
18 additional sad news came in, Greg Ulrich -- I am not  
19 sure if Greg has arrived yet -- but Greg is one of our  
20 Board of Commissioner members. He is also a former  
21 chair of the Representative Assembly from Wayne  
22 County. Just a few days after Kim's death we were  
23 informed that there was a sudden death of Greg's son  
24 who was serving in the armed forces, and the funeral  
25 was in January of this year. So our hearts go out to

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1 their family, and at this time I would ask that you  
2 join me in a moment of silence for Kim and also for  
3 Greg's son.

4 (Moment of silence.)

5 CHAIRPERSON GARDELLA: Thank you.

6 My remarks today are also dedicated to  
7 thanking all of you for your generous contributions of  
8 time and leadership. The Representative Assembly,  
9 which is the final policy-making body of the State Bar  
10 of Michigan, is very energetic, and we have a lot of  
11 things to do throughout the year, and there are many  
12 things that you don't see behind the scenes that  
13 happen before our meetings, and for all of the past  
14 chairs that are here and people who have served for  
15 many years, you know some weeks it gets very, very  
16 busy and time consuming. And I thank all of you for  
17 your commitment to this body to make it responsive to  
18 the approximately 39,000 lawyers now that we have in  
19 the state of Michigan.

20 As many of you know, when the Representative  
21 Assembly was started in 1972 we had approximately  
22 12,000 lawyers at that time, and the State Bar  
23 leadership at that point and the Supreme Court, they  
24 were trying to do something to make our leadership of  
25 the Bar more responsive to the regular, everyday

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1 practitioner and be a better link to the practitioner.  
2 By creating the Representative Assembly it did serve  
3 its purpose, and it still does. We have approximately  
4 39,000 members now, and we are more important than  
5 ever in carrying the voices of our local Bar members  
6 to this body and communicating our product from our  
7 resolutions here to the Supreme Court, State  
8 Legislature, and also to the executive branch of  
9 government.

10 So my thanks to you for taking the time out  
11 of your schedules and your generous gift of time to

12 your profession, because it truly is a gift, and  
13 hopefully you will get as much out of it as I have the  
14 last eight, eight and a half years that I have been on  
15 this body. Every time I leave this building I always  
16 get something out of it and say, wow, I never  
17 considered that argument or I never knew that bit of  
18 information, and hopefully it will be very educational  
19 for all of you as you continue to serve.

20 As we spotlight the issues and analyze the  
21 issues and vote on the issues, we also have to look  
22 ahead to what's coming up for the next meeting, and  
23 for this meeting that we have today we do have a full  
24 schedule. We are going to try to keep it on track.  
25 We do have one proposal that's going to be withdrawn

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1 which we will go into in just a few minutes, so that  
2 will help us keep on track.

3 I want all of you to know too that the  
4 proposals that we draft, that we analyze and that we  
5 eventually vote on, for those that are approved, they  
6 don't just get put on a list and put on the shelf.  
7 They do make it to the decision makers in the various  
8 governmental bodies.

9 For our resolutions that deal with  
10 Supreme Court issues and Court Rule issues, we will  
11 draft a letter to the Supreme Court or the Court of  
12 Appeals, whichever would be effective, it's usually  
13 the Supreme Court, that states this is what we have  
14 concluded, this is the recommendation that we would  
15 make and we would ask the Supreme Court seriously  
16 consider this and approve the recommendation that we  
17 are asking for.

18                   Also, at other times we will send letters to  
19                   the Legislature or the Governor's office if they deal  
20                   with legislative issues or administrative issues  
21                   within the realm of the respective branches of  
22                   government. But I want to reiterate that your service  
23                   is extremely important to improving our system of  
24                   justice.

25                   Another important thing that I have to

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1                   address is that we have important staff members that  
2                   many of you have already met before. We have  
3                   Anne Smith seated at the end. She is the  
4                   administrative staff person assigned to the  
5                   Representative Assembly, and I think I talk to Anne at  
6                   least once or twice every day of the week with the  
7                   Assembly, and without her we would be in trouble.

8                   Janet Welch, our executive director. Many of  
9                   you have known her. She has been our executive  
10                  director for the last year, and prior to that she was  
11                  our interim executive director, and prior to that the  
12                  general counsel for the State Bar.

13                  I am also very honored that circuit court  
14                  Judge Cynthia Stephens of Detroit is our  
15                  parliamentarian. I was just in her court, let's see,  
16                  a week ago Friday to make sure that she had this on  
17                  her agenda, and she does. I think she always looks  
18                  forward to the Assembly members and the various issues  
19                  that we address. She will be our parliamentarian  
20                  again this year, and I thank her for agreeing to serve  
21                  again. She was formerly a Representative Assembly  
22                  member and a member of our Board of Commissioners, and  
23                  I still remember her when she was making the great

24 arguments from the microphone, not too many years ago,  
25 and she has been involved in uncountable projects for

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1 the State Bar over the years, and she will help me  
2 keep everything on schedule today.

3 Also, our Vice Chair, Kathy Kaki sh, she is an  
4 assistant attorney general based in Detroit, and many  
5 of you know her, and then also our Clerk, Elizabeth  
6 Moehle Johnson, and she is also known to all of you.

7 So these are the people that you will see  
8 today as we proceed ahead, and then Marge Bossenbery  
9 is here somewhere too, and then also Nancy Brown from  
10 the State Bar staff is seated up here running our  
11 projector, and she is also in charge of the  
12 publications and many, many other hats at the  
13 State Bar, and we are very grateful that she is with  
14 us today.

15 I would also like to thank the chairs of our  
16 committees who have gotten us here today. They did a  
17 lot of work. Our Nominating Committee Chair, Victoria  
18 Radke, who guided our awards process and filled the  
19 vacancies on the Assembly as they popped up during the  
20 year. Where is Victoria at?

21 MS. RADKE: Right here.

22 CHAIRPERSON GARDELLA: She is on the other  
23 side, okay.

24 And I also wanted to give a special thanks to  
25 Ron Paul of Oakland County who helped us work

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1 diligently. He was also a member of the Nominating  
 2 Committee to fill some of the vacancies.

3 We are very fortunate that during this year  
 4 and pretty much during the last five years or so we  
 5 have been at or near a hundred percent commitment,  
 6 with all of our seats being filled, and we want to  
 7 keep that tradition going. Sometimes no matter how  
 8 hard we work, people move their offices and go  
 9 elsewhere, but we do have a very committed group at  
 10 this point.

11 The Drafting Committee Chair, Rod Buchanan.  
 12 Could not be here today. He is from Grand Rapids, but  
 13 he and all his committee members and Kathy Kaki sh and  
 14 Clerk Liz Johnson and all of you Drafting Committee  
 15 members here today, thank you very much for the work  
 16 that you have done. When we get the proposals that  
 17 come in, you work very hard in probably four days'  
 18 time to analyze and amend and modify the proposals to  
 19 make them work so that we link the proposal to a Court  
 20 Rule or a statute that we need to have the proper  
 21 linkage to, so my hat is off, and thanks to you for  
 22 doing that.

23 Also, the Assembly Review Committee Chair,  
 24 John Reiser, thank you for a project that many of you  
 25 don't even know happened, because we had to work on it

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1 very quickly this year. During the earlier part of  
 2 the year, right after the annual meeting, we knew that  
 3 we had a problem with our bylaws regarding elections,  
 4 and the chair of the Assembly Review Committee went to  
 5 work with State Bar legal counsel, Cliff Flood, and

6 some of the RA officers to make sure that we could get  
7 that, get an amendment done, and that was  
8 accomplished. The amendment basically focuses on --  
9 and you can look at this on the Bar website under the  
10 bylaws for the Representative Assembly.

11 The problem occurred when a circuit had two  
12 vacancies, as a hypothetical, one for a vacancy with  
13 one year remaining and the other with two years  
14 remaining. Well, it wasn't really a contested  
15 election, we had two people running, and so we put  
16 those people in the slots, but then the question was,  
17 well, which person received which slot, the two-year  
18 slot or the one-year slot.

19 So it was good that we filled both seats,  
20 that was a positive point, but the problem was how to  
21 determine who was assigned to each term. So  
22 correcting that we went to work right away. We knew  
23 that we had the April 2008 elections coming up, and it  
24 would have been nice to discuss it in an Assembly  
25 meeting to talk about it and get input, but the

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1 problem was we didn't want to have a problem in this  
2 election because of one of the problems that had  
3 occurred in past years and the officers had been  
4 discussing it over the last year.

5 So the legal counsel and John Reiser went to  
6 work on that. We were able to get an amendment taken  
7 care of. It was approved by the Board of  
8 Commissioners. The Board of Commissioners has to  
9 approve the bylaws regarding elections for the  
10 Assembly, and that's in place now, and we will not  
11 have that problem, and you can see the details in



18                   Also, the people who have been liaison's to  
19                   the other special interest Bar organizations and  
20                   sections, thank you for your involvement, and I  
21                   encourage all of you in your role as a Representative  
22                   Assembly member and liaison to really work with those  
23                   groups and give them a call once in a while or attend  
24                   their meetings at least once or twice a year so that  
25                   you can see what's on their mind. There may be a

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1                   proposal that they have that they would like to bring  
2                   to the Assembly but they just don't know how to do  
3                   that, and you are very important in being that link to  
4                   those organizations.

5                   One of the top reasons we are strong as a  
6                   150-member organization is that we have so many  
7                   energetic members in various practice areas, and this  
8                   year has been especially busy. We meet only twice a  
9                   year, and our committee chairs, as I said, have really  
10                  done a great job.

11                  The other item that I wanted to address, just  
12                  to give an update, for our past chairs of the  
13                  Assembly, and this is a carryover to Ed Haroutunian,  
14                  our past chair who is seated way in the back of the  
15                  room over there -- thanks, Ed, for being here -- we  
16                  have now a permanent display that's going to be  
17                  located on the first floor of the Bar building for all  
18                  the past chairs of the Assembly, which is coordinated  
19                  due to the 35th anniversary last year of the Assembly.  
20                  That's going to be placed as of June or July of this  
21                  year, whenever we can get all of the photographs  
22                  complete. We are still working on a couple of  
23                  photographs from some of our earliest chairs of the

24 Assembly. So when you come into the Bar building in  
25 the summer, you may see that up, and that will be a

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1 nice tribute to the hard work of the Assembly.

2 One other thing I wanted to add is that our  
3 pictorial directory for the Assembly is up and  
4 running. All of you who had your picture taken in the  
5 hallway in Grand Rapids, and maybe some of you today,  
6 you will notice when you go on the State Bar website  
7 under the Representative Assembly page, there is a  
8 pictorial directory now that has a photograph, has  
9 also your firm or law office address, phone number and  
10 then your areas of practice, and hopefully that will  
11 be a nice tool for you. It will also be a good  
12 networking device for all of our members to use. If  
13 all of you have a question in a certain area of law,  
14 you know, hey, I know that person from the 6th  
15 district or the 28th district that you can go to to  
16 have that question answered, or if you need to refer a  
17 case to someone in a particular circuit or locality,  
18 because you have a client, that will be a useful tool  
19 for you, and so I encourage you to look there.

20 And if your photograph is not there or you  
21 weren't here at the last meeting, Marge Bossenbery is  
22 taking photographs. We have a digital camera that  
23 will transfer the photo this coming week onto that  
24 pictorial directory. We have it alphabetically  
25 organized, and it will also be organized according to

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1 your circuit number in just a few weeks.

2 And at this time I am happy to introduce our  
3 State Bar President. Ron Keefe is another energetic  
4 president we have. He has been throughout the state  
5 already going to various Bar activity functions,  
6 speaking at various events and being also a great  
7 communicator for the State Bar.

8 I had the privilege of driving on our Upper  
9 Peninsula tour with Ron and Janet and Jim Erhardt, who  
10 is a former Representative Assembly member and current  
11 Board of Commissioner member, and also Candace Crowley  
12 who is here. I am not sure where Candace is at. I  
13 think she is in the back there.

14 We had our tour van going through most of the  
15 counties in the Upper Peninsula in October, and I got  
16 to know Ron very well from that week. We had a great  
17 time, and hopefully it was a good experience to help  
18 build the reputation for the Assembly and answer  
19 questions for members who may want to get involved in  
20 the future, but it was great to be able to get out to  
21 the various counties and see all of our Representative  
22 Assembly members in action in other localities.

23 And I admire Ron, because sometimes I will  
24 complain, well, gee, I had to drive an hour to court,  
25 and with Ron being in Marquette, I call him the happy

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1 traveler, because he sometimes will have to drive from  
2 Marquette over to Sault Ste. Marie or over to  
3 Ironwood, and, you know, for him to drive from his  
4 office sometimes to court, it may take two hours or  
5 three hours or over to Mackinaw City or wherever he

6 has to go to.

7 His firm is one of the largest firms in the  
8 Upper Peninsula, if not the largest, and he goes many,  
9 many places. So I have stopped complaining about the  
10 long drives now after Ron has told me about his  
11 stories, especially in the wintertime with the  
12 ferocious storms that they have. But it was good to  
13 see all of our Assembly members at the various  
14 locations, and Ron had great turnouts, I think  
15 probably the best turnouts we have ever had for the  
16 various events because he was their own from  
17 Marquette, and it was a great experience and a lot of  
18 fun. So at this time I would introduce our President,  
19 Ron Keefe. If you want to come on up, Ron.

20 (Applause.)

21 PRESIDENT KEEFE: Thank you very much, Bob.  
22 I also want to thank you for those very kind words  
23 about Kim and her family. We have Dana in the front  
24 row here. It's so nice to see you.

25 Kim was an extraordinary leader and person

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1 and a very dear friend of mine, so this is a difficult  
2 time to be president of the State Bar of Michigan.  
3 Let me tell you, everywhere I go I am reminded of Kim,  
4 either by the members who thought she was so  
5 wonderful, which she was, and all the other reminders  
6 that I have.

7 It's an honor to have an opportunity to  
8 address you this morning as President of the  
9 State Bar, and I do want to not only thank Bob but  
10 thank Kathy and Elizabeth.

11 Maybe some of you don't know how we are

12 structured, but the Chair and the Vice Chair and the  
13 Clerk of the Representative Assembly are also on the  
14 Board of Commissioners, so I had the pleasure of  
15 working with them as Board members. And you may not  
16 also know that the Executive Committee of the Board of  
17 Commissioners are also members of the Representative  
18 Assembly, so I am a member of the 25th judicial  
19 circuit with my colleague Andrea Monnett, who is  
20 sitting there, and Suzanne Larsen, my partner, who is  
21 not here today due to the weather, so we have a lot of  
22 contacts with your leadership and vice versa. In fact  
23 I have been a member of the Rep Assembly since 1995  
24 with a short break in service when I became a Board  
25 member.

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1 Over the past several months I have been to  
2 many Bar associations, I think around 25, 30 at the  
3 latest count. I have met a number of you. I see John  
4 Reiser over there from Washtenaw County and Don  
5 Rockwell in Genesee County a couple times. So I have  
6 been all over the area in the last several months. I  
7 have talked to the Bar associations, and one of the  
8 things I wanted to do this morning is basically talk  
9 to you about what I have been speaking about as I go  
10 around the state.

11 First of all, I like to talk about the things  
12 that we as lawyers all have in common, I think we can  
13 all agree on, and really there are three things that I  
14 have kind of honed down I think are the important  
15 things.

16 Number one is making the justice system  
17 accessible and affordable to all who need it. Now,

18 this is an access to justice issue, obviously, but I  
19 think it is something that we can all focus on and  
20 agree on is an important principle of what we do as  
21 lawyers.

22 The second thing I like to talk about is  
23 making a living while at the same time upholding the  
24 highest values of our profession. Sometimes easier  
25 said than done, but it's something that is a goal that

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1 we all have and we want to strive to maintain.

2 And then the last thing I think that we can  
3 all agree on is maintaining civility in a profession  
4 whose classical structure involves argument and  
5 confrontation is a tough thing to do, but that's  
6 something that we all strive as lawyers and members of  
7 our Bar association to do.

8 Now, I have also talked around the state  
9 about a whole range of emerging problems, and I just  
10 want to kind of go through the litany list and not  
11 take up a lot of your time this morning, but things we  
12 are seeing at our level and you are seeing as everyday  
13 lawyers.

14 The first thing is the need for disaster  
15 planning in a time of potential pandemic or energy or  
16 cyber crisis. We see that as something that we need  
17 to deal with certainly at the State Bar level.

18 The preservation of civil liberties in the  
19 face of terrorist threats. It's a critical matter  
20 that we are facing today. The importance of upholding  
21 the rule of law in this country as well as around the  
22 world is really at the fore these days.

23 Helping our members learn to manage clients

24 in an age where clients can reach you by e-mail or  
25 cell phone 24 hours a day, and they do their own legal

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1 research on the internet. These issues that I see  
2 across the state. No matter where I go I hear these  
3 same things. Dealing with the problem of a large  
4 number of baby boomers reaching retirement age. I am  
5 one, so, you know, I am speaking from experience now,  
6 and the shock waves that their departure will send  
7 through our system.

