

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 Dearborn Hyatt Regency,
Great Lakes A, 600 Town Center Drive, Dearborn, Michigan, on
Thursday, September 15, 2011, at the hour of 9:00 a.m.

AT HEADTABLE:

VICTORIA A. RADKE, Chairperson

STEPHEN J. GOBBO, Vice-Chairperson

DANA M. WARNEZ, Clerk

JANET WELCH, Executive Director

HON. JOHN CHMURA, Parliamentarian

ANNE SMITH, Staff Member

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1 Dearborn, Michigan
2 Thursday, September 15, 2011
3 9:05 a.m.

4 R E C O R D

5 CHAIRPERSON RADKE: Good morning, ladies and
6 gentlemen. I am going to call this meeting to order.
7 Welcome to the Hyatt Regency in Dearborn for this
8 session of the Representative Assembly.

9 At this time I will ask our clerk,
10 Dana Warnez, to certify that a quorum is present.

11 CLERK WARNEZ: Yes, there is.

12 CHAIRPERSON RADKE: And we have a quorum, so
13 we can continue.

14 I will at this time entertain a motion to
15 adopt the proposed calendar.

16 MR. BLAU: Good morning, Madam Chair,
17 Mike Blau, 6th judicial circuit, and move for adoption
18 of the proposed calendar.

19 CHAIRPERSON RADKE: Is there support?

20 VOICE: Support.

21 CHAIRPERSON RADKE: Any discussion?

22 All in favor.

23 Thank you. We will proceed.

24 At this time I will entertain a motion for
25 approval of the April 9, 2011 summary of proceedings.

1 VOICE: So moved.

2 VOICE: Support.

3 CHAIRPERSON RADKE: All in favor.

4 Thank you. At this time I would like to
5 introduce Jeff Nellis, the chair of the Assembly
6 Nominating and Awards Committee, to fill vacancies.
7 Mr. Nellis.

8 MR. NELLIS: Good morning. As is always the
9 case between meetings, we typically have a few people
10 who move or get out of the Assembly, and so we had
11 several vacancies to fill again. I am proud to report
12 that with the help of several people, including
13 Anne Smith, our committee, and I would like my
14 committee members to stand and be recognized. I don't
15 think people sometimes understand there is a lot of
16 work that goes into this.

17 My committee members this year are
18 Kathleen Allen. Please stand. Elisia Schwarz,
19 Anne McNamara, John Mills, and LaNita Haith.

20 We also throughout this process get a great
21 amount of help from folks on the Executive Board here.
22 Victoria, Steve and Dana have been a great help, along
23 with Anne, but I am very proud to report that we once
24 again have all of the seats filled, we have a hundred
25 percent participation, so at this time I am going to

1 read off the names of the folks that will fill those
2 seats if approved.

3 In the 3rd judicial circuit, Rebecca Simkins
4 of Detroit; the 20th judicial circuit, Peter J.
5 Armstrong of Grand Haven; the 25th judicial circuit,
6 Nels Chrisopherson, Marquette; 29th judicial circuit,
7 Pamela Munderloh of St.Louis; and the 30th judicial
8 circuit, Shenique A. Moss of Lansing. So at this time
9 I would accept a motion to fill those vacancies with
10 the persons that were mentioned.

11 VOICE: So moved.

12 VOICE: Support.

13 CHAIRPERSON RADKE: Is there any discussion,
14 any other nominees? Thank you.

15 All in favor of seating these people to their
16 respective circuits.

17 Any opposed.

18 Thank you. Thank you, Jeff.

19 Just as a matter of information, when we get
20 to the awards section, after you have received your
21 award, our distinguished recipients, the photographer
22 is going to be at my left-hand side. This is where
23 the photos will be taken, just to let you know.

24 Moving on in the agenda. At this time I
25 would like to invite to the podium Stacy Combs, who

1 will introduce the recipient of the Unsung, of one of
2 the Unsung Hero Awards. Ms. Combs.

3 And I forgot. I am also happy to introduce
4 and welcome back to the Representative Assembly, a
5 former chair, Bob Gardella. Welcome.

6 MS. COMBS: Good morning. As an attorney who
7 has practiced child welfare law for the past 11 years
8 and stood in the role of prosecutor, guardian ad litem
9 attorney, defendant attorney, and juvenile court
10 referee, Karen Cook I nominated for this award. Karen
11 has truly stood out in many years of practice as an
12 attorney who goes above and beyond for children in the
13 child welfare law system. Karen is an expert in child
14 welfare law. She also is an expert in DHS policy.
15 She always is willing to help other attorneys. She
16 can, in fact, cite case names, statutes off the top of
17 her head. Many attorneys have her on speed dial to be
18 able to discuss issues with her, and she can always
19 point them in the right direction.

20 Karen always makes sure that the children
21 that she represents are zealously represented, and she
22 has made a difference in countless families, and
23 children in the system. So that is some of the
24 reasons why I nominated Karen, and I believe
25 Mr. Gardella also would like to say a few words about

1 Karen. Thank you.

2 MR. GARDELLA: Thank you, Stacy. It's good
3 to be back at the Assembly gatherings. I miss it. I
4 have been gone for, I think, three years now, even
5 though I did come back and visit at the April meeting
6 and was able to speak with a lot of you at that
7 function.