8 Also on the flip side of that is dealing with  
9 the problem of aging lawyers who don't know when to  
10 retire, and we are trying to deal with that issue.  
11 And, of course, adapting the practice of law to the  
12 new reality of globalization and the ability to  
13 perform legal research and writing from anywhere and  
14 transmit it almost instantaneously as needed.

15 And a special concern I have noted in  
16 speaking with lawyers around the state is the growing  
17 prosperity gap between solo and small practitioners on  
18 the one hand and the large firms, and I know in this  
19 room we have solos and we have small firms and we have  
20 the large firms, but this is a concern, this is a  
21 problem, this is something that we are trying to deal  
22 with. And one of the ways that we are dealing with  
23 this is through the State Bar's, some State Bar  
24 programs, in particular the Practice Management  
25 Resource Center, which is geared to helping those who

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1 don't have those in-house abilities to have that kind  
2 of information that the larger firms may offer.

3 So these are some of the things that I have  
4 talked about. My theme this year for those who have  
5 had to sit through some of these Bar association  
6 meetings and listen to me is the senior lawyer issue.  
7 In November I set up a senior lawyer section planning  
8 group, because we are trying to figure out what we are  
9 going to do when these senior lawyers, these baby  
10 boomers begin their retirement and how can we use  
11 them. Really, we want to use them in some way to help  
12 with the pro bono needs that this state has and  
13 continues to have despite the excellent legal services  
14 providers that we have in the state, and I know some  
15 are here today.

16 So what I have done is I have set up this  
17 group. They have had some meetings. They are now  
18 moving forward. We are beginning to expand our group  
19 to include other stakeholders and resources, but as I  
20 have said in my talks around to the local Bars, we  
21 have a group who have a great deal of experience and  
22 knowledge, and there is so much that can be done.

23 Now, whether it's providing a section with a  
24 well written amicus brief or providing pro bono  
25 service to a couple who are being evicted from their

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1 home, or whether it's simply, you know, doing  
2 consulting work at a legal services office, or not  
3 consulting, but, you know, doing intakes, and I know  
4 Andrea, you could probably use some help in that  
5 regard.

6                   So those of us who are planning for  
7 retirement, what I am asking you to do is take a look  
8 at ways that you might do some work in your  
9 retirement. After all, there is only so much golf we  
10 can play, and particularly me. So I know there is a  
11 lot that can be done.

12                   When I talk about retired lawyers, I can just  
13 tell you very quickly that 52 percent of the active  
14 lawyers in this state are 50 years of age and older.  
15 Almost 23 percent are 60 and older, so there is going  
16 to be a broad, a group of lawyers who are going to  
17 start looking elsewhere to start to wind down their  
18 practices in the next ten years or so, and we are  
19 looking to really tap into that resource.

20                   So with your help, I would ask you to  
21 consider this if you are reaching those retirement  
22 years or if you are not to just think about it in  
23 general and ways that you can help us with this  
24 emerging issue.

25                   And I also want to thank you very much for

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1                   inviting me to speak to the Assembly. Like I said, I  
2 have been here since 1995, and you have got great  
3 leadership. It's a pleasure to work with them on the  
4 Board of Commissioners, and I hope it's likewise with  
5 the other Board members, but thank you very much for  
6 your time.

7                   (Applause.)

8                   CHAIRPERSON GARDELLA: Moving along, I would  
9 like to introduce Janet Welch. Many of you know her,  
10 but I would like to make a few comments about Janet.  
11 Positive ones.

12 Janet, as many of you know, she was the  
13 general counsel for the State Bar and eventually  
14 became the interim director and now executive director  
15 of the State Bar. She has been for the last year, and  
16 she has done marvelous work in that short time as the  
17 executive director.

18 But the positive things that benefit us that  
19 many people don't know about Janet is that her  
20 background in state government is extremely valuable  
21 to us, and, especially with all the proposals that we  
22 generate, our product can basically collect a lot of  
23 dust if we don't have good people that have good  
24 relationships and understanding of how our system of  
25 government works in Lansing.

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1 Janet does. Janet has been in Lansing in  
2 various capacities over the years. She has worked on  
3 the State Legislature, I believe it was the  
4 Legislative Analysis Office, doing research and  
5 analyzing the legislation. That was early on in her  
6 career.

7 She also was the general counsel for the  
8 Supreme Court, and also she worked her way over to the  
9 State Bar as the general counsel handling the various  
10 legal issues that come before the State Bar in our  
11 profession. That's extremely important for us.

12 When we looked for an executive director, I  
13 was on the Board of Commissioners when we made that  
14 choice, and Janet was definitely the clear choice. We  
15 needed her experience and guidance, and we have that,  
16 and we hope that she will be with us for many, many  
17 years. And her advice has helped the Assembly in so

18 many ways in helping us take the right direction on  
19 various issues, and I am appreciative of the guidance  
20 she gives to myself and the officers.

21 Janet is a Phi Beta Kappa graduate of Albion  
22 College. She is also a Fulbright scholar, and she is  
23 a graduate of University of Michigan Law School, and  
24 also she has been in Lansing for many years, as I  
25 said, but she is also a very good bowler, and we

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1 missed her yesterday. Each year the Young Lawyers  
2 Section bowls against the Board of Commissioners, and  
3 the Young Lawyers won again yesterday. Janet wasn't  
4 able to be there, and she is one of the most  
5 consistent bowlers that I know.

6 So with that, I introduce Janet, Janet Welch.  
7 (Applause.)

8 MS. WELCH: Thank you very much, Bob. Those  
9 are very generous remarks, and it's a lot nicer to  
10 hear that than Janet has been around for a very, very  
11 long time, which is true.

12 We also know that if bowling is any  
13 indication of one's success in public life, we have a  
14 sense of what the outcome of the democratic primary is  
15 going to be like.

16 Good morning. It is a pleasure to be here  
17 again. I was doing a count last night of how many  
18 times I have been at the Representative Assembly, and  
19 I came up with a count of 16 Representative Assembly  
20 meetings. I know some of you can beat me on that, but  
21 it's a lot of meetings. I have attended as a guest  
22 spectator from the Supreme Court, and I have been here  
23 as general counsel to the State Bar, and this is my

24 third meeting as Executive Director of the State Bar  
25 of Michigan.

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1 I have watched you all struggle with some of  
2 the most important questions of the day, like the  
3 rights of people deemed to be enemy combatants, and  
4 you got that right, as the Supreme Court is coming  
5 around to affirming. I have also watched you deal  
6 with critical small issues, little details, like the  
7 minutia of the contents of the SCAO forms, and you  
8 provided great service in that regard as well.

9 Each Assembly meeting has some unique and  
10 rewarding qualities, but they always share some common  
11 characteristics that I was thinking about last night  
12 as I was looking forward to this meeting.

13 Each Assembly meeting has produced at least  
14 one recommendation that's turned out to be of lasting  
15 value to the profession and to the public. Each has  
16 had some unexpected element of drama. At some point  
17 in each meeting I have realized that I have had not  
18 nearly enough sleep the night before. At each point  
19 in the meeting I have also experienced a nearly  
20 unbearable craving for sunlight that will come later  
21 in this day. And at each meeting, without fail, at  
22 some point some member will stand up against the  
23 apparent tide of consensus that's building and will  
24 make a remark so compelling or ask a question so  
25 provocative that you can just see the whole body

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1 concentrate its attention on the issue, and that is a  
2 really exciting moment, and I am looking forward to  
3 that moment today as well. I don't know when it's  
4 going to occur, but it will occur.

5 And at each meeting of the Representative  
6 Assembly that I have been at until today I have  
7 enjoyed the enlightening and sometimes raucous company  
8 of Kim Cahill. I am feeling her absence today, as I  
9 am sure many of you are, but I am also feeling her  
10 presence, and I wanted to speak to that.

11 Kim had many talents, and you have heard  
12 about many of them today, and you have seen many of  
13 them in action. But I think the secret of her  
14 leadership is that more than anyone else I ever met  
15 Kim Cahill believed in the power of the collective  
16 power of lawyers working together, lawyers of goodwill  
17 and intelligence, their power to effect a common good,  
18 and you as a group are Michigan's example of how to  
19 make that happen.

20 From this Assembly come the seeds of change  
21 in the profession and in the judicial system, seeds  
22 with the capacity to nourish the rule of law and to  
23 protect and advance the fairness and efficiency of our  
24 system of justice. And so in Kim's memory I am  
25 pleased to report to you today on what's happening

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1 with just a few of the seeds that you have sown.

2 As you directed in September of 2005, the  
3 State Bar of Michigan created a task force on  
4 custodial interrogation recording. To date that task  
5 force, which is composed of prosecutors, criminal

6 defense attorneys and law enforcement, has been  
7 working since May of 2006, and they have developed a  
8 pilot project for several sights around the state to  
9 obtain Michigan's specific information about custodial  
10 interrogation, to take the experience that has  
11 happened nationally and to bring that to bear in  
12 Michigan.

13 They have developed model policies for audio  
14 and video recording of interrogations. They have  
15 obtained funding from the Michigan State Bar  
16 Foundation and the Criminal Law Section, and thank you  
17 if you are in the Criminal Law Section for your  
18 assistance in that, to provide equipment,  
19 modifications and training for pilot sites, and those  
20 pilot sites are going to be critical to build  
21 consensus to get a change in the law.

22 One site has already been established in  
23 Jackson County. Where is Jackson County? A second  
24 site is anticipated soon in Washtenaw. Washtenaw is  
25 over here somewhere. I don't know the geography of

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1 this room yet. We have researchers from the  
2 University of Michigan who are assisting in that  
3 project, and there will be an informational hearing on  
4 the issue before the House Judiciary on April 30th.

5 So that is the result of the initiative you  
6 took, and that is building, and that will make a  
7 major, lasting difference in this state.

8 In September of 2006 you asked for changes in  
9 the state's garnishment forms, and I am here to tell  
10 you that the court published for comment your proposal  
11 in April of 2007. In response to the comments they

12 got back they decided not to adopt the proposal as you  
13 recommended it, asked some questions, and they have  
14 urged us to go back and to work with representatives  
15 of the banking industry and the Michigan creditors Bar  
16 on that issue, and we are doing that. So that issue  
17 has not come to fruition yet, but we are working on  
18 that, and it is still alive.

19 Last, but far from least, in 2002 you adopted  
20 11 principles of a public defense delivery system.  
21 You took the ten principles of the ABA for a good  
22 public defense system and you added the 11th  
23 principle, the Michigan principle as we want to call  
24 it now, because we want to be a model for the nation  
25 on this, calling for the involvement of defender

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1 offices in the design and operation of effective  
2 alternative sentencing programs.

3 What is happening on that front is that in  
4 2006 we talked the legislature into asking us, in  
5 combination with the National Legal Aid Defenders  
6 Association and the MLADA, and the State Court  
7 Administrative Office to partner in sponsoring a study  
8 of indigent criminal defense in Michigan. That study  
9 focused on ten Michigan counties. The counties  
10 themselves were selected by an advisory group of  
11 stakeholders that represented the state in terms of  
12 size, geographic location, the type of delivery  
13 system. The ten counties that were selected were  
14 Alpena, Bay, Chippewa, Grand Traverse, Jackson,  
15 Marquette, Oakland, Ottawa, Shiawassee and Wayne  
16 County.

17 Research teams of national experts spent a

18 significant amount of time in each county interviewing  
19 all the stakeholders in the justice system in those  
20 counties, watching courtrooms, compiling data. That  
21 report is going to be released soon. I am not going  
22 to give you a deadline for that, because we don't  
23 control when that's going to be released, but we are  
24 hoping that it will be released by the end of May.

25 Preliminary information indicates that the

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1 studies' findings will show details of systemic  
2 deficiencies in the delivery of the right to counsel,  
3 judicial and political interference, excessive  
4 caseload, involuntary waiver of counsel, and  
5 accountability failures. This is a significant,  
6 significant report, and it affirms what -- we  
7 anticipate that it will affirm and give data to  
8 demonstrate what the State Bar has been saying for as  
9 long as I have been aware of the State Bar, which is  
10 now in its fourth decade. This is an issue that the  
11 State Bar of Michigan has identified as important for  
12 40 years.

13 These, of course, are just a few of the seeds  
14 that you have sown for justice over the years. Kim  
15 knew, as you do, that the work doesn't stop with the  
16 adoption of a proposal, that, in fact, that's just the  
17 opening argument often in making the case, and  
18 sometimes the case isn't won for years, but one of the  
19 qualities that we have as lawyers is that we are  
20 patient. We know that patience is important, even if  
21 our clients don't always know that. We appreciate the  
22 importance of process, and we know that even if the  
23 fight is long, if it's important, the victory is all

24 that sweeter when it arrives.

25 So here's to our success in the decades to

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1 come in the long struggle for a better public defense  
2 system, and here is to success in your endeavors  
3 today. Thank you all, and for the reasons I cited  
4 earlier, I look forward to the afternoon.

5 (Applause.)

6 CHAIRPERSON GARDELLA: Next on our agenda we  
7 have our Nominating and Awards Committee Chair,  
8 Victoria Radke. If you could approach the microphone.  
9 Thank you.

10 MS. RADKE: I am here. Thank you, Robert.  
11 Good morning, everyone.

12 I am honored to have been appointed  
13 chairperson of the Nominations and Awards Committee,  
14 and the first order of business that I have this  
15 morning is filling the vacancies and the membership.  
16 I am pleased to announce that until a few days ago we  
17 had all seats filled and a hundred percent  
18 participation.

19 I received an e-mail from Anne on Thursday  
20 advising me that the seat in the Gaylord, Crawford and  
21 Kalkaska circuit, which is the 46th, became open  
22 because the representative from that circuit for  
23 personal reasons had to resign, and I was advised  
24 yesterday by Robert that there is an opening in the  
25 9th circuit. I also am pleased to announce that

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1 wheels have already been set in motion to fill those  
2 seats, and we hope to have them filled by the  
3 September meeting.

4 Having said that, there are currently  
5 vacancies which we are going to fill today. There is  
6 a list in your materials, but I would like to read off  
7 the names and ask the individuals who are named to  
8 stand so you can be recognized by this body.

9 From the 3rd judicial circuit, John Philo of  
10 Detroit and Margaret VanHouten of Dearborn.

11 From the 6th judicial circuit, Jennifer  
12 Hastings of Bloomfield Hills, Jeffrey Linden of  
13 Farmington Hills, Angelique Strong Marks of Troy, Mark  
14 Teicher of Bloomfield Hills.

15 From the 9th judicial circuit, Donald Roberts  
16 of Kalamazoo.

17 From the 17th judicial circuit, Troy Haney of  
18 Grand Rapids. Also from the 17th judicial circuit,  
19 Hal Ostrow of Grand Rapids.

20 From the 22nd judicial circuit, Erane  
21 Washington-Kendrick of Ann Arbor.

22 39th judicial circuit, Gregg Iddings of  
23 Adrian.

24 From the 40th judicial circuit, Michael  
25 Delling of Lapeer.

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1 From the 43rd judicial circuit, William LaBre  
2 of Edwardsburg.

3 From the 51st judicial circuit, Jeffrey  
4 Nellis of Ludington.

5 And from the 56th judicial circuit, Michael

6 Thomsen of Eaton Rapids.

7 At this time I would make a formal motion  
8 that these members who I have just names be seated and  
9 approval be given by the Representative Assembly for  
10 them to take their seats.

11 VOICE: Second.

12 CHAIRPERSON GARDELLA: I hear the motion and  
13 I also hear support already. Is there any discussion?

14 Not hearing any, all those in favor of the  
15 motion say aye.

16 Those opposed say no.

17 Any abstentions say yes.

18 And the motion carries.

19 I would also again introduce Victoria Radke,  
20 our Nominating and Awards Committee chair, to address  
21 the issue of the upcoming awards and the  
22 recommendations, but before she does that, all of the  
23 people who have been to seated to fill the vacancies,  
24 I welcome you to the Assembly, and I would like you to  
25 be seated in your circuits if you have not already

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1 done so.

2 (Applause.)

3 CHAIRPERSON GARDELLA: I would ask Victoria  
4 if you could come up to the front here.

5 MS. RADKE: Sure. I got a slight look from  
6 somebody up here.

7 Victoria Radke from the 47th judicial  
8 circuit. At this time it is an honor for me to put  
9 forth to you the names of those people that the  
10 Nominating and Awards Committee has selected for the  
11 Unsung Hero and the Michael Franck Awards.

12 The committee was unanimous in its selection  
13 for the Unsung Hero Award, and it makes me very proud  
14 of our profession to know that everybody who was  
15 nominated for both of those awards were very talented  
16 or very talented people, and we should be so proud to  
17 claim these people as members of our profession.

18 For the Unsung Hero Award one name came to  
19 the top, Susan Spagnuolo-Dal, an attorney with Central  
20 Michigan Legal Services. She exemplifies the  
21 characteristics of this award by the service that she  
22 has given to her community and especially to those  
23 disadvantaged members of the state of Michigan.

24 This award is given by the Representative  
25 Assembly, that's every one of you, to a lawyer each

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1 year who exhibits the highest standard of practice and  
2 commitment to others. You will see by the information  
3 in your packets, and I am not going to go through and  
4 list that for you today, that Ms. Spagnuolo-Dal is an  
5 exceptional individual who has served many members of  
6 our community and who continues to do so every single  
7 day of the week, of the month, of the year.