8 It's an honor to join Stacy Combs in the
9 presentation of the Unsung Hero Award to Karen Cook of
10 Oakland County. I thank the Assembly for recognizing
11 Karen's wonderful accomplishments, and she does have
12 wonderful accomplishments.

13 I know a couple years ago I tried a case
14 where Karen was the guardian ad litem on the case in
15 Judge O'Brien's court in Oakland County, and she put
16 her total focus on this case helping a very, very
17 troubled situation involving parents and guardians and
18 really brought great order to a situation where there
19 was chaos and animosity and the children were in the
20 middle, and she turned that case around and helped the
21 parties, I think, to see a lot more clearly when they
22 couldn't see that without her help.

23 And the more I was involved in that case, the
24 more I talked to other attorneys and was able to
25 recognize that she does this in all of her cases, not

1 only does she do a great job in advocating for the
2 children and working for the children's best
3 interests, she also helps other attorneys in Oakland
4 County and many other counties throughout the state in
5 terms of knowing what the rules are, what all the case
6 law happens to be, the statutes involving children
7 protective law. And she also does many appellate
8 cases in addition to her trial work and guardian ad
9 litem work in Oakland County, but I think many of you
10 may have spoken with Karen over the years and asked
11 her for assistance and guidance, because some of the
12 law can be complicated, and many of us need that
13 assistance. She definitely is a great resource, and
14 that's her passion, child protective law.

15 Karen gives her enthusiastic dedication for
16 the children for whom she is appointed to protect.
17 She steps into environments where kids are plagued
18 with abuse, neglect. Probate and family court judges
19 in Oakland County often appoint Karen as a guardian
20 and guardian ad litem for protecting children. While
21 serving as a GAL, Karen is known as a thorough
22 investigator and for being diligent in her efforts to
23 make sure that solid remedies are put in place to meet
24 the needs of the children, both physical needs,
25 emotional needs and also the academic needs of the

1 children when those are at issue.

2 She demands a code of conduct for the
3 children's guardians, the foster parents, the parents,
4 and even the Department of Human Services. She often
5 devotes hours, uncountable hours, tending to the
6 duties without being paid. She many, many times will
7 work on the weekends and in the evenings to make sure
8 that the needs are met for the children, and she
9 carefully coordinates supervised parenting time
10 sessions. She also seeks to comprehensively implement
11 orders of the court and also will ask the court to
12 change orders when things are needed and the orders
13 are insufficient.

14 Karen graduated from Duke University with a
15 B.A. degree. She also graduated from Wayne State
16 University with her J.D. Karen was admitted to the
17 Michigan Bar in 1976. She practices family law,
18 probate law and consumer law in Oakland County. She
19 has been a member of the State Bar of Michigan's
20 Children Law Section. She was on the advisory board
21 to prepare the guardian ad litem protocol handbook
22 published by the Michigan Judicial Institute. The 6th
23 Circuit Court judges and Oakland County probate judges
24 frequently appoint her as a guardian and guardian ad
25 litem for the children, and that's been her priority

1 in her career.

2 The judges in Oakland County are grateful for
3 Karen's special talents and as a troubleshooter in
4 difficult child protection cases. In fact, I was
5 speaking to some of the judges yesterday asking them
6 to give their thoughts on Karen Cook, and even though
7 they had busy schedules -- it was motion Wednesday in
8 Oakland County -- they took time out of their
9 schedules to give me a few quotes.

10 First of all, Judge Daniel O'Brien, his quote
11 reads, I am regularly confronted with a difficult case
12 where the welfare of the most vulnerable members of
13 the community is in jeopardy. In those cases I often
14 think of Karen Cook as the one person I can count on
15 to appoint, work tirelessly to protect their rights.

16 Judge James Alexander stated as follows,
17 Karen Cook has always been a strong advocate for
18 children. She performs above and beyond the duties
19 expected by the court. I have great respect for
20 Karen's unwavering determination to help children as
21 their attorney, guardian ad litem and friend.
22 Congratulations, Karen, for a well-deserved award.

23 And also Cheryl Matthews, I think she summed
24 it up maybe the best from the attorney's point of
25 view. Karen's encyclopedic knowledge makes her the

1 Cliff Claven of family law. And for those of you who
2 don't know who Cliff Claven is, he was the postal
3 worker on Cheers years ago, in case anybody has
4 forgotten.

5 The award that we present to her will
6 hopefully show her that we appreciate all of her hard
7 efforts and the commitment she has made. We
8 congratulate Karen Gullberg Cook as this year's
9 recipient based on her commitment to children in
10 Southeastern Michigan.

11 (Applause.)

12 CHAIRPERSON RADKE: It's a great honor to be
13 able to present this Unsung Hero Award to
14 Karen Gullberg Cook.

15 MS. COOK: Thank you. Good morning.
16 Receiving this award is quite overwhelming, and I am
17 pretty nervous, but I want to thank Stacy Combs and
18 Robert Gardella, my colleagues, for nominating me.
19 Thank you, Representative Assembly, for giving me this
20 award.

21 To be brief and to be gone is a virtue in
22 these types of occasions, but I do want to share one
23 experience which I think exemplifies why I do what I
24 do and why I love it so much.

25 In the summer of 2001 a grandmother

1 petitioned to be guardian for her granddaughter, who
2 was about 12 years old and was getting severely
3 abused. A stepmother was beating her with a heavy
4 metal dog chain, and she didn't have statutory grounds
5 for guardianship, but the judge was concerned that DHS
6 had not petitioned the child into a child protective
7 proceeding, so Judge McDonald called me in and said,
8 Can you fix this? I said, Well, just keep the
9 guardianship case open so I have some authority. So
10 for two months I kind of annoyed DHS and the
11 prosecutor's office trying to get a petition filed.
12 It was finally filed on 9-11-2001.

13 We had a preliminary hearing, court did not
14 close, and an order to take into custody ensued, and
15 Nicole, the little girl, was picked up later that
16 night. And when I later spoke to her about getting
17 removed from the abusive situation and being placed
18 with her grandmother, she said to me, This might have
19 been the worst day in American history, but it was the
20 best day of my life, because you got me to my
21 grandma's.

22 So I think that's a reward in itself for
23 being able to help that little girl. I ran into her
24 grandmother recently in the courthouse. She is now in
25 nursing school and doing extremely well. To be able

1 to do that kind of work is extremely rewarding, and to
2 receive this reward is an additional blessing. Thank
3 you very much.

4 (Applause.)

5 CHAIRPERSON RADKE: At this time I would like
6 to introduce Lawrence T. Garcia, who will present the
7 second Unsung Hero Award of the morning. Mr. Garcia.

8 MR. GARCIA: Thank you very much. Good
9 morning. Buenos diaz. It is my honor to address this
10 august body and also my honor to introduce a friend of
11 mine, Mayra Lorenzana-Miles, as a recipient of the
12 Unsung Hero Award. Mayra is my personal hero because
13 she has built a practice the many years as she has
14 been working as a lawyer that is representative of the
15 reasons that I got into wanting to be a lawyer in the
16 first place when I was a much younger and much more
17 idealistic person.

18 Mayra's career has been one of service,
19 dedicated, tireless, thankless service, and it is only
20 fitting that we recognize her for that today. Mayra
21 always has a dozen pro bono cases open at any time,
22 and in her work what she really tries to do, I think,
23 if I could sum it up in a sentence, is to help people
24 legally navigate our broken immigration system, which
25 is so cruel and so unfair to so many people today, but

1 Mayra is helping to work within the system to the
2 greatest degree possible to ameliorate some of the
3 suffering that's caused by our inadequate system.

4 For over 15 years that I know Mayra has been
5 helping people, many of them Latinos, in this way,
6 volunteering twice a month at basically a one-woman
7 pro bono clinic is what Mayra is. She is just a
8 walk-in pro bono clinic for people with immigration
9 problems. You might have guessed all of that about
10 someone receiving the Unsung Hero Award today, but I
11 would like to share with you a few tidbits about Mayra
12 that you probably wouldn't guess.

13 First, looking at her, her youthful
14 appearance and all of her energy, you wouldn't guess
15 that she is married with children and has been
16 practicing for 28 years. They have been very kind to
17 you, Mayra.

18 Second, during many of those years that she
19 has been practicing Mayra was legally blind. She has
20 macular holes, which is a very serious
21 sight-threatening disease. It is progressive. It's
22 treatable, and luckily in her case she has had a lot
23 of healing take place. But for much of the time she
24 has been practicing as an attorney she has been unable
25 to drive, for example, because she was blind.

1 She was one of the founding members of the
2 Hispanic Bar Association of Michigan. A lot of people
3 don't know that. And she is a mentor to nearly every
4 young attorney that she meets, especially the ones
5 that practice immigration law. A lot of people don't
6 know that, because she is a very humble person.

7 Finally, when you hear her accent, you might
8 not believe this one, but Mayra was actually born a
9 United States citizen in Puerto Rico, and she is just
10 a remarkable woman. She is my personal hero, and I
11 hope today you will be an unsung hero no more, Mayra.
12 Congratulations on this award.

13 (Applause.)

14 CHAIRPERSON RADKE: You got to give the
15 paparazzi their due, right? It is a great pleasure to
16 be able to present the Unsung Hero Award to
17 Mayra Lorenzana-Miles.

18 MS. LORENZANA-MILES: Thank you so much, and
19 I do have some notes to your benefit, because I know I
20 have just a few minutes, and if I get talking about my
21 passion, I would be thrown out of here.

22 I am honored to be recognized by this group
23 that I respect so much and did so much for me,
24 especially when I began my practice here after
25 practicing in Puerto Rico and Louisiana for six years.

1 I came here in 1995 with my husband and family who are
2 the light of my eyes and they are first, second, third
3 fourth. They are first thing.