8 And so it is with great pleasure that I now  
9 move the Representative Assembly, with the permission  
10 of our Chairperson, to award the 2008 Unsung Hero  
11 Award to Susan Spagnuolo-Dal.

12 VOICE: Second.

13 CHAIRPERSON GARDELLA: The motion on the  
14 nomination of Susan Spagnuolo-Dal for the Unsung Hero  
15 Award has been presented, there is support. All those  
16 in favor say aye.

17 All those opposed no.

18 Abstentions say yes.  
19 Not hearing any, the motion carries.  
20 MS. RADKE: Thank you, Mr. Chairman.  
21 The next award, of course, is the Michael  
22 Franck Award, which is the highest award given by this  
23 body to an attorney who has made an outstanding  
24 contribution to the improvement of our profession,  
25 and, again, this was a very difficult decision because

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1 the people who were nominated all presented us with  
2 fine examples of people who truly give back to their  
3 profession.

4 However, it was the unanimous decision of the  
5 committee that we would nominate this year Thomas E.  
6 Brennan, Sr., the former justice of the Supreme Court,  
7 for his years of contribution to the Bar and to the  
8 public in preserving and improving the legal  
9 profession. His contributions to both the legal  
10 community and the community at large are well  
11 documented in your packets, and, again, I am not going  
12 to waste your time by going through them. Hopefully  
13 you have read them all, and you will join with me in  
14 approving this award.

15 At this time, therefore, with the chair's  
16 permission, I will move the acceptance of Thomas E.  
17 Brennan, Sr., for the Michael Franck Award.

18 VOICE: Second.

19 CHAIRPERSON GARDELLA: It's been moved that  
20 former Justice Brennan be selected as the Michael  
21 Franck Award winner. There is support. Is there any  
22 discussion?

23 Hearing none, all those in favor say aye.

24 Those opposed no.

25 Those abstaining, say yes.

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1 Hearing none, the motion carries.

2 MS. RADKE: I have one more thing. I would  
3 also like to take this opportunity to thank each of  
4 the members of the Nominating and Awards Committee who  
5 worked very hard to make sure that the seats were  
6 filled and who worked on selecting the award  
7 recipients for this year, and so if the members, if  
8 you are present today, I would ask you to stand. Tom  
9 Evans from the 5th circuit, Suzanne Larsen from 25th  
10 circuit, Michael Olson from 44th circuit, Jeff Nellis  
11 from the 51st circuit, Richard Paul from the 6th  
12 circuit -- thank you so much for your hard work,  
13 Richard -- and Jeff Crampton from the 17th circuit.  
14 Thank you for your hard work.

15 (Applause.)

16 CHAIRPERSON GARDELLA: Thank you, Victoria.

17 Moving along, our next item on the agenda is  
18 item number nine, the proposed policy on dues waiver  
19 for members serving in the military, and we have with  
20 us today as the presenter Greg Ulrich. Greg is a  
21 former chair of the Representative Assembly for the  
22 State Bar. He currently serves on the Board of  
23 Commissioners for the State Bar representing the Wayne  
24 County area, and I am not sure of all the other  
25 counties. Monroe and Lenewee county also. So, Greg,

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1 come on up.

2 MR. ULRICH: Good morning, everybody. One of  
3 the aspects of being involved in the American Bar  
4 Association has been the kind of forward thinking that  
5 the ABA has in its House of Delegates, and there was  
6 an opportunity that came up last summer at the ABA  
7 meeting where a recommendation had been presented to  
8 provide for a dues waiver for military lawyers serving  
9 on active duty in combat zones.

10 As it happened, I was having dinner, and the  
11 proponent in Virginia happened to sit down next to me,  
12 just by happenstance, and he told me that this was a  
13 matter that had to be taken back to each particular  
14 state and encouraged for adoption. He didn't come  
15 from any particular military background other than his  
16 own.

17 In my family we had at that point three  
18 family members serving in the military -- a nephew  
19 with the Army Rangers, my son Scott, and then a  
20 goddaughter serving in the Air Force.

21 I said that I would bring it back to  
22 Michigan, and with Janet's help, who also comes from a  
23 military family, and the encouragement of some others  
24 here in Michigan, Jim Fousone, who had served in the  
25 military while he was a lawyer, I saw that it might be

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1 something that we should consider here.

2 You have the proposal before you and in  
3 particular from Michigan it modifies the ABA's  
4 recommendation to this extent, it does not delineate  
5 combat zone as a criteria, and, frankly, there is a

6 reason behind that. There are some administrative or  
7 logistical aspects of determining combat zone  
8 participation, because actually the rear echelons of a  
9 deployed unit are considered part of a combat zone  
10 deployment, so you may have people in other parts of  
11 the world or here in the United States.

12 It has, in terms of impact on the Bar, what  
13 we believe to be a minimal impact. I believe at one  
14 point, about a month and a half ago, we had an  
15 estimate of about 15 attorneys who were serving.

16 If you have an opportunity to take a look at  
17 the American Bar Association Journal for April, there  
18 was a piece in there about an attorney from Alabama  
19 named Sterling DeRamus, who is a naval reserve officer  
20 and has been called up to Afghanistan. He is going to  
21 assist in rebuilding in Afghanistan.

22 We have military lawyers serving as JAG  
23 officers who are assisting individuals with their  
24 civil matters, but they are fairly constrained.  
25 Numbers of attorneys in the military are not what is

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1 needed for the force, military force.

2 I think anything we can do to respect their  
3 commitment, their sacrifice, and their devotion, as  
4 well as to indicate our support of them as lawyers, is  
5 worthwhile, and so I move the motion for your  
6 consideration.

7 VOICE: Second.

8 CHAIRPERSON GARDELLA: Just as a point of  
9 procedure, we need a motion from one of the members of  
10 the body on this matter. Do I hear a motion on this  
11 matter?

12 VOICE: So moved.

13 VOICE: Support.

14 CHAIRPERSON GARDELLA: It's been moved on the  
15 waiver issue. We have support. Is there any  
16 discussion? Judge Kent.

17 JUDGE KENT: Wally Kent, 54th circuit. Greg,  
18 the only question I have is why limit it to four  
19 times? If they are on active duty, they are not  
20 competing with us, they are making the sacrifices that  
21 you mentioned, why shouldn't we allow them to remain a  
22 member of the Bar until such time as they leave active  
23 duty and return to private practice?

24 MR. ULRICH: My information is, based on the  
25 ABA, is the ABA had a limitation, I believe, of three

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1 years, doesn't have to be consecutive. Four years was  
2 to move beyond that. I understand your concern,  
3 because you could have a deployment plus additional  
4 reserve service as active duty that could extend five  
5 years supposedly or even seven years, depending on  
6 when you had finished your active stint.

7 JUDGE KENT: I am thinking also of those who  
8 are in full-time career practice with JAG Corps or  
9 otherwise but active duty for their 20 or 30 years,  
10 would you entertain a friendly amendment to delete  
11 that restriction?

12 MR. ULRICH: I need to talk to Janet first,  
13 because I am not sure about the fiscal impact to that.

14 Janet was reminding me of the ABA's analysis.  
15 One was that if it were open ended that you would  
16 have, and extending to everybody who was on active  
17 duty, the potential was that you would have some

18 people who are in reserve or National Guard service  
19 who would seek that active duty status.

20 The idea is not something that cannot be  
21 revisited, and I think as a first attempt to do this  
22 and exceeding the ABA's approach, which was three  
23 years, and the ABA was trying to restrict it to combat  
24 only, this would take care of those who are deployed  
25 in the states or in Pacific base, and that would

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1 extend to quite a number of people.

2 So I think the prudent thing at this point is  
3 to put it in place, try it out, and then it can be  
4 revisited if it looks like there is a greater need.  
5 Does that answer, Judge?

6 JUDGE KENT: It does. Thank you.

7 CHAIRPERSON GARDELLA: Any other discussion  
8 on this matter? Mr. Abel.

9 MR. ABEL: Thank you, Mr. Chairman. Matthew  
10 Abel from the 3rd circuit. At the risk of seeming  
11 unpatriotic, I have to oppose this resolution. To me  
12 it appears that this encourages our members to go into  
13 the military. It subsidizes war, if you will. It  
14 encourages that aspect.

15 We should reward the peacemakers, not the  
16 warmakers. There is certainly inactive status that's  
17 available to anyone who is not practicing law in  
18 Michigan. So if you don't want to pay your dues, you  
19 are not practicing law, you can go on inactive status,  
20 but I think that perhaps it sends the wrong message to  
21 society that we are encouraging our members to go to  
22 war by reducing their dues. Thank you.

23 CHAIRPERSON GARDELLA: Is there any other

24 discussion on the matter? Any other commentary? On  
25 the prior comment there was no need to do any

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1 amendments on the motion at that point.

2 So hearing no other discussion, I would --  
3 and we have the motion to support -- I would ask for a  
4 vote on this matter. All in favor of the motion,  
5 please state aye.

6 All opposed say no.

7 All abstaining say yes.

8 After the vote, the ayes have it, and the  
9 motion passes. Thank you, Greg.

10 MR. ULRICH: Just a moment here to thank  
11 everybody who had expressed their concern about the  
12 death of our son Scott. I appreciate it. My wife  
13 Linda, Todd, and Tessa have been deeply affected by  
14 the expressions of sympathy. So thank you.

15 (Applause.)

16 CHAIRPERSON GARDELLA: We are going to move  
17 ahead here on the agenda to try to keep ahead of  
18 schedule. Item number 11, consideration of political  
19 and judicial endorsements by Assembly officers. Our  
20 member, Joan Vestrand from the 6th circuit, if you  
21 could approach.

22 MS. VESTRAND: This is a proposal to prohibit  
23 the officers of the Representative Assembly from  
24 endorsing a candidate for judicial or political office  
25 during their term of office as a Representative

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1 Assembly member. Yesterday this same proposal was put  
 2 before the Board of Commissioners, and it was tabled  
 3 yesterday.

4 Because of that, I would withdraw  
 5 consideration of the proposal at this meeting before  
 6 this body until the Board of Commissioners has had the  
 7 opportunity to review the proposal and take action  
 8 regarding it and bring it back to the Rep Assembly at  
 9 that time.

10 CHAIRPERSON GARDELLA: At this time we do not  
 11 need to take a vote on this matter because it is being  
 12 withdrawn and it will be resubmitted at a later time.  
 13 So thank you very much for addressing it.

14 The next item is item number 12,  
 15 consideration of ABA Model Court Rule on provision on  
 16 legal services following determination of major  
 17 disaster and Terri Stangl will be the proponent on  
 18 this matter.

19 MS. STANGL: Good morning. This proposal  
 20 under item 12 came up through the pro bono initiative  
 21 under the Committee on Justice Initiatives, and it is  
 22 a proposal to adopt another ABA Model Rule that was  
 23 developed in response to the events of Hurricane  
 24 Katrina, and, as President Keefe mentioned, the idea  
 25 of disaster response is something that Bar

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1 associations are looking at around the country, and  
 2 it's my understanding that at least 15 states are at  
 3 various stages of considering the adoption of this  
 4 rule.

5 The rule essentially has two components. The

6 first one is to address the legal needs of people who  
7 are displaced who may need pro bono assistance, and it  
8 would allow a state that has a disaster to -- if  
9 Michigan had a disaster, for example a flood,  
10 tornadoes, whatever, civil disaster, it would allow  
11 our court to declare that disaster and allow other  
12 attorneys to come into Michigan, and if they worked  
13 under the auspices of a pro bono program, through a  
14 Bar association or a legal services office or  
15 otherwise authorized by the court, those pro bono  
16 attorneys could practice law on behalf of victims of a  
17 disaster and not be violating unauthorized practice of  
18 law. They could not get a fee for the service. They  
19 would have to register within 30 days with the  
20 Supreme Court, and they would be subject to the  
21 ethical rules of this state.

22 They would have to get pro hac vice approval  
23 to appear in courts of this state unless the  
24 Supreme Court specifically authorized as a group  
25 pro bono practice in one or more kinds of cases. So

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1 it's a limited pro bono allowance that would be under  
2 the control of the Supreme Court to address the needs  
3 of people, either residence of Michigan or people who  
4 may come to Michigan from another state. You know, as  
5 we saw with Katrina, people went to Mississippi from  
6 Louisiana and had legal needs there. So volunteers  
7 were trying to go down to that neighboring state or  
8 help them out in that neighboring state.

9 The second part of the proposal would deal  
10 with the needs of lawyers themselves, so if, for  
11 example, there were a major tornado in Northern Ohio

12 and Toledo was wiped out and those attorneys had no  
13 where, no physical office, and the Ohio Supreme Court  
14 would he have to define that they had a disaster, our  
15 Supreme Court would have to recognize there had been a  
16 disaster and then could authorize an Ohio attorney to  
17 be physically located in Michigan for the time  
18 approved by the court where they agree that that's  
19 necessary. They could not take Michigan cases, they  
20 could only do the legal work arising from their Ohio  
21 practice, but if they were taking calls, holding out  
22 themselves in Michigan doing that work, they would not  
23 be susceptible to being accused of doing unauthorized  
24 practice of law.

25 So that's the limited issue that they are

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1 trying to address. So they are saying I am a lawyer,  
2 I am doing my Ohio work, but I happen to have a  
3 Michigan address here. For that purpose, it would not  
4 be a problem.

5 So those are the two issues that this  
6 proposal is attempting to address, and I would move  
7 that the recommendation under item 12 be adopted.

8 VOICE: Support.

9 CHAIRPERSON GARDELLA: There is a motion on  
10 the floor. I hear support. Is there any discussion  
11 on this matter?

12 Hearing none, I would call for a vote. All  
13 those in favor say aye.

14 Those opposed no.

15 One no. Any abstentions, yes.

16 One abstention. And hearing that result, the  
17 motion carries. The matter is passed and approved.



24 I don't want you to search my car, and the officer  
25 pushed him out of the way and searched the car anyway

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1 and then lied about it, we are just stuck because the  
2 judge believes the officers.

3 Now, it's one thing where there is no  
4 recording, but it's different where there is a  
5 recording and it turns up missing, where it's actually  
6 put on evidence but isn't saved as evidence or where  
7 the audio portion goes out at the critical moment or  
8 where the video goes out at the critical moment.

9 How many people in this room practice  
10 criminal defense? Now keep your hands up for a  
11 minute. Any of those of you who have not seen this  
12 situation happen put your hands down. What, a couple  
13 people, two people put their hands down. Look how  
14 many hands are left up. Okay. Thank you. So that's  
15 a demonstration.

16 Now, I have been doing this 22 years, and I  
17 am sick and tired of it. And it's one thing if a tape  
18 inadvertently gets destroyed, and I know there are  
19 rules about bad faith, but the problem is there is bad  
20 faith, and we just can't prove it. There is bad faith  
21 over and over and over again. And it's the bad faith  
22 on the part of the police, and sometimes the  
23 prosecutor will go along with them.

24 But as a defense attorney and for a  
25 defendant, the cards are stacked against us highly

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1 enough. This rule would just put a modicum of justice  
 2 into the justice system. I think it's needed. I  
 3 would be happy to answer any questions.

4 I move passage of this proposal.

5 VOICE: Support.

6 CHAIRPERSON GARDELLA: It's been moved, item  
 7 number 13, preservation of electronic recordings.  
 8 There is support. Is there any discussion on this  
 9 matter?

10 I would recognize Vice Chair Kathy Kaki sh.

11 VICE CHAIR KAKISH: Mr. Chair, Kathy Kaki sh,  
 12 Vice Chair of the Representative Assembly, also from  
 13 the 3rd circuit.

14 I am an assistant attorney general, and  
 15 before you on the table this morning you would find  
 16 these, I guess you would call this light orange,  
 17 salmon color handouts. This is a handout that comes  
 18 from the Department of Attorney General. I do want to  
 19 mention that I am not representing the Department of  
 20 Attorney General as I speak now. I am only here in my  
 21 personal capacity as a member of this esteemed body.  
 22 However, in reviewing the comments that the attorney  
 23 general has written, I believe they should be  
 24 mentioned.

25 With respect to this particular amendment, I

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1 stand here in agreement with the attorney general in  
 2 believing that it should be opposed.

3 I see from the amendment that there is no  
 4 wiggle room for evidence to be inadvertently  
 5 destroyed. The language of the proposed Rule 6.201

6 clearly indicates that failure to preserve such  
7 evidence shall entitle the accused to a jury  
8 instruction that such evidence not produced should be  
9 presumed by jurors to have been adverse to the  
10 prosecution.

11 The attorney general's comment with respect  
12 to this is on the third page, I believe, the first  
13 full paragraph, and I would like to read that. It  
14 says that we believe that the proposed addition to  
15 this amendment is unnecessary and unduly burdensome  
16 and could result in injustice based on inadvertent  
17 conduct of well-intentional law enforcement personnel.  
18 And it could be a deterrent from having the police  
19 officers electronically record items for the fear of  
20 losing it down the road.

21 Therefore, I do support the attorney  
22 general's view on this matter, and, as a member of  
23 this esteemed body, I personally oppose it. Thank  
24 you.

25 CHAIRPERSON GARDELLA: Thank you. If you

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1 could state your name and circuit for the record.