4 And through this body and belonging to
5 committees and coming here and getting my bag and
6 going to all the stations, not knowing anybody, one
7 committee at a time I began a solo practice, and I did
8 not want to do immigration. I was kind of forced into
9 it because the lawyer referral lines were referring to
10 kind of case it was, domestic or immigration because
11 my accent, and I opted for immigration. I did not
12 want to, because I wanted to incorporate myself into
13 the community and not limit myself to maybe the Latino
14 community.

15 But I want to take the opportunity to tell
16 you how blessed I am and how lucky I am that I was
17 pushed by life to do that and in this time invite
18 you -- I know that I am preaching to the choir,
19 because if you are here you are dedicated, you have
20 service, and you are doing this when you are not
21 getting paid.

22 So this room is full of unsung heros, because
23 I think as attorneys we have more than one case that
24 we have not been paid, we have more than one client
25 that has been our worst enemy because they didn't give

1 us all the information we needed. We have all been
2 victims of a judge in a bad mood or the prosecutor
3 that does not tell us all, so we all are. I think I
4 invite us to a flame that's in our hearts that we all
5 have, because we are all unsung heros.

6 But a little bit that I want to tell you,
7 sometimes it's not that I embarked in this big
8 crusade, although many times I did feel like don't
9 give up the fighting, the meals, and crying a lot. I
10 am sure that the other recipient also feels the same
11 thing.

12 But I invite you to -- we are given the
13 unique opportunity as attorneys to serve. And I think
14 it only to service we can find the best of all, and if
15 we are all the best, we can make a whole, complete
16 country, nation, planet that is better. And I
17 challenge us to look at the people that are around us,
18 not because of their faith or their color of the skin
19 or what is different, and begin to think again of all
20 of us, we are one, and that's what made us great.
21 That's what makes the association so successful,
22 because all the little pieces that we can make
23 something different, and I would like us to be
24 challenged to begin to live without fear and serve in
25 a case even though we may know that we may not get

1 paid, because life will take care of us once we find
2 that inside us that is what we all came here for.

3 So I am very honored. I am happy for the
4 people from my office and my mom and my sister that
5 came from Puerto Rico for this five minutes of glory,
6 and I thank you for the opportunity, because I do
7 respect this body. Lawrence Garcia James Feinberg,
8 and the people from the Hispanic Bar Association who
9 have been there through the years, thank you very
10 much. And, again, I think we all do a little bit,
11 this place can be a whole lot better. Thank you.

12 (Applause.)

13 CHAIRPERSON RADKE: At this time -- I am so
14 excited about this one -- we would like to invite
15 Michael Hale to the podium to introduce this year's
16 Michael Franck Award recipient, and this is a great
17 honor for me personally, because Professor Clark
18 taught me at DCL, and for those of you who were not at
19 the awards banquet last night, Harold Norris also
20 received an award, so we are doubly blessed this year
21 if you are a DCL graduate to have two of our esteemed
22 professors receive awards this year. Michael Hale.

23 MR. HALE: Good morning. Someone once told
24 me in offering these kind of introductory comments and
25 remarks that you have to treat them a lot like a mini

1 skirt. You have to make sure they are short enough to
2 make it interesting but long enough to cover the
3 essentials.

4 So, Clark, I am going to do my best to try to
5 cover the essentials that I have on you for your 37
6 years as an educator and a professional, because, in
7 fact, the Michael Franck award is given annually to an
8 attorney who has made an outstanding contribution to
9 the improvement of the legal profession. It has been
10 bestowed on many dignitaries since 1998, including
11 Michigan Supreme Court justices, many other judges,
12 State Bar presidents and prominent attorneys who have
13 made a special mark upon this profession, and this
14 year the award unanimously goes to someone who humbly
15 refers to himself as school teacher, Professor
16 Dr. Clark Johnson.

17 For those, such as myself, who recall the
18 hallowed halls of the Detroit College of Law, learning
19 from Professor Clark Johnson was originally always a
20 rather inspiring experience, whether it was his often
21 to the point comments in class, such as that's what
22 you do to them on cross-examination, or watching him
23 wheel down Elizabeth Street in his it
24 O.J. Simpson-like Bronco carrying his loads of books.

25 Dr. Johnson was and is a unique kind of

1 educator who has made a significant difference in the
2 lives of countless budding attorneys. This certainly
3 has continued in the years following DCL at the now
4 Michigan State University College of Law.

5 Clark also was very, very pragmatic in some
6 of his teaching for those of you who had some of his
7 classes. He actually would teach life lessons as
8 opposed to just case law. Some of the lessons that he
9 would teach the students, in fact, were that there is
10 no such thing as drinking two beers. It is either one
11 or 12.

12 The other one that comes to mind is his
13 lesson that you don't ever want to take a sleeping
14 pill and a suppository at the same time. I think
15 maybe Clark may have learned that one the hard way.

16 It's rare to find a law school professor who
17 imparts compassion for the lowly law student. They
18 generally do not occupy the same space, yet Clark has
19 found a way, somehow understanding that the agonizing
20 metamorphosis from layman to lawyer does not always
21 have to be agonizing all the time. He is known for
22 telling students that practicing law is like having a
23 front row seat to the greatest show on earth. I am
24 sure we can all relate to that in many ways.

25 And really one of my favorite testimonials

1 about Clark Johnson is at the end of his examinations,
2 for those of you that have had him, I am sure he still
3 does this today, at the end of the final examination,
4 you go through this agonizing exam, and there would be
5 a note from Clark at the end saying, Your tuition with
6 me is good for a lifetime. If you ever have anything
7 that I can do to help you, please call upon me. And
8 he meant it. I am sure I am not the only one who has
9 taken him up on that offer and called upon him for
10 guidance in my days since law school.

11 That spirit and attitude simply made you want
12 to learn the law and taught you what it meant to
13 practice law. The simple gesture at the end of these
14 examinations is perhaps one of the finest testaments
15 to the true care he has for his students and the
16 difference one educator can make in the lives of those
17 he is educating. This is, indeed, worthy of
18 recognition as a substantial improvement to the
19 profession that we are all part of.

20 Clark is an alumnae of this very
21 Representative Assembly he told me recently -- I did
22 not know -- having been elected several years ago. He
23 has always given back to this legal community in ways
24 even outside the educational process.

25 Seventeen years ago I recall Dr. Johnson

1 advising me upon my graduation from law school at DCL
2 about a career opportunity with a major firm in
3 Detroit, and he told me, he said, You are lucky, Mike,
4 but you are not as lucky as they are to have you.
5 This was the spirit of engendering confidence in young
6 lawyers that makes him in some ways larger than life
7 in my view of the legal community and deserving of
8 this award.

9 At one time Dr. Johnson was cited in the
10 Detroit College of Law Journal about achieving yet
11 another degree, this one a Ph.D. in psychology. And
12 he remarked, I actually might just plan to get another
13 degree, maybe two. He was always learning, and he has
14 really been a great example for students even outside
15 of the classroom in that regard.

16 When Clark learned he was going to be the
17 recipient of this award at my nomination, he wrote me
18 that there were many others far more deserving and
19 that all he had ever done was to really look after his
20 students. This was not surprising to me, for that is
21 what Clark Johnson has stood for as an educator for
22 over 37 years. He often signs his letters and emails
23 Clark Johnson, school teacher.

24 It is time that this inspiring level of
25 humility be recognized for the significant

1 improvements he has made to the legal profession and
2 how fitting that would be with the Michael Franck
3 Award. Stimulating, intelligent beyond words, artful
4 with language, eloquent, a master of the law. The
5 only other adjective that really comes to mind in
6 speaking of Clark Johnson is that of a giver.

7 There is no one quite like this man in the
8 legal community. Just ask around for those that he
9 has touched in so many ways. And among all his great
10 accomplishments he can now add one more, and this one
11 is a big one, the substantial honor of being a
12 recipient of the Michael Franck Award, named after an
13 attorney who stood for something of significance and
14 for whom the building housing the State Bar of
15 Michigan was named in Lansing. Please join me in
16 congratulating Clark Johnson.

17 (Applause.)

18 CHAIRPERSON RADKE: I am so proud to be able
19 to present this to Dr. Johnson.

20 DR. JOHNSON: Good morning. I am
21 Clark Johnson, school teacher. Trying to gather
22 myself together.

23 Mike, the last I knew, it was not proper to
24 argue facts in closing argument that had not been put
25 in as evidence. However, I am so honored to be here,

1 and I thank you so much.

2 Mike did tell me my remarks were limited to
3 five minutes. I think he has forgotten that what it
4 takes to say in five minutes generally takes me about
5 three hours. However, I want him to know that he,
6 among so many in this room, faces that I recognize,
7 former students, that we are all so fortunate, every
8 one of us, blessed to be here, blessed to be part of
9 the Bar, blessed to be part of the Representative
10 Assembly.

11 And as one speaker said, I dedicated my life
12 to giving in this and giving in that and the children,
13 what have you. I am a school teacher. I decided that
14 I could do my very best there. Had a lot of trial
15 experience, been in every court in the country from
16 the lowest municipal court all the way to the top, and
17 for me the greatest rewards have come in being a
18 school teacher. And I will be so ever grateful for
19 having had the opportunity to serve in that capacity
20 and to have this great ride in life, and I do thank
21 all of you from the bottom of my heart. Thank you so
22 very, very, very much.

23 (Applause.)

24 CHAIRPERSON RADKE: I would like to thank all
25 of the award recipients and the presenters for this

1 morning's presentation. Thank you so much for
2 bringing these people to the attention of the
3 Representative Assembly, which brings me to another
4 point, you know people in your own lives that would be
5 worthy recipients of those awards, so think about who
6 they are and submit those applications and
7 nominations. Thank you.

8 This is the point at the meeting when we are
9 supposed to be receiving remarks from Tony Jenkins,
10 the current State Bar President. And I have been
11 advised that we are supposed to take our break right
12 now, so sorry about that. Go fill your coffee cups up
13 and we will be back in ten. Five minutes. Thanks.