2 MR. KROHNER: Martin Krohner, 6th circuit. I  
3 also have a privilege and honor to be co-chair of the  
4 Criminal Jurisprudence and Practice Committee. We had  
5 our monthly meeting two days ago where we discussed  
6 all these proposals. The committee did support this  
7 particular proposal in a vote. However, we did  
8 discuss the issue, the electronic recording evidence.  
9 We did come up with what we consider to be a friendly  
10 amendment that after the word "evidence" in the first  
11 line there be a comma with the words "which is

12 introduced at trial," so we are looking for items that  
13 are actually introduced at trial, not items that are  
14 kept.

15 Also, there was a question brought up by the  
16 committee which they asked me to address today and  
17 that is the length of time the appellate process will  
18 take because there was some concern about the 6500  
19 motions, and so there was issues as to how long these  
20 items would actually have to be retained by the  
21 prosecuting attorney, and some people felt it could be  
22 retained for many years which may create a burden, so  
23 we would like just to have that question addressed by  
24 the proponent.

25 MR. ABEL: Mr. Krohner, question. Does that

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1 mean if the item is destroyed before trial and never  
2 introduced then nothing is ever said about it?

3 MR. KROHNER: No, we are saying that it's  
4 actually physically introduced as part of the judicial  
5 proceedings against your client or whoever the  
6 defendant may be.

7 MR. ABEL: Well, if it's been destroyed,  
8 advertently or inadvertently, how would it ever be  
9 introduced at trial?

10 MR. KROHNER: We are talking about the item  
11 that was actually introduced at trial, not that there  
12 has been any destruction prior to the actual  
13 proceedings.

14 MR. ABEL: There is already a rule requiring  
15 preservation of evidence introduced at trial, so that  
16 would seem to be redundant. I don't get it.

17 MR. KROHNER: The fact of the matter is if

18 the item is not introduced at trial, do you want it  
19 kept, you know, ad infinitum?

20 MR. ABEL: I see what you are saying.

21 CHAIRPERSON GARDELLA: At this point the  
22 question is would the proponent accept this as a  
23 friendly amendment at this point instead of going back  
24 and forth with discussion on it.

25 MR. ABEL: No, I think this guts the

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1 intent -- one of us is misunderstanding here.

2 MR. KROHNER: Then I would move that the  
3 words that I just had put up there be introduced as an  
4 amendment to the proposed rule.

5 VOICE: Second.

6 CHAIRPERSON GARDELLA: The amendment has been  
7 proposed. There is support. Is there discussion on  
8 the amendment to the motion?

9 JUDGE KENT: Wally Kent, 54th circuit. I  
10 rise in objection to the proposal to amend. As  
11 Mr. Abel suggests, this guts it. The whole point of  
12 Mr. Abel's proposal, as I understand it, is to  
13 preserve evidence for exculpatory as well as culpatory  
14 purposes. If it's not introduced at trial and you  
15 don't have to preserve it, the exculpatory potential  
16 is destroyed.

17 MR. CRAMPTON: Jeff Crampton from the 17th  
18 circuit. I also oppose this amendment, but I think  
19 you can accomplish what -- I think both ends can be  
20 accomplished by taking that language and moving it to  
21 the next sentence. So any electronic recording  
22 evidence made by a governmental agency or agent  
23 pertaining to the matter known to the prosecuting

24 attorney would stay in as something that must be  
25 produced by the government and saved by the

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1 government. Such records which are introduced at  
2 trial shall be preserved by the prosecuting attorney  
3 until after all appeals have been exhausted I think  
4 accomplishes what I think is the intent of this  
5 proposed amendment and would be fine. Certainly if  
6 it's been introduced, it should be preserved until all  
7 the appeals have been exhausted, and if it's not been  
8 produced, then there is no point in saving it any  
9 longer.

10 CHAIRPERSON GARDELLA: Just as an order  
11 point, we can't do another amendment while that motion  
12 is pending.

13 MR. CRAMPTON: I understand. I oppose this  
14 amendment because I think you can accomplish both  
15 goals by doing it that way.

16 CHAIRPERSON GARDELLA: Is there any other  
17 discussion on the amendment that is pending? Please  
18 state your name and circuit.

19 MR. LINDEN: Jeff Linden, 6th circuit. I  
20 would also oppose the amendment. I agree with  
21 Mr. Abel, that if I understand the purpose of the  
22 original proposal is to address the situation where  
23 some sort of electronic evidence or recording is  
24 created at pre-trial and that is destroyed  
25 inadvertently or intentionally. If you have an

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1 introduction in trial requirement, there is no way of  
 2 having any sanction levied for what would be the  
 3 destruction of evidence, you know, whether it's  
 4 favorable or not favorable to the defendant.

5 I understand the purpose of this proposal to  
 6 address pre-trial evidence that is known to exist at  
 7 one time that for some reason or another, whether by  
 8 avarice or accident disappears and having a remedy and  
 9 something presented to the court or jury with respect  
 10 to the example would be a drunk driving case where  
 11 there are field sobriety tests which are videotaped.  
 12 The officer testifies that the person failed the field  
 13 sobriety test which led to probable cause finding for  
 14 the prosecution. The defendant and the defense  
 15 attorney claims I didn't fail, no reasonable person  
 16 would have said that I failed, let's look at the  
 17 videotape which we know was made. Now the videotape  
 18 doesn't exist pre-trial for any hearing. I believe  
 19 that is an example of the issue the proposal is trying  
 20 to address in having it required to be introduced at  
 21 trial before an obligation to preserve would negate  
 22 and completely ineffectuate the purpose of the  
 23 proposal, and for that reason I would oppose the  
 24 amendment to the proposal.

25 CHAIRPERSON GARDELLA: Thank you. Any other

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1 discussion on the amendment? Hearing none, we will  
 2 vote on the approval of the amendment.

3 All those in favor say aye.

4 All those against say no.

5 And all those abstaining say yes.

6 The noes have it on this matter.

7 Now we move ahead. Further discussion  
8 relating to the overall underlying motion.

9 Mr. Elkins.

10 MR. ELKINS: Good morning, Michael Elkins  
11 from the 6th circuit.

12 While I strongly agree with the proposal by  
13 Mr. Abel, I would propose a friendly amendment to it.  
14 The basis for it is that quite often the prosecuting  
15 attorney or the city attorney will plead lack of any  
16 information as to what the police department, which is  
17 actually an agent of the prosecution, but will say  
18 that we don't know what they have and we don't have  
19 any influence over them. It's patently incorrect.  
20 They can send a letter or put them on notice, they  
21 being the police department, to maintain and preserve  
22 the evidence.

23 Accordingly, I would move that to amend,  
24 after the word "prosecuting attorney" at the end of  
25 the first sentence, add the language "or the police

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1 agencies involved." Agencies involved.

2 CHAIRPERSON GARDELLA: I would inform  
3 Mr. Elkins that that is agreed to by the proponent as  
4 a friendly amendment.

5 MR. ELKINS: I understood it might be. The  
6 reason, of course, is that there is very little burden  
7 on the prosecution when they have received a request  
8 to preserve evidence, simply to send a letter to the  
9 police department saying don't erase it. Because of a  
10 policy many of the police departments do erase these  
11 in the, quote, normal policy matter of the passage of

12 time.

13 CHAIRPERSON GARDELLA: I think I also have to  
14 ask the person who gave the support, is that agreeable  
15 to the person who supported the motion, wherever you  
16 are?

17 MR. BARTON: Yes.

18 CHAIRPERSON GARDELLA: Any further  
19 discussion?

20 MR. ELKINS: I would ask that it be approved.

21 MS. MCQUADE: Nothing to say to the  
22 amendment.

23 MR. POULSON: Barry Poulson, 1st circuit.  
24 This is really the gist of what goes on, right, the  
25 police destroy the recordings. Now, I come from a

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1 more advanced or maybe enlightened county where I  
2 recently won a Walker hearing because the police  
3 didn't record an interrogation on videotape. Judge  
4 simply asked them, Do you have videotape? Why didn't  
5 you record it? The confession, so-called, goes out.  
6 And so that's the standard now, at least for the  
7 sheriff's department in our county, but I think that  
8 may not be universal across the state, right?

9 What we are asking here is that the evidence  
10 simply not disappear, and if it does disappear, to say  
11 what we often say in our summations at jury, the  
12 prosecutor had the evidence, they didn't bring it to  
13 trial. The reason they didn't bring it to trial,  
14 because it helped the defendant, right? So that would  
15 allow the court, the point of this amendment is to get  
16 to the people who are really destroying the actual  
17 evidence and tell them if you are going to destroy it,

18 it's going to look bad for you in court. So I support  
19 that amendment with that in mind. Thank you.

20 CHAIRPERSON GARDELLA: Any further  
21 discussion? My understanding is that we continue on  
22 with discussion because it is a friendly amendment and  
23 received support.

24 MS. MCQUADE: Discussion on the merits then?

25 CHAIRPERSON GARDELLA: On the overall

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1 proposal.

2 MS. MCQUADE: Barbara McQuade from the  
3 3rd circuit.

4 First I want to applaud my friend, colleague,  
5 and fellow progressive, Matt Abel, for bringing to us  
6 challenging issues to debate today before the  
7 Assembly. However, I must strongly oppose this one.  
8 And, you know, I don't even mind that this is  
9 burdensome. Of course it's burdensome.

10 I am a federal prosecutor, and it should be  
11 burdensome to prosecute people in court, but what I am  
12 concerned about is this rule, as written, will cause  
13 great injustice to victims.

14 And I think, as Roberts P. Hudson has said,  
15 we have to worry about protecting the public, as well  
16 as the defendant, and I think the status quo does  
17 that. This rule would require that there be this  
18 instruction that jurors should presume that the  
19 recording would be adverse to the prosecution  
20 regardless of the reason it no longer exists. Whether  
21 that was inadvertent erasure, a flood, Hurricane  
22 Katrina, doesn't matter, this instruction must be  
23 given. It doesn't matter whether this recording was

24 favorable to the prosecution. Maybe it's a  
25 confession. Maybe it's Charles Manson confessing to

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1 the crimes. It doesn't matter. The jury gets  
2 instructed that they should presume it was against the  
3 prosecution.

4 And it doesn't matter whether there are  
5 multiple witnesses, lay witnesses, anyone who will  
6 say, yeah, it was a confession, doesn't matter, the  
7 court must, shall instruct the jurors that it would be  
8 adverse to the prosecution. And so I believe that  
9 this rule would cause great injustice against victims.

10 Of course, we certainly need to safeguard the  
11 rights of defendants, as well as the rights of  
12 victims, and I believe the law already does that. The  
13 Court Rules provide that the prosecution must produce  
14 evidence that is exculpatory, including recordings.  
15 The current law also allow defendants to argue that  
16 the jury may infer that the recording was adverse to  
17 the prosecution, and the law allows courts to instruct  
18 the jurors on a case-by-case basis. There is nothing  
19 that precludes a court from issuing such an  
20 instruction, but to say that it shall be instructed  
21 would result in some cases in injustice, and for that  
22 reason it should be rejected.

23 CHAIRPERSON GARDELLA: Thank you.  
24 Mr. Debiasi.

25 MR. DEBIASI: William M. Debiasi from the 3rd

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1 circuit, and I would like to echo the sentiments of my  
2 colleague. We have the same problem with this  
3 presumption.

4 As the attorney general has pointed out, this  
5 would create a situation in which you may have five  
6 eye witnesses to the occurrence of a particular event  
7 and all of those eye witnesses have testified and  
8 testified in a consistent manner. However, because  
9 there is some clerk in the records department may have  
10 misplaced the piece of videotape which more than  
11 likely is inculpatory, then the judge is placed in the  
12 position where the judge must instruct the jury that  
13 you are to presume that it is contradictory to all of  
14 the testimony of the witnesses even where there is not  
15 a showing of any kind of bad faith or any kind of ill  
16 intent on the part of the prosecution. It's  
17 contradictory to the ends of justice, it is an  
18 unintended consequence of what I believe Mr. Abel is  
19 trying to accomplish.

20 Secondly, Mr. Abel does state as the  
21 proponent that he believes that the lower costs of  
22 higher storage capacity of newer storage devices  
23 should make additional expense, if any, minimal. What  
24 I would like to know from Mr. Abel is what backup does  
25 he have for that? Did you talk to police departments?

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1 Do you know anything about police administration? You  
2 have got a multifaceted issue here. It's not just a  
3 question of storage of the record, it's a question of  
4 making the determination of what records to store,  
5 because as I read this particular rule, a

6 determination will have to be made to store records  
7 indefinitely.

8 If somebody gets arrested and they leave on  
9 bond, which happens quite commonly, and you have to  
10 pick somebody up a year, two years, three years later,  
11 you have got to store those records forever, for four,  
12 five, six years?

13 MR. ABEL: Just till the Statute of  
14 Limitations runs out.

15 MR. DEBIASI: How long are you -- well, it  
16 won't while they are on bond, while they are  
17 absconded, and you know that.

18 What determination have you made about the  
19 actual administrative cost both in terms of money and  
20 in terms of personnel? It's easy to say the  
21 government can hire more people or spend more money,  
22 but I don't know of one governmental agency in  
23 Michigan that's in that position right now.

24 MR. ABEL: This does not force the creation  
25 of any records. It only forces preservation of

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1 records that are already created.

2 MR. LARKY: Mr. Chairman, Mr. Abel is out of  
3 order.

4 MR. ABEL: This is a response. I asked the  
5 chair if I could. If I am out of order, I will sit  
6 down. Judge.

7 CHAIRPERSON GARDELLA: I would give him a  
8 privilege for a brief response but without getting  
9 into a dialogue back and forth or a debate.

10 MR. ABEL: My other comment is that I think  
11 we could take judicial notice that the cost of

12 electronic storage goes down at a rapidly progressive  
13 rate and has historically for the last 20 years and is  
14 going to continue to go that way, so it gets cheaper  
15 and cheaper. You really want to debate that issue? I  
16 don't think so.

17 MR. DEBIASI: As my final point, with respect  
18 to the presumption, under cases such as Greenfield  
19 case, as my colleague pointed out, the judges still  
20 have authority under a case-by-case basis to fashion  
21 whatever instruction they believe is in the interest  
22 of justice in terms of the circumstances surrounding  
23 what a videotape may contain, whether the prosecutor  
24 even knew it existed, whether the prosecutor had even  
25 seen it and what relationship it may have had to any

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1 particular issue in the case, and there is no reason  
2 to, by virtue of this amendment, to take that judicial  
3 discretion away, which would be more properly applied  
4 in a case-by-case basis.

5 CHAIRPERSON GARDELLA: Thank you. Next.

6 MS. COOK: Good afternoon, Shon Cook of the  
7 17th circuit. I am sorry, the 14th circuit. I forget  
8 where I am from.

9 Anyway, the office that I work in we do city  
10 prosecution for numerous municipalities. I myself  
11 have done criminal defense throughout the years and  
12 found myself in Mr. Abel's position many times.

13 The reason why I think this rule is important  
14 is because in preserving this evidence I think it  
15 often leads to resolution of matters, that being how  
16 many times I have actually had a tape that I could  
17 show to my client and demonstrate you were, in fact,

18 weaving all over the road, all off the road and into  
19 the field, whereas they have a much different  
20 recollection or other factors that you find in those  
21 tapes that can be helpful.

22 I find that for that reason alone it should  
23 be preserved so that you have something you can show  
24 to your client or as a city prosecutor you have the  
25 ability to demonstrate that you, in fact, have a case

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1 that should not be going to jury trial and, in fact,  
2 should not be burdening the taxpayers, so for those  
3 reasons I support this rule.

4 CHAIRPERSON GARDELLA: Thank you. Next.

5 MR. LAITUR: Good Afternoon, my name is Tim  
6 Laitur. I am the Representative Assembly  
7 representative from the 38th circuit. I am also the  
8 Rose City attorney, and I rise in opposition to this  
9 proposal. Basically, in summary, I support the  
10 objective or the alternative decisions reached by the  
11 attorney general's office as well as the Sherman and  
12 Sherman, P.C.; however, Mr. Debiasi did make a good  
13 point that I think is relevant to small  
14 municipalities.

15 Now, the City of Monroe, my police chief has  
16 a \$5.5 million budget. Don't ask me why, but he does.  
17 He is one of these computer kind of nerd guys who has  
18 all sorts of buzzers and buttons and could do that.  
19 Down the road we have Erie Township that has five  
20 part-time police officers. They put their police  
21 budget together with bubble gum and wrapping tape. I  
22 think it would perform a real injustice to smaller  
23 municipalities, and for that reason alone I would ask

24 that this proposal be defeated.

25 Also, I am sorry I neglected to mention that

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1 I am the liaison for the Public Corporations Section  
2 too, and I have made this issue known to a couple of  
3 the -- John Barr from Ypsilanti and a couple of other  
4 city attorneys, and they have indicated the same  
5 thing. Thank you, Chairperson.

6 MR. EVANS: Thank you. Tom Evans, 5th  
7 judicial circuit, Barry County prosecutor. In many  
8 ways I am in support of Mr. Abel's proposal in that we  
9 do search for justice, and nine times out of ten the  
10 911 tapes sound like the Blair Witch Project and they  
11 are actually very helpful to our prosecution, and we  
12 don't want to prosecute innocent folks either, so in  
13 that way I am very supportive, but I have a couple  
14 pragmatic issues with the way it's presented here.