14 (Break was taken 9:40 a.m. - 9:52 a.m.)

15 CHAIRPERSON RADKE: This is the time set
16 aside actually for remarks from the Chair, and just to
17 apologize to the Assembly for my phone going off, that
18 was Tony Jenkins, and apparently we need UPS, because
19 I guess our logistics failed. Tony didn't realize he
20 was on the agenda, so we are going to have a little
21 stand-in for him. Bruce Courtade has graciously
22 agreed to step in on behalf of Tony, so I will give
23 you the podium in just a few minutes, Bruce. Thank
24 you.

25 First of all, I want to thank the staff of

1 the State Bar, and especially Anne Smith, because she
2 is the person who takes care of the logistics for the
3 Representative Assembly, and she more than anybody has
4 the backs of the Executive Committee for the
5 Representative Assembly and makes us all look so good.
6 So any screw-ups are our own. It had nothing to do
7 with Anne, I just wanted to point that out.

8 I would also like to thank the Board of
9 Commissioners, as well as if Tony was here I would
10 shake his hand, Janet Welch, our executive director,
11 for all the help they provide to the Representative
12 Assembly throughout the year as well.

13 Thanks too to all of our RA committees and
14 their chairs for their hard work in getting ready for
15 this meeting today. You don't know how much Dana and
16 Steve and I appreciate your hard work. I know that we
17 thank you, but it's really from the heart, and we
18 appreciate all that you do. And, again, I want to
19 thank all of the Representative Assembly members for
20 being here, because this takes time away from your
21 practices and you earning a living and you do this
22 voluntarily because, like so many of us, you are a Bar
23 geek.

24 Speaking of which, at this time, because
25 seems to me half the room is filled with former chairs

1 of the Representative Assembly, I would like all these
2 former chairs to stand and please be recognized by
3 your colleagues. I think that includes Nancy Diehl,
4 Bruce Courtade, Elizabeth Johnson, Kathy Kakish,
5 Bob Gardella if he is still in the room, Tom Rombach
6 who is already on his feet. I hope I didn't miss
7 anybody. Carl Chioini, sorry. Thank you so much.
8 Can we have a round of applause for these people.

9 (Applause.)

10 CHAIRPERSON RADKE: They just keep coming
11 back. We love them.

12 It has been a great year for me to be Chair
13 of the Representative Assembly and to be able to stand
14 up here and work with all of you to make the policy
15 decisions and set the course for the State Bar of
16 Michigan, and I appreciated the opportunity that you
17 have given me to do that, and so thank you all for
18 that.

19 At this point in time I want to introduce an
20 issue that has arisen that you will be hearing more
21 about in the 2011-2012 Bar year. As you know, the
22 State Bar has a standing committee on the unauthorized
23 practice of law, and that committee selected an ad hoc
24 committee to help them. That ad hoc committee was
25 chaired by our own chair-elect, Steve Gobbo. Thank

1 you, Steve, for that.

2 And the purpose of that committee was to come
3 up with the definition of the practice of law. And
4 you will be presented in the future, in the near
5 future we hope, with an opportunity to vote on
6 amending the rules of the State Bar of Michigan to
7 include that definition.

8 I want you to know that in selecting the
9 members of that ad hoc committee, the UPL committee,
10 picked distinguished practitioners from across the
11 state and from a broad constituency of sections to
12 develop a uniform definition, and as you receive more
13 information during the course of the coming Bar year
14 about this definition, I want you to consider what
15 effect it will have and ask you to support it to
16 assist the State Bar of Michigan in its efforts to
17 protect the citizens of our state from the
18 unauthorized practice of law.

19 And I just mention this now to alert you to
20 the importance of this issue, which the Board of
21 Commissioners has requested be presented to this body,
22 because it is going to change policy for members of
23 the Bar, and so I want to alert you to that so that
24 when you start receiving this information you will
25 give it due attention on behalf of the citizens of the

1 state of Michigan as well as members of the State Bar.

2 I just have a few housekeeping matters that I
3 want to alert everybody to just at this point, because
4 I am the chair and I can do that, and that is you know
5 we have a contested election for clerk this year.
6 There are three people running. You have received
7 that information and their background in your packets.
8 At the front there are envelopes for each member of
9 the Assembly. The tellers who have been selected will
10 be passing those out. When you get your envelope,
11 please carefully print the name of the candidate you
12 are selecting, put it back in the envelope, and the
13 tellers will recollect them, and then they will
14 convene and count the votes and deliver a result to us
15 later in the meeting.

16 At this time it is a great pleasure for me --
17 Julie, oh great. Even better. Bruce Courtade has
18 alerted me that in place of Tony Jenkins that he is
19 ceding his position at this podium to our
20 President-Elect, Julie Fershtman. Welcome, Julie.

21 (Applause.)

22 PRESIDENT-ELECT FERSHTMAN: All right. Talk
23 about speaking when you had no idea that you were
24 going to be here. Yes, I am not Tony Jenkins. I know
25 I look a little bit like him, slightly challenged in

1 the height department. But, first of all, I would
2 like to welcome all of you here.