15 One is the retention length, which it really  
16 sounds like it could be forever. As far as  
17 Mr. Laitur, I am not sure about the municipal  
18 prosecution, but the Prosecutors Association of  
19 Michigan has established retention policies, so have  
20 State Police agencies, and so, first of all, I think  
21 it's unrealistic and unfair to ask folks to keep  
22 evidence for longer than those established retention  
23 policies which exist and are very broad.

24 The second thing is, placing the burden on  
25 the prosecuting attorney to do this preservation is

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1 also unrealistic. As we do not hold evidence,  
2 generally we do not testify. Generally that's held by  
3 a police agency. And I can jump up and down and say,  
4 hey, sheriff, don't get rid of that stuff, so could  
5 this guy right here, okay, it doesn't mean anything.  
6 So putting that obligation on the prosecution is also  
7 something that's very cumbersome.

8 In the end, failure to preserve such evidence  
9 shall entitle the instruction, to me -- I mean, for  
10 the argument absurdum, let's say I am the defendant.  
11 I see the 911 tape and I eat it at the preliminary  
12 examination and I say, judge, you got to give that  
13 instruction.

14 Well, under your proposal, that would be true  
15 Mr. Abel, and so, you know, and you very ably  
16 presented yourself here. Maybe something to the  
17 nature of, you know, if bad faith is shown or gross  
18 negligence is demonstrated that they would be entitled  
19 to that instruction, but, Matt, it might not be their  
20 fault. There may be some other personal recollection  
21 that is quite reliable, and that just seems to paint  
22 with such a broad brush that it would not achieve the  
23 goals of justice. Thank you very much.

24 CHAIRPERSON GARDELLA: One point of  
25 procedure, permanent procedure does prohibit any

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1 member from speaking twice on the same motion, so if  
2 you have already spoken once, you cannot speak twice.  
3 So Mr. Nellis, I would recognize you.

4 MR. NELLIS: Jeff Nellis from the 51st  
5 circuit. I am here to speak in favor of this

6 amendment. I think why this is really important is  
7 because I think it might be the impetus that law  
8 enforcement needs to sort of reevaluate their  
9 practices as far as how they save this information.

10 I practice in a small town up north, and the  
11 thing I encounter a lot, we don't have the newer  
12 systems, but I hear all the time where they tape over,  
13 and so it's like a lot of things in the law, it may  
14 seem a little bit extreme, but what it will really do  
15 is force those that are creating the evidence in the  
16 first place to take a second look at how they are  
17 preserving this. I think if they know this rule is  
18 out there, the problems of adverse things that we are  
19 talking about will actually be solved by law  
20 enforcement themselves by maybe being a little more  
21 careful, not taping over and that type of thing. So I  
22 think this is an example where the law can really help  
23 put it -- people who are not lawyers, force them to  
24 change their actions a little bit.

25 I know in drunk driving cases if you have got

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1 a tape, it actually saves judicial resources, because  
2 if there is a good tape, those drunk driving cases  
3 almost never go to trial because the tape pretty much,  
4 it's all right there. You are wasting your time on  
5 one side or the other, so I think we need this  
6 procedure, because I think that evidence is really  
7 important.

8 CHAIRPERSON GARDELLA: Thank you.

9 MR. LINDEN: Jeff Linden, 6th circuit. I had  
10 a comment on the first proposed amendment to the  
11 proposal. I did not comment on the actual proposal

12 itself. The question is would my comment on the  
13 original proposal be out of order?

14 CHAIRPERSON GARDELLA: That would be fine.  
15 You can make commentary because you did not comment on  
16 the underlying motion.

17 MR. LINDEN: I have a couple of comments and  
18 then perhaps a friendly amendment also.

19 I have a wide-based practice which has  
20 included criminal defense in both state and federal  
21 courts, as well as a civil practice. The problem  
22 sought to be remedied by this proposal is paramount.  
23 It occurs often, but on the other hand I recognize the  
24 needs and the comments of my distinguished colleagues  
25 in the prosecutorial practices that an absolute

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1 instruction saying that a presumption shall be made  
2 when sometimes this evidence could be lost by  
3 inadvertence through no fault of anybody would be  
4 overstepping.

5 Perhaps it's possible where we could propose  
6 an amendment to change -- I would propose an amendment  
7 to change the language in the instruction that the  
8 court shall instruct that the jury "may presume"  
9 instead of "shall presume," because what it would do,  
10 it would open the circumstances of the loss of  
11 evidence to discussion.

12 There was a comment by Ms. McQuade about a  
13 judge has the ability to instruct the jury or the  
14 counsel has the ability at argument or summation to  
15 instruct the jury that they may discredit the loss at  
16 that point.

17 CHAIRPERSON GARDELLA: If the Chair can

18 interrupt for just a moment. Mr. Abel does state he  
19 would agree to that as a friendly amendment if the  
20 person supporting would agree.

21 MR. BARTON: I do.

22 CHAIRPERSON GARDELLA: That's a yes, so two  
23 yeses. Does that accomplish --

24 MR. LINDEN: If I could, for purposes of  
25 further discussion, explain why it would help. A

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1 lawyer's ability to argue to a jury the circumstances  
2 of the loss about why it should be, first of all.  
3 It's very difficult, if not impossible, to establish  
4 bad faith on the part of the prosecution or the police  
5 agency involved if there is a loss of evidence without  
6 having some sort of whistle blower coming forward.  
7 It's almost an unmanageable burden to show bad faith,  
8 but if the circumstances are available for  
9 discussion -- my point was that the lawyer arguing to  
10 the jury faces the problem that the judge will  
11 instruct the jury every time that the lawyer's  
12 arguments are not evidence.

13 If the court instructs the jury that in the  
14 light of this absence of evidence that was presented  
15 that existed, then you don't have the conflict between  
16 the lawyer's argument and the conflict of a judicial  
17 instruction that the lawyer's argument is really  
18 argument and not to be considered as evidence. If you  
19 have a court instruction that says you as the jury may  
20 consider this as a presumption that the contents of  
21 the electronic evidence would be adverse to the  
22 prosecution, then that puts it where it should be,  
23 which is really an issue of credibility of the case,

24 credi b i l i t y of the wi t n e s s e s .

25 Both sides can argue the circumstance, it was

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1 i n a d v e r t e n t , i t w a s i n t e n t i o n a l . You the jury are the  
2 a r b i t e r of c r e d i b i l i t y . You decide whether or not  
3 t h i s e v i d e n c e i s m i s s i n g u n d e r c i r c u m s t a n c e s w h i c h  
4 s h o u l d a l l o w a p r e s u m p t i o n a g a i n s t t h e p r o s e c u t i o n o r  
5 r e a l l y n o t a n d t h e d e f e n s e i s j u s t t r y i n g t o m a k e  
6 s p a g h e t t i s t i c k t o t h e w a l l .

7 I t h i n k t h a t a m e n d m e n t , t h e p r o p o s a l w i t h  
8 t h i s a m e n d m e n t a l l e v i a t e s m u c h o f t h e c o n c e r n , a n d I  
9 t h i n k i t i s a n a d v a n c e o f j u s t i c e i n o u r j u d i c i a l  
10 s y s t e m .

11 M R . R E I S E R : J o h n R e i s e r , 22nd c i r c u i t ,  
12 A n n A r b o r , a l s o a n a s s i s t a n t p r o s e c u t i n g a t t o r n e y . I  
13 t h i n k t h i s i s s w e e p i n g w h a t w e a r e t r y i n g t o d o . I  
14 d o n ' t k n o w o f a n o t h e r C o u r t R u l e w h i c h c r e a t e s a d u t y  
15 o n t h e a d m i n i s t r a t i v e b r a n c h o f g o v e r n m e n t r e g a r d i n g  
16 t h e c o l l e c t i o n , r e p l i c a t i o n , c a t a l o g i n g , a n d s t o r i n g  
17 o f e v i d e n c e , n o r d o I k n o w o f a n o t h e r C o u r t R u l e w h i c h  
18 a t t e m p t s t o m e d d l e w i t h s u b s t a n t i v e l a w , t h a t i s t h e  
19 c r e a t i o n o f p r e s u m p t i o n s o f w h a t a r e t o l d t o t h e j u r y .

20 S o w e a r e t r y i n g t o d o w i t h a C o u r t R u l e  
21 w h a t -- I w o u l d s u b m i t t h a t t h e p r o p o n e n t s a r e t r y i n g  
22 t o d o w i t h a C o u r t R u l e w h a t t h e y h a v e b e e n u n a b l e t o  
23 d o b e f o r e t h e M i c h i g a n L e g i s l a t u r e o r t h e M i c h i g a n  
24 C o u r t o f A p p e a l s o r t h e M i c h i g a n S u p r e m e C o u r t o r t h e  
25 U n i t e d S t a t e s S u p r e m e c o u r t .

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1 Frankly, this is a substantive issue of law,  
2 due process, that type of thing, and I don't think it  
3 belongs in a Court Rule, but as long as we are talking  
4 about it, I got a little bit more, not too much.

5 As a prosecutor, matters known to the  
6 prosecuting attorney. I know that in almost any case  
7 there are all kinds of electronic recordings. There  
8 is often a 911 call. If the ambulance is involved,  
9 there is a Huron Valley call. That's a government  
10 agency. So you have got the police dispatch tape, you  
11 have got the ambulance dispatch tape. There is a  
12 patrol video. There is a jail booking video. There  
13 are digital photographs, audiotapes of interviews.  
14 There are seven that I can come up with while in line  
15 that I am going to have to go out and get on every  
16 case, whether it's used or not, so that we can then  
17 keep it just in case it's needed down the future.

18 I submit that there is a better process  
19 available, and that's the FOIA process. I think that  
20 the smart defense attorneys, they don't ask it from  
21 me, they get it from FOIA, they see what it is, and  
22 then they sit on it. So they will still do that, they  
23 will sit on it, and when I don't get it but they have  
24 it, they don't tell me they have it, they will want to  
25 use that presumption as a gotcha.

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1 You know, Matt, I am with you on the third  
2 one regarding PSI reports. I am ambivalent on the  
3 second one, but I am really against you on this one,  
4 not you personally, just what you have to write down.  
5 So thank you very much.

6 MR. NINOMIYA: Chris Ni nomi ya, 41st ci rcui t,  
7 li fel ong prosecu tor, so admi ttedl y bi as here, but I  
8 agree wi th some of my col leag ues, parti cul arl y  
9 Kathy' s, as we ll as Tom' s. Thi s real l y has a  
10 po ten ti al to cre ate some ab sol utel y ab surd re sul ts.

11 It' s my un der stand ing that there is a task  
12 force, I thi nk Janet al ready men ti oned that, on  
13 el ec troni c re cord ing s that' s al ready in place. At the  
14 ta ble there are ju dges, pro se cu to rs, de fense  
15 at tor neys. They may al ready be run ni ng some pi lot  
16 pro jects wi th re spect to re qui ri ng el ec troni c  
17 re cord ing s. It' s my un der stand ing that that body wi ll  
18 be ma ki ng some re com men da ti ons to the State Bar  
19 even tu al l y, and I thi nk it ma kes a wh ole lot of sense  
20 at thi s po int, we can ar gue about thi s al l day long  
21 and prob a bly not get any where. We beat the dead horse  
22 be fore, we wi ll do it a gain, but I thi nk it ma kes a  
23 lot of sense to prob a bly ta ble thi s mat ter at thi s  
24 ti me un til we have had those re com men da ti ons from that  
25 body

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1 CHAIRPERSON GARDELLA: Is that a motion to  
2 ta ble?

3 MR. NINOMIYA: It is.

4 VOICE: Support.

5 CHAIRPERSON GARDELLA: There is no di scus si on  
6 on a mo ti on to ta ble. At thi s po int I wou ld call for  
7 those in fa vor of the mo ti on to ta ble say aye.

8 Those a gai nst say no.

9 At thi s po int I be lie ve there is di vi si on. I  
10 wou ld call for a rai si ng of hands. If we cou ld have  
11 the tel lers.

12 MR. ABEL: This is so unfair to do right  
13 before lunch. I move to adjourn for lunch and we vote  
14 after lunch.

15 VOICE: Support.

16 CHAIRPERSON GARDELLA: You can't do it while  
17 the motion is on the floor, even though stomachs are  
18 growling.

19 If the tellers could take the various  
20 sections, those in favor of the motion at this point,  
21 the motion to table, raise your hands please and keep  
22 them up.

23 Tellers, are we all set at this point? Okay,  
24 you can put your hands down.

25 Those opposed to the motion to table, please

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1 raise your hands and keep them up.

2 Tellers, are you all set at this point. You  
3 can put your hands down.

4 Those abstaining, raise your hand.

5 The results of the division vote on that,  
6 those in favor 58, those against 49, so the motion  
7 carries to table.

8 (Applause.)

9 CHAIRPERSON GARDELLA: We can go to lunch  
10 now.

11 (Lunch break taken 12:22 p.m to 1:14 p.m.)

12 CHAIRPERSON GARDELLA: Calling the meeting to  
13 order. We have a motion from Victoria Radke.

14 MS. RADKE: Good afternoon, Mr. Chairperson,  
15 Victoria Radke, 47th circuit. I am making a motion to  
16 amend the meeting minutes from earlier to include the  
17 name of John Mucha from the 6th circuit as a new

18 member of the Representative Assembly and would so  
19 move him to be seated.

20 CHAIRPERSON GARDELLA: Just for a point of  
21 clarification, that's for a vacancy?

22 MS. RADKE: A vacancy that was to be filled.

23 CHAIRPERSON GARDELLA: Is there support?

24 VOICE: Support.

25 CHAIRPERSON GARDELLA: Any discussion? Not

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1 hearing any, all those in favor say aye.

2 Those opposed no.

3 Any abstentions.

4 The ayes have it, motion is approved.

5 John, we are sorry. That was an oversight  
6 before. There he is right there. Welcome, and we  
7 have gotten it in the record.

8 MS. RADKE: Thank you, Mr. Chairman.

9 CHAIRPERSON GARDELLA: Mr. Barton.

10 MR. BARTON: Mr. Chairman, Bruce Barton,  
11 4th circuit. I am the former president of the  
12 Prosecuting Attorneys Association, and I have been in  
13 a defense practice for about 30 years, so I have both  
14 sides of the resolution previously before the group  
15 relative to electronic saving, I guess you might say.  
16 I would move at this time that the issue be referred  
17 to the Special Issues Committee for the simple reason  
18 that it's not something that we want to go away, but  
19 there are real problems with the original proposal.

20 VOICE: Second.

21 CHAIRPERSON GARDELLA: We are doing this by  
22 consensus if there is support. Any discussion? Not  
23 hearing any, I would call for a vote.

24 All those in favor say aye.

25 Those opposed no.

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1 Any abstentions say yes.

2 The ayes have it, and that matter will be  
3 referred to the Special Issues Committee. Thank you.

4 The next item on your agenda is number 14,  
5 the consideration of MCR 6.201 discovery to apply in  
6 misdemeanors and civil infractions, as well as felony  
7 cases, and Mr. Matt Abel from the 3rd circuit is our  
8 proponent on that.

9 MR. ABEL: Thank you, Mr. Gardella. Over  
10 lunch I had the opportunity to consult with some  
11 people and -- John Reiser, is he in the room?

12 VOICE: No.

13 CHAIRPERSON GARDELLA: Well, John threatened  
14 that if this passed that it would forever and  
15 henceforth be known as the Abel Rule requiring  
16 defendants to produce lists of witnesses 28 days  
17 before trial. Well, I don't think I want that to  
18 happen exactly, and so I think this needs further  
19 consideration, and I would withdraw this particular  
20 proposal at this time.

21 (Applause.)

22 CHAIRPERSON GARDELLA: I think that's the  
23 most applause I have heard today. Moving along. We  
24 do not need to have a motion on that.

25 Number 15 consideration of MCR 6.425(C)

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1 providing copies of pre-sentencing reports to the  
2 defendant and defense counsel, Matt Abel from the 3rd  
3 circuit is our proponent on that.

4 MR. ABEL: Thank you, Mr. Chair. I am  
5 Matthew Abel from the 3rd circuit, and I am moving the  
6 adoption of this measure which would require that both  
7 the defendant and the defense counsel be provided  
8 written copies of the pre-sentence report to have and  
9 to hold, to keep forever more before sentencing, and  
10 the reason why this is necessary is not so much for me  
11 but for our brothers and sisters in the appellate Bar  
12 who oftentimes are appointed to represent a defendant  
13 or retained to represent a defendant where there is a  
14 limited time to pursue the appeal, and oftentimes it  
15 may be based on improper scoring of the sentencing  
16 guidelines, which are contained with the pre-sentence  
17 report, and defendants in some courts -- in some  
18 courts the lawyers can't even keep the reports,  
19 contrary to what I think the law is.

20 There are places where you are required to go  
21 over -- well, they hand you the report, tell you to go  
22 over it with your client and when you are ready for  
23 sentencing hand it back to the clerk. At that point  
24 you are doing sentencing without having the report in  
25 front of you. I think that's wrong.