3 Ten years ago I was chair of the
4 Representative Assembly and had an absolutely
5 wonderful time working with the then composed
6 Representative Assembly, some of whom I think are
7 back. You do, as you know, a wonderful job. So I
8 would like to thank you for being here, thank you for
9 the work that you are doing, not just now but at our
10 next meeting next year.

11 And I would also like to thank and to
12 congratulate our outgoing chair, Victoria Radke. This
13 is a difficult meeting, because it's exciting. You
14 have got a great agenda, so many different things to
15 cover, and then after all of this Victoria steps down.
16 So I know it's a tough time, but you have done a
17 wonderful job as chair, and it's been a pleasure
18 working with you at the State Bar on the Board of
19 Commissioners.

20 I would also like to congratulate Steve Gobbo
21 who becomes the new chair and who I will be working
22 with quite a bit in the year ahead and, of course,
23 Dana Warnez who steps up to the vice chair.

24 And I would like to thank in advance the
25 three candidates, or congratulate in advance the three

1 candidates, because one of you will win the election,
2 and I know we have a three-way race for clerk, which
3 is not typical of a Representative Assembly election.
4 When I ran for Assembly clerk way back when, it was an
5 uncontested election. It was just a walk straight in.
6 I think everybody was, frankly, not interested at that
7 point, and I just happened to be the only one
8 standing, and there I was.

9 But it will be a challenging race. You will
10 learn a lot if you haven't already about the
11 candidates. So I would like to thank the three of you
12 for stepping up and looking to a leadership position
13 in the Representative Assembly, which of necessity
14 will give you a leadership position in the State Bar
15 of Michigan. You will serve on the Board of
16 Commissioners, you serve as you move up to vice chair
17 and chair on the Executive Committee, so the position
18 that your leader here, your top two leaders in the
19 Representative Assembly have, takes them even further
20 in terms of Bar governance. So preemptive
21 congratulations to the three of you who are stepping
22 up.

23 I know that you have awards that the Assembly
24 has given and will be giving. There is the Unsung
25 Hero Award, and that will be given later today.

1 CHAIRPERSON RADKE: No, already done.

2 PRESIDENT-ELECT FERSHTMAN: Already done.

3 They just threw me in here and didn't tell me what was
4 on the agenda. You think I would have known.

5 But congratulations to the award winners, and
6 that would be to Mayra Lorenzana-Miles and
7 Dr. Johnson, and I have Ms. Cook in my notes here.

8 CHAIRPERSON RADKE: Karen Gullberg Cook.

9 PRESIDENT-ELECT FERSHTMAN: Karen Gullberg
10 Cook. Of course the two names would have been a
11 little bit easier than Ms. Cook, but that's okay. All
12 right, Bruce, don't worry. I still love you.

13 But congratulations to the award winners, and
14 I offer all of you the invitation that when we come
15 back next year we will have other award winners to
16 congratulate and think about people that you believe
17 are deserving out there and put their name in for
18 consideration.

19 You may want to know about the Bar, seeing
20 that this was supposed to be Tony, the president's
21 presentation. What I will leave for you, because we
22 have a lot to cover in the morning's agenda, is that
23 the State Bar of Michigan is in very, very good shape.
24 The leadership in the State Bar of Michigan, with one
25 exception, me, is very strong. We have a tremendous

1 Board of Commissioners. We have dedicated officers,
2 and, as you know, we have an exceptionally good
3 executive director in Janet Welch. She has done and
4 will continue to do an absolutely wonderful job.

5 We are, I should tell you, because one of the
6 things I have done is travel around the United States.
7 We are here, in the state of Michigan, considered
8 widely, nationwide, as one of the leading Bar
9 associations in the country. We are on the cutting
10 edge. We are a Bar that people look to. Frankly,
11 they copy us. They do what we do after we have done
12 it, because we have been very successful with our
13 initiatives and our programs.

14 So I want you to know that not only are we
15 strong, but we are clearly and very widely perceived
16 as being a strong Bar association. So I commend the
17 leadership of Janet, there you are, and of course the
18 staff of the State Bar of Michigan that have worked
19 very, very hard, and then of course my fellow
20 commissioners, Representative Assembly leaders, and
21 all of you for making the Bar association what it is
22 today.

23 Couple of things that I wanted to mention and
24 then I will step down, because, again, you have a lot
25 to cover. Tonight is the Diversity Reception and,

1 yes, you have seen signs. People are probably
2 cornering you about it. It takes place over at the
3 Henry Ford Museum. Shuttle busses will take you back
4 and forth. Don't even worry about driving to and
5 from. We have got that covered. So I hope that you
6 will all join us at the Diversity Reception, which is
7 tonight at the Henry Ford Museum. Tickets are at \$10.
8 The event starts at 6:30.

9 Between now and then, if you have dead time,
10 there will be plenty of receptions that you can either
11 go to invited, like the Law School Reception, or you
12 could be like me and just crash a few of them and
13 nobody will really complain, but there will be plenty
14 of receptions going on between now and then that will
15 keep you busy, or you can check your email on your
16 Blackberry.