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1 I don't think this is very burdensome. This  
2 would provide the defendant and his lawyer with a copy  
3 of the pre-sentence report so the defendant,  
4 especially those sentenced to prison, can take it with  
5 them, which will expedite a lot of things. This is

6 just intended to solve some problems, not to create  
7 new ones. Thank you.

8 I move adoption of this proposal.

9 VOICE: Support.

10 CHAIRPERSON GARDELLA: Hearing support, is  
11 there any discussion on this proposal. Mr. Larky.

12 MR. LARKY: Sheldon Larky, 6th circuit. My  
13 concern with this is I have a concept problem. I  
14 agree with Mr. Abel that a defendant and her counsel  
15 ought to be able to read and examine the reports. I  
16 have no problem with this. This says making provision  
17 for the copies to be provided to the defendant.

18 If Mr. Abel by the intent of this proposal  
19 says that the attorney or the in pro per can walk out  
20 with that report, it bothers me. It bothers me  
21 because, as pointed out by the attorney general MCL  
22 791.229 says that all pre-sentence reports, and it's  
23 on page three of the attorney general's letter to us,  
24 all pre-sentence reports are, in fact, confidential.  
25 They are confidential documents that are created by an

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1 arm of the court and, in fact, are court documents.  
2 And my concerns are the confidentiality of the  
3 information.

4 I agree that a good, vigorous defense  
5 attorney should know all of the contents of the  
6 report. I agree that a defendant should have the  
7 opportunity to examine the document. I believe that  
8 it's a necessity, and I agreed with Mr. Abel that many  
9 courts on the moment of before sentencing a document  
10 is handed and there is really not sufficient time to  
11 develop the information, especially when you have a

12 defendant who is in custody, that even makes it worse  
13 yet.

14 But my concern is, the way this is written,  
15 is we are giving documents of extremely confidential  
16 nature that may leave the room and leave the building  
17 afterwards. So the language bothers me, not the  
18 concept.

19 The concept, I think, is the perfect concept.  
20 I think that too many pre-sentence departments,  
21 probation departments play games, very honestly, and  
22 they don't allow defense counsel enough opportunity to  
23 investigate. I think sometimes the prosecutors get  
24 advantage over the situation, because many prosecutors  
25 will have pre-sentence reports days before defense

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1 counsel, and I really have a significant problem with  
2 this, not so much on the concept but on the idea that  
3 this report is going to leave, leave the building with  
4 the defense attorney, and there may be information  
5 contained in it that's not correct.

6 So for those reasons, because it's really  
7 ambiguous in my wording to provide copies. I am going  
8 to vote no, and I would urge the membership to please  
9 read the bottom of page three about the paragraph that  
10 starts, Moreover pre-sentence report, because I think  
11 it may also violate the statute on confidentiality.  
12 Thank you.

13 CHAIRPERSON GARDELLA: Judge Kent.

14 JUDGE KENT: Wally Kent, 54th circuit. I  
15 would agree that the Legislature describes the  
16 documents as confidential, but once the defendant and  
17 his counsel have seen them, that confidentiality has

18 been breached. They have a need to know. We all, I  
19 think, I hope we all agree that the defendant and his  
20 counsel have the need to know.

21 It may not leave the courtroom in the printed  
22 form, but it still leaves in the minds of the  
23 defendant and his counsel. It's far better that it  
24 leave in printed form so that it not be misconstrued,  
25 the memory not fog so the defendant and his attorney

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1 misrepresent its contents later. They might better  
2 have it to look at and examine.

3 So for that reason I think that the objection  
4 based on confidentiality is without validity.

5 MR. KROHNER: Martin Krohner, 6th circuit.  
6 When we had the meeting of the Criminal Jurisprudence  
7 and Practice Committee, the same issue was raised  
8 about defendant actually physically receiving a copy  
9 of it, and there was some concern about how that would  
10 actually work, especially if they are incarcerated,  
11 but the bigger concern that was addressed was the  
12 timing. It says on the rule proposed, In a reasonable  
13 time before the day of sentencing. Not quite sure  
14 what reasonable time means, and it could be  
15 interpreted many ways, so the committee asked that we  
16 bring before this body and to the proponent of the  
17 item here that at least five days but no less than 48  
18 hours prior to sentencing.

19 CHAIRPERSON GARDELLA: If it's over six words  
20 we have to have it in writing, unfortunately.

21 MR. KROHNER: At least five days but no  
22 later -- how many words are we at?

23 CHAIRPERSON GARDELLA: You are right at six.

24 MR. KROHNER: Five days prior to date of  
25 sentencing. At least five days before sentencing.

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1 CHAIRPERSON GARDELLA: So you are saying  
2 delete "a reasonable time before" and insert "at least  
3 five days before".

4 MR. KROHNER: Correct, because that would  
5 give, especially in cases if they are in custody, that  
6 gives sufficient time to go over it, go over the  
7 report, rescore it, and meet with your client,  
8 because, again, you are going to have the issue if you  
9 don't make the corrections at the time of sentencing,  
10 then there is going to be appellate issues that you  
11 are going to lose, so a lot of these people have a lot  
12 of time when they are sitting around. Is that right?  
13 We have got five words, correct?

14 MR. ABEL: Can I make an inquiry?

15 CHAIRPERSON GARDELLA: The chair will give a  
16 short allowance.

17 MR. ABEL: I don't necessarily have a problem  
18 with that, but I think there may be other people that  
19 do have a problem with that, specifically court  
20 administrators, and my understanding is the rule  
21 now -- there is a rule, I don't know if it's statute  
22 or court rule, that requires the pre-sentence report  
23 to be provided at least the day before sentencing. I  
24 don't have a problem to make it, you know, a year  
25 before sentencing. I am being facetious here. I

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1 mean, to me, sometimes you don't even get them the day  
2 before. Five days would be great, but, you know, if I  
3 get a report the day before sentencing and there are  
4 more complex issues, I will ask for an adjournment.

5 CHAIRPERSON GARDELLA: Are you in agreement  
6 with that as a friendly amendment?

7 MR. ABEL: Five days, Martin?

8 MR. KROHNER: How about three? Would you  
9 accept three?

10 MR. ABEL: It's going to require modification  
11 of other Court Rules is the problem.

12 MR. KROHNER: Because the question is what is  
13 reasonable, and that's going to be the issue without  
14 having some sort of time limit.

15 MR. ABEL: How about one day, which is  
16 consistent with current Court Rules, and then if we  
17 are expanding them they should be expanded by statute  
18 and Court Rules consistent with --

19 MR. KROHNER: At least one day before  
20 sentencing.

21 MR. ABEL: I mean, not that I am opposed to  
22 greater time. Yes, at least one day.

23 CHAIRPERSON GARDELLA: Based on comments of  
24 the proponent, he has accepted the friendly amendment.

25 MR. KROHNER: At least one business day,

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1 because I just heard a comment, what happens if it's a  
2 Sunday and you have got sentencing on Monday.

3 CHAIRPERSON GARDELLA: Mr. Krohner is saying  
4 at least one business day before sentencing. Mr. Abel  
5 is accepting that as a friendly motion. The person

6 who supported the motion, do they agree with that,  
7 wherever they are?

8 VOICE: Yes.

9 MR. KROHNER: Ron, thank you.

10 CHAIRPERSON GARDELLA: Any further  
11 discussion?

12 It's on the underlying motion

13 MR. HORKEY: Christian Horkey from the 38th  
14 circuit. There has been some comments made about the  
15 privileged or confidential nature of PSI reports, and  
16 let me just describe what my experience is with PSI  
17 reports.

18 Those PSI reports are given on a temporary  
19 basis, look at this, go over it with your client, have  
20 sentencing, you know, in a few minutes, maybe the next  
21 day. Then corrections are made at the time of  
22 sentencing, and you have to give your report back to  
23 the probation department and a copy of it goes in, if  
24 your client goes to prison, a copy of it goes into  
25 their Department of Corrections file, and it follows

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1 them to prison.

2 In prison it's maintained in a records room  
3 where oftentimes there are other prisoners who are  
4 trustees that work in that room. Those people have  
5 access to it, but I can't keep a copy of it. My  
6 client can't have a copy of it. I hardly think that  
7 that's in line with any confidential issue.

8 You want to make sure that you understand  
9 everything that's in that pre-sentence investigation  
10 report and redact anything that is in error or could  
11 potentially be harmful to your client.

12 For example, if your client had acted as a  
13 confidential informant, you want to make sure there is  
14 no mention of that in the PSI, because that could be  
15 very harmful to them if one of their fellow prisoners  
16 sees that while they are in prison in their trustee  
17 position in the record room.

18 I think the confidential nature of the rule  
19 is to prevent the PSI or any of the information in it  
20 from being available under FOIA, that this is  
21 something that's not FOIA-able. We will call it  
22 confidential so that everybody can't just get a copy  
23 of the PSI with a small copy fee request under FOIA.

24 In the federal court system it's been my  
25 experience that the court requires that the PSI be

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1 submitted to defense counsel, I think weeks ahead of  
2 the sentencing.

3 JUDGE KENT: Fourteen days.

4 MR. HORKEY: Two weeks before the sentencing.  
5 Admittedly, those are much more comprehensive and take  
6 a lot longer to review than you could do on the day of  
7 sentencing, but that system seems to work very well.  
8 You can keep that copy as defense counsel. So I  
9 would, I strongly support this proposal.

10 CHAIRPERSON GARDELLA: Thank you.

11 MS. COOK: Shon Cook of the 14th circuit. My  
12 perception of MCL 791.229 is really to protect the  
13 defendant, and that's the reason I believe it's not  
14 open to public inspection, meaning it is not open in  
15 the public file for public access, is not to be made  
16 part of the permanent court file, not that it is meant  
17 that a defendant should not have access to it or

18 permanent record of it or the defense attorney.

19 And I think that that was the intent, because  
20 the confidential information that's contained in PSIs,  
21 almost a hundred percent of it contains confidential  
22 information about the defendant. Very rarely does it  
23 contain confidential information about the victim that  
24 is not found in a police report, which is and can be  
25 accomplished by getting a FOIA request.

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1 So I would state that I don't believe that  
2 MCL 791.229 can be used as a justification to oppose  
3 this.

4 MR. NINOMIYA: Chris Ninomiya, 41st circuit.  
5 I guess my concern, and I support the principle and  
6 concept of sharing the report with the defendant and  
7 giving them access to it and perhaps a copy. I guess  
8 my concern as a prosecutor is this creates an absolute  
9 mandate that the court has to provide that defendant  
10 with a copy at least one business day, as it stands  
11 right now, before sentencing. A lot of these folks,  
12 after they do a PSI interview, they disappear, even  
13 their attorneys don't know where they are. They may  
14 not see them again until they show up in court for  
15 their sentencing date.

16 From our perspective, if we have got a family  
17 full of victims and a bunch of people attending the  
18 sentencing, the last thing I want, and these people  
19 are expecting closure of this case at this point on  
20 the sentencing date, the last thing I want is the  
21 defendant walking into court that same day and saying,  
22 Hey, I never got a copy of this report. You are  
23 absolutely required to give this to me at least a

24 business day before sentencing. We are requesting an  
25 adjournment because of that. And I think that the way

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1 this language is written it certainly brings that into  
2 the realm of possibility where defendants could cause  
3 their own delay in proceedings, and, again, it's gong  
4 to affect the efficiency of the courts as well if we  
5 have that situation.

6 CHAIRPERSON GARDELLA: Mr. Nolan.

7 MR. NOLAN: Thank you, Mr. Chair. Larry  
8 Nolan, 56th circuit. I have never understood the  
9 reason for this. I have accepted it, but I think in  
10 some sense defense lawyers have been treated as less  
11 than officers of the court, and I think this is a  
12 perfect example.

13 I have a case pending that involves a removal  
14 of top secret documents from the Embassy in  
15 Washington D.C. with the client now living in  
16 San Diego who worked as an intern while at Michigan  
17 State and had this program through the University.  
18 That pre-sentence report was sent to me 14 days before  
19 the sentencing. I sent it to him, I was invited to  
20 send it to him, and to respond to the pre-sentence  
21 investigator and probation officer in regards to any  
22 errors, mistakes, or changes I wanted. It was also  
23 then required to be sent to the sentencing judge. I  
24 don't know if the federal judges have less time to  
25 review materials on the day and they want them

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6 being the best defense lawyer being handed something,  
7 because you get back to the office and you say, jeez,  
8 I should have responded to this, but you didn't think  
9 of it because you were coming from some other  
10 jurisdiction.

11 I don't see why -- I think actually the  
12 greater length of time protects the prosecutor. I  
13 don't see why the written report in my possession,  
14 it's not like I am going to go out and publish it, and  
15 the defendant certainly can safeguard his own privacy  
16 in regards to what he does or what she does with the  
17 report, so I am very in favor of being able to get the  
18 report in advance, come there and the prosecutor  
19 should be able to say really, Mr. Nolan, you have no  
20 excuse, you have had this report in your hands for 14  
21 days, and I even have to respond prior to the  
22 sentencing date in regards to information I am aware  
23 of is either incorrect or I object to. So I support  
24 the motion.

25 CHAIRPERSON GARDELLA: Thank you.

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1 Mr. Reiser.

2 MR. REISER: John Reiser, 6th circuit,  
3 Ann Arbor, Michigan. I support as a prosecutor --  
4 22nd. I used to work in Oakland County. Sorry about  
5 that. 22nd circuit court. I like Ann Arbor better.  
6 Hiss away, I still like it better.

7 I support the concept of this, but I believe  
8 that 6.425 is a Court Rule that only applies to  
9 felonies, is that correct? Matt, do we have a point  
10 of clarification on that?

11 MR. ABEL: I don't usually read the Court

12 Rules.

13 MR. REISER: As criminal practitioners for  
14 the defense and prosecutors know, most of 6.0 applies  
15 only to felony cases and only a few things apply to  
16 misdemeanors, so at the outset are we talking about  
17 felony PSI's, misdemeanor PSI's, or all PSI's?

18 MR. ABEL: All of them.

19 MR. REISER: Does 6.425 currently include in  
20 the scope, and I didn't bring the rules, and I was  
21 driving here I regretted not bringing them, but the  
22 rules spell out the scope of whether we are talking  
23 about felony or misdemeanors?

24 JUDGE STEPHENS: No.

25 MR. REISER: It does not? So we are talking

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1 really about felony PSI's, is that what we -- because  
2 it can apply to misdemeanors if the scope contained in  
3 6.102, or whatever that is of the Court Rules,  
4 enumerate those few Court Rules that apply to  
5 misdemeanor cases.

6 CHAIRPERSON GARDELLA: Mr. Abel wants to  
7 address.

8 MR. ABEL: I don't know, but if this applies  
9 only to felonies, are you more likely to support it?

10 MR. REISER: No, I just want these people to  
11 know what we are debating about. We might come back  
12 promising relief to our constituents when in fact that  
13 didn't happen.

14 JUDGE STEPHENS: 6.425, point of  
15 clarification, pursuant to 6.001(B) is not included in  
16 those enumerated for misdemeanor.

17 MR. REISER: So just so you all know, when

18 you do your little updates for your newsletters, we  
19 are only talking about felony discovery.

20 MR. ABEL: Right, apparently so.

21 MR. REISER: Another question.

22 MR. ABEL: Not discovery PSI.

23 MR. REISER: Under the synopsis it says, And  
24 to maintain the report both in their files for future  
25 reference, what about the suggested changes, which I

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1 understand only to be things that are lined out, give  
2 the attorney the right to keep it? I am not talking  
3 about the red. I am talking about the original  
4 proposal as submitted has the word "or" lined out and  
5 "if not represented by a lawyer," and there is not any  
6 additional text which says "with said report to be  
7 retained or maintained by," and I am wondering how you  
8 can make that promise without it being contained in  
9 the wording?

10 MR. ABEL: Can I respond?

11 MR. REISER: Or am I missing something?

12 CHAIRPERSON GARDELLA: It is a point of  
13 clarification. Go ahead and respond.

14 MR. ABEL: I think you are reading this to  
15 say that the defense lawyer must maintain it in his  
16 files. This just says that the lawyer have adequate  
17 opportunity to review, use, and maintain it. Doesn't  
18 mean they have to maintain it, but they can. At least  
19 they will get it.

20 MR. REISER: Don't you have to give it back  
21 right now? A lot of courts you have got to give it  
22 back to them, you don't get to keep it, and that's the  
23 rub. Can't they still demand it back? You want it in

24 advance and you want it permanently, and I get how  
25 this gives it to you in advance, but how does it let

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1 you retain it for your record when the guy hires you  
2 again on the next felony? Which is a good thing. We  
3 all get work that way.

4 MR. ABEL: Especially you. Well, I don't see  
5 that this requires the defense lawyer to give it back.  
6 Currently some courts require the defense lawyer to  
7 give it back, some don't care, some of them want you  
8 to keep it. There is a whole --

9 MR. REISER: But if a uniform system is what  
10 you seek, I don't see this bringing that about.

11 MR. ABEL: There is a rule requiring that the  
12 defendant be provided the report at least one day  
13 before sentencing.

14 MR. REISER: Provided a copy.

15 VOICE: This one says the day before or it  
16 says prior to the day of.

17 MR. REISER: I don't know if you say a  
18 permanent copy, his own copy, a copy which may be  
19 maintained, however you want to do, but I don't think  
20 you are telling the various courts around, various  
21 circuit courts around this state that you get to keep  
22 it.

23 I would offer a friendly amendment, but Matt  
24 and I clearly aren't friendly with one another.

25 MR. ABEL: I thought we were close.

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1 MR. REISER: Actually I think you should, I  
 2 really think you should modify it if you want to be  
 3 able to keep it, but the thing I do want to talk about  
 4 is about --

5 CHAIRPERSON GARDELLA: Is the speaker asking  
 6 for a friendly amendment?

7 MR. REISER: Yes, sure.

8 CHAIRPERSON GARDELLA: What are you asking?

9 MR. REISER: That the word "permanent" be  
 10 added unless someone suggests something better.

11 MR. ABEL: I have no objection, but I think  
 12 it's redundant and that shall be known as the Reiser  
 13 word.

14 MR. REISER: And the final thing I have --

15 CHAIRPERSON GARDELLA: Hold on. There has  
 16 been the request for a friendly amendment. The person  
 17 who supported the motion, do I hear approval from the  
 18 person who gave support?

19 VOICE: Yes.

20 CHAIRPERSON GARDELLA: You can proceed,  
 21 Mr. Reiser, with your comments.

22 MR. REISER: Do we need to vote on the  
 23 permanent thing first?

24 The other thing I want to point out is what  
 25 concerns me about providing the entirety of victim

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1 impact statements, which sometimes are attached to PSI  
 2 reports, is they contain personal identifying  
 3 information of stalking and domestic violence victims,  
 4 and while that information is contained in a police  
 5 report, that sometimes changes after the charges are

6 brought. So I don't want the defendant with one of  
7 these assaultive crimes knowing the personal  
8 identifying information of the victim, and, remember,  
9 it could be months, maybe a year or so, between the  
10 time of the offense and the PSI report and that  
11 information has changed. So, you know, as a guardian  
12 of victim's rights, that's one of the things that  
13 really concern me. Ah, but what to do about it?

14 CHAIRPERSON GARDELLA: Thank you.

15 MR. REISER: I would, if I need something in  
16 writing, I would add a section (D), and I have it in  
17 writing. It states, Pre-sentence reports shall not  
18 contain the personal identifying information of  
19 victims, crime victims.

20 CHAIRPERSON GARDELLA: Hold on, just to keep  
21 the procedure in place here. Are you asking that that  
22 be a friendly amendment or are you asking that the  
23 motion be amended.

24 MR. REISER: I am asking that it be a  
25 friendly amendment, but it's more than five or six

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1 words.

2 MR. ABEL: I have no objection.

3 MR. REISER: I am asking that there be a (D).

4 CHAIRPERSON GARDELLA: If it's more than six  
5 words, it has to be in writing and submitted on paper.

6 MR. REISER: It's not neat, but I will submit  
7 it.

8 CHAIRPERSON GARDELLA: We will take it any  
9 way you can get it down on paper.

10 JUDGE STEPHENS: There is a (D), by the way.

11 CHAIRPERSON GARDELLA: Mr. Reiser, there is

12 already a (D) in the Court Rule as it exists, so we  
13 have to renumber or reletter it.

14 MR. REISER: Whatever letter we are up to  
15 would be the next letter.

16 CHAIRPERSON GARDELLA: That's fine. We can  
17 keep the (D) for purposes of the amendment.

18 Mr. Abel states that he is agreeable to that  
19 as a friendly amendment. Again, the person who gave  
20 support, that person is agreeable also?

21 VOICE: Yes.

22 CHAIRPERSON GARDELLA: Any further  
23 discussion?

24 MR. HILLARD: Martin Hillard, 17th circuit.  
25 I don't particularly have a dog in this hunt. I found

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1 the debate rather interesting. Mr. Reiser has  
2 addressed part of what I wanted to say, and that is,  
3 as originally presented, all it really changes is what  
4 happens with the represented defendant versus the  
5 pro per defendant. It does not really address whether  
6 copies are given or shown. Adding the word  
7 "permanent" does affect that somewhat but kind of  
8 makes it linguistically awkward. It would seem that  
9 the original intent was to provide copies and that the  
10 courts that don't and take them back aren't complying  
11 with the Court Rule to begin with.

12 But, in any event, the primary substantive  
13 change is that the unrepresented defendant now has or  
14 the, excuse me, the represented defendant has the same  
15 rights to the report as the unrepresented, so I would  
16 guess any defendant that wants to make nefarious use  
17 of the report would merely fire his attorney and then

18 demand the rights as a pro per.

19 So I am not sure that the change addresses  
20 those concerns. It seems to me we have a lot of very  
21 legitimate concerns here that are beyond the scope of  
22 what the rule currently says or what the changes  
23 propose.

24 CHAIRPERSON GARDELLA: We can read the entire  
25 paragraph.

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1 JUDGE STEPHENS: Currently there is a rule,  
2 just a point of information. After (B), which is the  
3 section that talks about disclosure before sentencing,  
4 there is a (C) which reads, Pre-sentence report  
5 disclosure after sentencing. After sentencing the  
6 court on written request must provide the prosecutor,  
7 the defendant's lawyer, or the defendant not  
8 represented by a lawyer with a copy of the  
9 pre-sentence report and any attachments to it. The  
10 court must exempt from disclosure any information the  
11 sentencing court exempted from disclosure pursuant to  
12 subrule (B).

13 Subrule (B) did provide for exemption from  
14 disclosure of certain information already. It did not  
15 include the identifiers relative to victims, but  
16 probably that's where the nondisclosures go, and there  
17 is already requirement that there be a disclosure upon  
18 written request, furnishing of a copy upon written  
19 request, period.

20 MR. HILLARD: But I guess still my point is  
21 does it make a lot of a sense to treat the represented  
22 and unrepresented defendants differently, and that's  
23 the substantive change here.

24 CHAIRPERSON GARDELLA: Thank you.

25 Mr. Elkins.

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1 MR. ELKINS: Michael Elkins, 6th circuit.  
2 Two points if I may. The first is in paragraph (B),  
3 it's a linguistic matter. The word "permanent" was  
4 added, I believe a permanent copy is one that won't  
5 fade. I think the intent was it must permanently  
6 provide, so I would make a friendly amendment to  
7 delete "permanent" and add permanently before --

8 CHAIRPERSON GARDELLA: Mr. Abel accepts.  
9 Supporter, are you accepting? Yes.

10 MR. ELKINS: Thank you.

11 CHAIRPERSON GARDELLA: We will make that  
12 amendment.

13 MR. ELKINS: The second goes to the new  
14 proposed (D), which deals with the deletion of  
15 identifying information. As it is, it seems broad  
16 enough to indicate that a complainant's name or a  
17 person who provided information's name might be  
18 deleted, which makes it very difficult to rebut the  
19 pre-sentence report if you don't know the anonymous  
20 accuser. I think that the personal identifying  
21 information should be limited in some way so that they  
22 can have -- I have no problem with some of it being  
23 out, but you should at least be able to identify.

24 CHAIRPERSON GARDELLA: Mr. Elkins, are you  
25 suggesting a friendly amendment to change (D)?

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1 MR. ELKINS: I would suggest, Shall I not  
2 contain the personal identifying information saving  
3 names or excepting names of crime victims.

4 MR. ABEL: I think that's a whole other can  
5 of worms that -- no. There is a separate issue about  
6 crime victims in PSI's, but this does not attempt to  
7 deal with that. In fact, I don't see that there is a  
8 problem with identifying information of crime victims  
9 or anyone in a PSI. That is a solution without a  
10 problem, I believe.

11 MR. ELKINS: Thank you.

12 MR. ABEL: But thank you.

13 CHAIRPERSON GARDELLA: More discussion?  
14 Mr. Crampton.

15 MR. CRAMPTON: Jeff Crampton, 17th circuit.  
16 Matt, I really appreciate your bringing this up. As a  
17 criminal defense lawyer, you know, I feel your pain  
18 every day. We go through this a lot.

19 It seems to me that we are trying to solve  
20 several problems with this. We want the reports, we  
21 want them before sentencing, we want to be able to  
22 keep them, we want our clients to be able to have  
23 them, and we are, I think, at least sensitive to the  
24 fact that there are some personal identifying  
25 information that shouldn't be brought to the

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1 defendant. It seems to me that we really need to  
2 think about this a lot more, and we need, frankly, all  
3 of us ought to have the entire Court Rule in front of  
4 us, because I think the first friendly amendment was  
5 not necessary since it already says before sentencing

6 or before the day of sentencing, not just before  
7 sentencing. It already said at a reasonable time  
8 before the day of sentencing, so the first friendly  
9 amendment wasn't really needed.

10 The permanently one isn't needed because  
11 sub (C) says that upon written request the court must  
12 provide, which means they have got to send them to the  
13 lawyer and the defendant after sentencing. I have at  
14 times brought a written request with me. The  
15 defendant has been sentenced, and I have handed it to  
16 the court and taken my copy with me. So, you know, I  
17 have done that.

18 I think this needs a lot more thought, and I  
19 would move to table it and send it to the same  
20 committee we are sending the other one to.

21 VOICE: Support.

22 CHAIRPERSON GARDELLA: Mr. Crampton, are you  
23 saying you prefer to refer it to Special Issues  
24 Committee --

25 MR. CRAMPTON: Yes.

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1 CHAIRPERSON GARDELLA: -- instead of table  
2 it?

3 So rather than table it, you are moving to  
4 refer it to the Special Issues Committee?

5 MR. CRAMPTON: Sure.

6 CHAIRPERSON GARDELLA: Is there support for  
7 that motion?

8 VOICE: Support.

9 CHAIRPERSON GARDELLA: Any discussion?  
10 Hearing none --

11 MR. ABEL: I have discussion. I have a

12 comment. Listen, people, this is a no-brainer. The  
13 defendant is -- Matthew Abel from the 3rd judicial  
14 circuit.

15 The defendant is already entitled to a copy  
16 of the pre-sentence report the day before the  
17 sentencing. The problem that this is addressing is  
18 the courts that are not complying with the Court Rule.  
19 They are not providing it the day before sentencing  
20 and they are not letting the defendant have it to  
21 read.

22 Once the guy has read it or the woman has  
23 read it, they can write down every bit of information.  
24 This confidentiality thing is a red herring. Whatever  
25 is confidential is already not in the pre-sentence

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1 report.

2 This is just to save some criminal appellate  
3 lawyers some running around time and to protect some  
4 defendants' rights who otherwise are going to lose  
5 their rights because the time is going because some  
6 clerk is sitting on the pre-sentence report and won't  
7 give it to them.

8 This is a no-brainer. I oppose any motion to  
9 refer to committee. It doesn't need it. There are  
10 other problems that need to be solved beyond and above  
11 this. I mean, if you want to look into  
12 confidentiality, that's another issue, but this is  
13 clear and simple.

14 CHAIRPERSON GARDELLA: Any other discussion?  
15 Hearing none -- Mr. Barton.

16 MR. BARTON: First of all, I am in favor of  
17 the motion to send it to Special Issues. My name is

18 Bruce Barton, 4th circuit. I am a past president of  
19 the Prosecuting Attorneys Association, past chair of  
20 this Assembly. I have been in private practice as a  
21 defense attorney for 30 years.

22 Something that I meant to speak to or wanted  
23 to speak to, this is a very important topic in another  
24 sense that nobody has considered. Most people don't  
25 know that the first thing that the Parole Board looks

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1 at is the pre-sentence report. Most people realize, I  
2 think, that a lot of us have a good idea sometimes  
3 what the judge is going to do and so we don't  
4 challenge things in the pre-sentence report, and  
5 without a pre-sentence report that you can take back  
6 to the office, think about it before you make your  
7 sentence, your comments at sentencing, you are winging  
8 it. If you don't have that thing in front of you, you  
9 are definitely winging.

10 Now, Mr. Reiser's county and my county are  
11 totally different. We get a copy of the pre-sentence  
12 report to keep. In Washtenaw County you have to give  
13 the pre-sentence report back, and I think in some  
14 cases you have to give it back and you don't have it  
15 in front of you at the time of sentencing. But if you  
16 have got a good idea of what the judge is going to do,  
17 you don't think it's important to challenge everything  
18 in that pre-sentence report, and it is important way  
19 down the line when the matter goes to the Parole  
20 Board, and the Parole Board is not required to  
21 consider challenges if you haven't raised the  
22 challenge at the time of sentencing.

23 Now, I am not sure I like the language of

24 this particular proposal, so I am speaking in terms of  
25 the motion to table, or I am sorry, the motion to

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1 refer. If that sounded maybe redundant for me, I am  
2 sorry, but it is something that we shouldn't just  
3 shrug off. It is something that perhaps we can refine  
4 the wording of, and I definitely support the referral  
5 to the committee.

6 CHAIRPERSON GARDELLA: Mr. Gobbo.

7 MR. GOBBO: Stephen Gobbo from the 30th  
8 circuit. I have probably some more unique experience  
9 than some of the persons in this room because I served  
10 in various prison capacities for about 20 years in the  
11 state of New York, state of Connecticut, state of  
12 Michigan, as well as the Federal Bureau of Prisons.

13 I would vote in favor of the motion and the  
14 writing as it stands as amended, but I would echo the  
15 comments that have been made in terms of the  
16 importance of the pre-sentence report, investigation  
17 report, in the use for parole and throughout the  
18 appellate process that would be followed later on. I  
19 think it's an important enough issue to ensure that  
20 the defendant receives a copy of it. Whether you want  
21 to play with the wording permanently and everything  
22 else, that's another issue, but I would at this point  
23 just maybe move to call the question.

24 CHAIRPERSON GARDELLA: Are you talking about  
25 the question and referring it to the Special Issues

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1 Committee? The motion on the floor is motion to refer  
 2 the issue or the proposal to the Special Issues  
 3 Committee.

4 MR. GOBBO: Express no opinion on that  
 5 motion.

6 MS. STANGL: Terri Stangl from the 10th  
 7 circuit. I am speaking in opposition to motion to  
 8 table, and I will read language that if it is not  
 9 tabled that I would propose. If it is tabled, then I  
 10 will hand it to the committee to consider.

11 The language would be, At least one business  
 12 day before the day of sentencing the court must  
 13 provide copies of the pre-sentence report to the  
 14 prosecutor, the defendant's lawyer, and the defendant  
 15 for their review and retention. Okay.

16 CHAIRPERSON GARDELLA: Thank you. We will  
 17 get back to that, depending on how the vote goes.

18 MR. LINDEN: Jeff Linden, 6th circuit. My  
 19 position would be in favor of the referral to the  
 20 Special Issues Committee, because there are some other  
 21 issues that I don't think the current amendments and  
 22 proposals really are accomplishing.

23 One of the problems is that the rule, as  
 24 written without any of the amendments today, requires  
 25 disclosure providing a copy of the pre-sentence report

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1 to counsel before the day of sentencing. The real  
 2 problem is arising from courts, through either the  
 3 judges or their clerks, who are not doing that and are  
 4 requiring you to look at the report on the fly in  
 5 court, not keep a copy.

6                   When you have to argue scoring, many times  
7 the issues involved in scoring are factual, which  
8 require some investigation background. Many times  
9 they are legal, which require some legal research,  
10 which you can't do on the courtroom steps or you can't  
11 do in lockup if you have an in-custody client.

12                   And you have to, as everybody has heard  
13 today, the effects of the pre-sentence report are felt  
14 long beyond the day of sentencing. They go to the  
15 prison, they go to the parole board. If you don't  
16 object to something, you are deemed to admit the  
17 statements in the pre-sentence report on that day  
18 forever.

19                   The issues -- the most important issue is  
20 access to the information and access to the  
21 information in a meaningful way that allows counsel to  
22 provide adequate representation and guidance to the  
23 court and to the client. I don't think that any of  
24 the amendments address the issue of the courts that  
25 are not complying with the rule, even as written, or

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1 adding language to say "must provide," "must provide a  
2 copy for retention." You can easily argue that the  
3 rule, as written, which states "must provide copies  
4 prior to the day of sentencing," says that already,  
5 yet that's not happening.

6                   So I think some further thought, some learned  
7 thought and attention is necessary to find a way to  
8 rephrase the rule that actually addresses the problem,  
9 which is noncompliance of the rule by the court, and I  
10 would move and support the motion to refer the matter  
11 to the Special Issues Committee.

12 CHAIRPERSON GARDELLA: Any other discussion?  
13 Hearing none, we will vote on the motion pending.  
14 All in favor say aye.  
15 All opposed no  
16 All abstentions say yes.

17 In the opinion of the chair the ayes have it,  
18 so that matter will be referred to the Special Issues  
19 Committee.

20 Moving along number 16, consideration of  
21 Court Rule 8.115, use of cell phones by lawyers in  
22 courtrooms, and our proponent on that is Mr. Matt Abel  
23 from the 3rd circuit.

24 MR. ABEL: Good afternoon. Again, I am  
25 Matthew Abel from the 3rd circuit. I am a little

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1 hesitant to say this is a no-brainer, because the last  
2 one I said is a no-brainer went out the window, but,  
3 ladies and gentlemen, this is a no-brainer. It looks  
4 like a no-brainer, it walks like a no-brainer, it  
5 talks like a no-brainer. This has to do with your use  
6 of cell phones in courthouses.

7 I travel throughout the state of Michigan.  
8 My practice is quite varied as to geography and so are  
9 the rules and regulations about taking phones into  
10 courthouses. Some courthouses have old signs that say  
11 no phones allowed. Plymouth court has one. Just the  
12 other day I was complaining to the court officer. I  
13 said, How come you won't let lawyers bring phones in?  
14 He goes, Oh, we changed that rule a long time ago. I  
15 said, Well, you should change the sign, you know.

16 And then in Wayne County juvenile court, you  
17 can't take a cell phone in there, but in Frankfort --

18 VOICE: They will steal it.

19 MR. ABEL: -- in the recorder's court, you  
20 can take a phone there.

21 How many people work in jurisdictions where  
22 you are not allowed to take a phone into court?  
23 Anybody think that's reasonable? Do I need to say  
24 anymore.

25 VOICE: No.

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1 MR. ABEL: Oh, I do need to say something  
2 more, I move adoption of this proposal.

3 CHAIRPERSON GARDELLA: It's been moved. Do I  
4 hear support?

5 VOICE: Support.

6 CHAIRPERSON GARDELLA: Any discussion on the  
7 matter?

8 VOICE: Call the question.

9 CHAIRPERSON GARDELLA: We have people who  
10 want too address the issue.

11 MR. POULSON: I have what I hope will be  
12 thought of as a friendly amendment, and I make this  
13 because of a county just east of me that allows you no  
14 electronics whatsoever. Barry Poulson from 1st  
15 circuit. Pointing east, I am referring to another  
16 county that won't allow any electronics in the  
17 building. It is a nightmare, and so I would propose  
18 right after the word "cell phones" if Mr. Abel would  
19 consider adding the phrase "electronic pocket  
20 schedulers." I know they are called PDA's, but judges  
21 don't want that, but electronic pocket schedulers.

22 MR. ABEL: How about, other electronic  
23 devices?

24 MR. POULSON: Well, that's pretty broad, and  
25 I don't even know. I mean, that could mean TV's.

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1 CHAIRPERSON GARDELLA: Mr. Abel states that  
2 he is agreeable with the language. Whoever supported,  
3 are you agreeable?

4 VOICE: Yes, I am.

5 CHAIRPERSON GARDELLA: Any further  
6 discussion?

7 MS. VALENTINE: Victoria Valentine, 6th  
8 circuit. The issue later in the paragraph addresses  
9 no photographs or other things taken. I served as the  
10 chair of the Circuit Court Committee for Oakland  
11 County where we do have a rule. The issue is camera  
12 phones in our circuit, so I would propose an amendment  
13 instead of this to say, Including those with recording  
14 devices. They consider cameras to be recording  
15 devices. I think that would allow schedulers,  
16 recording devices, and not get into things like  
17 personal data -- PDA's.

18 MR. POULSON: What do you call that? A  
19 pilot, palm pilot.

20 MR. ABEL: I am in general agreement. I  
21 don't understand the specific language yet.

22 MS. VALENTINE: My proposal would be lawyers  
23 may carry cell phones, including those with recording  
24 devices.

25 CHAIRPERSON GARDELLA: And you are asking if

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1 that would be a friendly amendment?

2 MS. VALENTINE: Friendly amendment and then  
3 striking Mr. Poulson's amendment.

4 MR. POULSON: I object to the striking.  
5 That's a different thing.

6 CHAIRPERSON GARDELLA: Mr. Abel states that  
7 he is agreeable with the language. Is our supporter  
8 of the motion agreeable?

9 VOICE: Yes.

10 CHAIRPERSON GARDELLA: They find it  
11 agreeable. Next speaker, Mr. Barton.

12 MR. POULSON: Point of order. My amendment  
13 was already accepted as a friendly amendment, and I  
14 like it. I don't want it to be --

15 CHAIRPERSON GARDELLA: Our parliamentarian  
16 has ruled that you cannot get rid of that language.

17 MR. POULSON: Thank you.

18 CHAIRPERSON GARDELLA: So that will stay in.

19 MR. BARTON: Are we on the amendment or main  
20 motion?

21 CHAIRPERSON GARDELLA: We are on the main  
22 motion now.

23 VOICE: Point of order.

24 CHAIRPERSON GARDELLA: Who raised the point  
25 of order. That's waived. Okay.

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1 Mr. Barton.

2 MR. BARTON: Bruce Barton, 4th circuit. This  
3 particular issue raised more comment in our Bar than  
4 anything else on the docket. In fact, I received  
5 comments from two people, one of whom wanted to amend,

6 the other wanted to come up with the pocket calendar  
7 issue because he had to take his matter into court.  
8 The first gentleman was not particularly happy with  
9 having cell phones in court, and those two gentlemen  
10 were both in the same firm, for what it's worth.

11 In any event, I do have a proposed amendment,  
12 and I have got it written out. I could bring it up  
13 there -- well, the amendment written out, and I will  
14 present it is, to add after the word "incarceration,"  
15 that after the word incarceration and the comma these  
16 words, as one of the penalties, confiscation of the  
17 cell phone or a combination thereof, referring to the  
18 various things, and then strike the words "or both."  
19 I guess I will bring it up there first.

20 MR. ABEL: I would rather go to jail than  
21 give up my cell phone.

22 CHAIRPERSON GARDELLA: Mr. Abel will accept  
23 that as a friendly amendment, unless there is more to  
24 it.

25 MR. BARTON: No.

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1 MR. GARDELLA: The person who supported, I  
2 think is Mr. Crampton, are you agreeable?

3 VOICE: Yes.

4 MR. BARTON: Bottom line is there are some  
5 judges in this state I would rather give any remedy I  
6 can rather than sending a lawyer to jail, because  
7 there are some judges that would love to send the  
8 lawyer to jail. Beyond that, most lawyers, I think as  
9 was commented by Mr. Abel I believe, would just as  
10 soon not lose their cell phone. So it almost may be a  
11 greater punishment than anything else there. And the

12 word that perhaps is important in the present language  
13 is the word "may result" in a fine, incarceration,  
14 confiscation of the cell phone or a combination  
15 thereof.

16 CHAIRPERSON GARDELLA: Thank you.

17 Mr. McClory. I am sorry, Ms. Radke.

18 MS. RADKE: Victoria Radke, 47th circuit. I  
19 rise in support of Mr. Abel's proposal, because we  
20 aren't talking about being able to use these devices  
21 in courtrooms. We are talking about being able to use  
22 these devices in courthouses, and the problem is now  
23 there are many courthouses that will not let you bring  
24 these kind of electronics in at all, and when you have  
25 a very busy schedule or you are working in a lot of

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1 different jurisdictions, as I do, it is necessary to  
2 keep in contact with your offices, and, you know, you  
3 are not going to be going out and sitting in your car  
4 when it's 40 degrees below zero in Manistique.

5 So I would rise in support and with the  
6 amendment as suggested and I think that we should call  
7 this question.

8 CHAIRPERSON GARDELLA: Is there support for  
9 the call of the question?

10 VOICE: Yes.

11 CHAIRPERSON GARDELLA: At this point we are  
12 taking the vote on that. All in favor say aye.

13 Those opposed say no.

14 Those abstaining say yes.

15 There is someone saying abstaining. You can  
16 state your reason for abstaining if you wish, but you  
17 don't have to.



24 In the course of the investigation through  
25 the Special Issues Committee where Josh Ard is the

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1 chair of the UPL Committee had participated to some  
2 extent, we found that the Bar has had some programs in  
3 place to provide education to the general public, and  
4 earlier today we heard from the Chief Justice about  
5 some of the issues involving unskilled persons posing  
6 a danger to the public, and the Bar certainly has  
7 some, I guess, mandate to educate the public, and up  
8 until recently there was some cooperative aspects with  
9 other groups, the AARP as an example, that was  
10 providing funding for brochures and the like, but that  
11 group has decided to move on to other areas. And the  
12 resolution that you have before you simply is a first  
13 step to ensure that the Bar can look at using its own  
14 resources to continue with the educational activities,  
15 and, therefore, I shall move the adoption of this  
16 particular proposal.

17 VOICE: Support.

18 CHAIRPERSON GARDELLA: There has been a  
19 motion for acceptance of the unauthorized practice of  
20 law educational activities proposal. There is  
21 support. Any discussion? Hearing none we will vote  
22 on the underlying motion.

23 Those this favor say aye.

24 Those opposed say no.

25 Those abstaining say yes.

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6 I heard a conversation where some people were  
7 saying, well, you know, going to court doesn't always  
8 require that much profound legal knowledge and legal  
9 discretion. Take landlord/tenant cases. Why do we  
10 need attorneys? We can just let ordinary folks go in  
11 and represent people, so what kind of guidance do we  
12 have right now as to what is clear and what is not  
13 clear, and that's one of the problems and one of the  
14 things that we would need to address.

15 Following up on what Steve said, we  
16 definitely do want to emphasize remedial efforts.  
17 Prevention is a more efficient use of time and other  
18 resources than trying to do remediation after it  
19 happens, and so that's one of the things we want to  
20 do. And there is a solid series of successes where  
21 you can build upon.

22 We have had numerous trainings around the  
23 state, and Kim Cahill was a speaker at one in  
24 St. Clair Shores. And we have had some of those were  
25 to address the trust mill presentations. We had a

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1 special one that involved AARP, OFIS, and the Federal  
2 Securities and Exchange Commission to address what's  
3 the new wrinkle, and these are the free meal financial  
4 seminars where if you buy their real poor investment  
5 products they will throw in an estate plan as a  
6 freebie. So that's an interesting thing to show how  
7 much they think legal service is like if it's just the  
8 freebie thrown in like the transistor radio you can  
9 get for reupping your subscription.

10 We have done that. We are working on a  
11 number of brochures trying to get some information

12 out. Some of these are on topics like immigration  
13 law, real estate law, probate and estate planning.  
14 And for those of you who practice in other areas, if  
15 you are aware of some UPL activities going on, we  
16 would be more than happy to work with you to see if we  
17 can get some information out to encourage people to  
18 really get quality advice in what they are doing, and  
19 so you can see me or contact some people in the Bar  
20 about doing that.

21 I have also been engaged in a project, this  
22 is one thing AARP is still interested in, to try to  
23 work with libraries and senior centers and other  
24 places that will open their buildings for these people  
25 who say I want to do an educational presentation where

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1 they are really trying to sign up customers for UPL  
2 activities. We are trying to educate them as to what  
3 to look for. We are talking about possibly requiring  
4 a code of conduct, some various things that might  
5 discourage them from unwittingly helping UPL guys out.

6 And of course there are other people out  
7 there who have done a lot of work, in particular,  
8 interestingly, the Securities and Exchange Commission  
9 has done quite a lot in this area.

10 One reason also, of course, to look at  
11 remedial activities is that -- I mean to look at  
12 prevention and educational activities is there are,  
13 quite frankly, some challenges in remedial activities.  
14 One challenge the Bar is facing, and I don't know how  
15 many of you are aware of this, but the two staff  
16 people at the Bar who primarily work on UPL activity  
17 are both leaving the Bar, and so the Bar is looking

18 for replacements, but it will take a little bit of  
19 time for those replacements to come onboard.

20 They did a lot of good work. Catherine  
21 O'Connell is working in D.C. and Victoria Kremski is  
22 going to become a prof at Cooley in Grand Rapids.

23 The statutory scheme also creates some  
24 challenges for us. For one reason is the complaints  
25 we normally hear from attorneys is I saw that ad

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1 that's misleading. Well, the Bar right now can't act  
2 until somebody really falls for it. We don't have a  
3 direct way of doing anything about the misleading  
4 advertisements that essentially say come to me and I  
5 will practice the unauthorized practice of law for  
6 you.

7 The punishment we have is really not severe  
8 enough in my opinion. It's basically an injunction  
9 saying don't do the same thing again. It would be  
10 nice to have something with a little bit more teeth in  
11 it. And, quite frankly, the resources the Bar has  
12 make it easier to go after the little guy who is doing  
13 something than some of the bigger operations, although  
14 we have had success against some of the larger  
15 operations, an injunction against We the People, for  
16 example.

17 Could we have better statutes? Well, yeah, I  
18 think we could. A question as to what extent can the  
19 Bar as a whole take a position on these with the  
20 Keller type restrictions that we face. I think we  
21 could go a little far, but, you know, that's sort of  
22 open. It hasn't stopped me from making some  
23 suggestions, because I am not subject to Keller, at

24 I least when I am talking as for myself.

25 Typically the people who are victimized are

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1 going to be consumers. Whatever problems Michigan  
2 businesses have had, they typically haven't involved  
3 hiring people to do UPL. So it's really been more of  
4 an individual problem, and one thing that would really  
5 help would be if our Legislature would do something to  
6 fix the problem with the Consumer Protection Act so  
7 that people that are harmed by the unauthorized  
8 practice of law would be able to take their own remedy  
9 under the Consumer Protection Act and also to make it  
10 clear, as was the original intent, that businesses  
11 that are harmed, including law firms, could bring a  
12 complaint under the Consumer Protection Act for others  
13 who have been engaged in these unfair and deceptive  
14 acts and practices that are taking clients away.

15 I also think that it would be very helpful if  
16 we could say that somebody who engages in the  
17 unauthorized practice of law and has caused harm has,  
18 in fact, committed the malpractice of law, and they  
19 should be subject to those standards. The current  
20 statute says someone holding themselves out to be a  
21 member of a licensed profession, and it's just not  
22 really clear whether that includes unauthorized  
23 practice or not, but it would be nice to get that  
24 clarified.

25 We need to have a more direct way to address

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1 the deceptive market, and there are some ways of doing  
2 that. I don't want to go into detail about all of  
3 that, because it's not clear that the Representative  
4 Assembly can take these positions because of the  
5 Keller issue, but there are things that can be done  
6 and perhaps you can do by talking with your local  
7 legislators of saying this is a concern, this is  
8 something you would like for them to get involved  
9 with.

10 But we certainly don't need to wait. There  
11 are plenty of things we can do now. We need to think  
12 of the educational effort. We need to think a lot  
13 more about contacting local media, trying to get some  
14 stories out there, getting the word out to people  
15 about why it's important for them to get quality  
16 service.

17 So are there challenges? Yes. Are there  
18 things that we are doing? Yes. Are there things that  
19 we can be doing that will be increasing the effort and  
20 doing more good? The answer to that is yes as well.

21 I don't have anything to move on. I don't  
22 know if this is -- if you want to make some questions  
23 or comments, I guess I will respond to them, but I  
24 will defer to the chairperson to decide what's  
25 supposed to be going on right now.

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1 CHAIRPERSON GARDELLA: Josh has worked very,  
2 very hard, along with Steve Gobbo, on the Unauthorized  
3 Practice of Law Standing Committee for the State Bar,  
4 so if any of you have questions, I would encourage you  
5 to ask. Their committee has worked diligently for

6 numerous years trying to come up with proposals that  
7 will address these issues that will be effective and  
8 also get some results so that we can stop some of the  
9 people, especially in immigration area, estate  
10 planning, wills and trusts, and many other types of  
11 business issues too. So go ahead if anybody has any  
12 questions.

13 MR. ARD: Ask me a question or comment if  
14 anybody wants to know anything, or if you just want to  
15 get out of here and see if it's raining.

16 JUDGE STEPHENS: We could express  
17 appreciation for his work.

18 (Applause.)

19 CHAIRPERSON GARDELLA: Josh, thank you very  
20 much. Thank you, Steve, also for your work on the  
21 proposal.

22 And we are out of issues. I am sure that  
23 everybody is so disappointed.

24 MS. RADKE: Move to adjourn.

25 CHAIRPERSON GARDELLA: A few comments before

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□ REPRESENTATIVE ASSEMBLY 4-12-08

1 we adjourn. I am sorry. For those of you who are  
2 here for your first time, we have attendance sheets  
3 that all of you have to sign before you leave.  
4 Anne Smith and Marge Bossenbery and other staff  
5 members will have those, so do not leave until you get  
6 those. We do have the attendance policy, and we don't  
7 want to have you receive an unexcused absence  
8 especially after you were here the whole day.

9 The other thing is there is a mileage voucher  
10 in your packet. The per cents mile or cents per mile  
11 is 50.5, so you can fill that out and send that in to

12 the Bar as a little benefit of you driving over here  
13 today and giving your generous contribution of time.  
14 I thank you for your participation in the  
15 meeting. The debate was excellent, as it usually is.  
16 A lot of thought goes into it, and we will see all of  
17 you at the next meeting. Is there a motion to  
18 adjourn?

19 VOICE: So moved.

20 CHAIRPERSON GARDELLA: I hear support. All  
21 in favor.

22 VOICES: Aye.

23 CHAIRPERSON GARDELLA: Motion approved.

24 (Proceedings concluded at 2:27 p.m.)  
25

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□ REPRESENTATIVE ASSEMBLY 4-12-08

1 STATE OF MICHIGAN )  
2 COUNTY OF CLINTON )

3 I certify that this transcript, consisting  
4 of 153 pages, is a complete, true, and correct transcript  
5 of the proceedings and testimony taken in this case on  
6 Saturday, April 12, 2008.

7  
8 April 30, 2008

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

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