17 Speaking of diversity, one final note I leave
18 with you, and that is the diversity pledge. The
19 diversity pledge was initiated a year ago. Law firms,
20 lawyers, corporations, schools, sections of the Bar,
21 committees have signed onto it. I strongly believe
22 that all of you as leaders in the Bar have an
23 opportunity that awaits you to sign on to the
24 State Bar of Michigan's diversity pledge.

25 So if you haven't done so already, think

1 about doing it, and if you are wondering how that gets
2 done, easy. Do a little surfing on the State Bar's
3 website and you will see it and you will see how easy
4 it is to simply put your name in as somebody who is
5 committed to the goals of diversity for the Bar and
6 for the profession.

7 I will be seeing more of you in the year
8 ahead. I would leave with my final parting comment,
9 which is this. One of my goals as the State Bar of
10 Michigan President, which, of course, hasn't begun yet
11 because this is Tony's last few hours, but one of my
12 goals is to be accessible and to communicate, and I
13 strongly encourage all of you to take advantage of
14 that opportunity that I am giving you to contact me if
15 there is something that you think that the Bar should
16 be doing better, a concern that you have, an unique
17 idea that you have, something that you would like to
18 help do within the Bar that I can assist you with. I
19 invite all of you to contact me at any time.

20 And you will learn a little bit later at the
21 inaugural luncheon about a blog that's being launched.
22 Everybody loves the State Bar of Michigan blog. Janet
23 does a great job with it, but there is a blog going
24 out called SBMPres2012.com. It goes live in a couple
25 of hours. It's my blog, and I will be updating

1 everybody about my travels all over the state,
2 sometimes even at Washington, D.C. and what I will be
3 doing, people I will be meeting and what's happening
4 around Michigan mainly in the profession. I think you
5 will find it interesting, and keep your eyes open for
6 it. It will be not just a journey with me, but I
7 think it will also be an eye opener as you see the
8 types of things that are happening in the profession.

9 So have a wonderful meeting, and thanks for
10 allowing me to pinch hit.

11 (Applause.)

12 CHAIRPERSON RADKE: Thank you, Julie. It's
13 always great when someone can step up at the last
14 minute. We appreciate it. And I would like to thank
15 Bruce, who I know sweated a few minutes when he
16 thought he was going to be up here. Thank you, Bruce.

17 We will now have remarks from Janet Welch,
18 our executive director, but before I let her get to
19 this microphone, I would be remiss if I didn't ask for
20 your acknowledgement of the fact that she has been
21 nominated as a Woman in the Law Award by the Michigan
22 Lawyers Weekly, and we are so proud of Janet and her
23 hard work.

24 (Applause.)

25 EXECUTIVE DIRECTOR WELCH: Thank you,

1 Victoria. If I could, I would have taken myself off
2 the agenda after extravagant praise, because I always
3 worry about disabusing people of the notion that it
4 all is true, but I am pleased to be here. I have come
5 to you directly from speaking to the Solo and Small
6 Firm Institute, and my message there was that the
7 world is changing so fast in so many ways, and the way
8 in which it is changing is impacting the practice of
9 law in such a significant way that the Solo and Small
10 Firm attendees are to be commended for their good
11 sense in checking in.

12 And my message to you in regard to the topic
13 of how fast the practice of law is changing and all
14 the forces that are coming to us is that you are at
15 ground zero for that change, because what it means is
16 that our Rules of Professional Conduct, the tools that
17 lawyers have, all of those are in flux, and you
18 control how that's going to look in Michigan.

19 Victoria has already indicated to you that
20 the question of how we define the practice of law is
21 coming to you, and that is just one of the examples of
22 the way in which legal services is being impacted by
23 technology in particular and by the access to
24 information about legal knowledge that used to be
25 behind closed doors on our shelves and is now on the

1 internet for everyone to see.

2 Julie, I can't embrace Julie's praise of me,
3 but I can embrace the idea that the State Bar of
4 Michigan is at the cutting edge of paying attention to
5 what's going on and making wise decisions about how to
6 guide our members in moving forward and that we are
7 doing that for the cheapest cost of business for
8 practicing law in the country. Maryland might have
9 some sort of an argument with us, but I think we would
10 win it.

11 The average practice of law, if you don't
12 include even continuing legal education, the average
13 cost to practice law that you have to pay just to not
14 be accused of practicing law without a license is
15 \$389, so we are significantly below that amount, and
16 we don't anticipate that's going to change for a long
17 time. I know that's one of your responsibilities, to
18 pay attention to what our dues are, so I wanted to
19 call that to your attention.

20 Elizabeth Lyon is on the agenda, so I won't
21 wander into her territory and tell you some of the
22 things that are going in terms of the Judicial
23 Resource Report, but change is happening all across
24 the board.

25 I want to update you on one interesting piece

1 of the way in which the legal landscape is changing
2 globally that I talked to you about last year, and
3 that was that in England they have changed the rule
4 that says that legal practices cannot be owned by
5 nonlawyers. And I said that I think we need to be
6 concerned about that change, because if it is
7 successful commercially, if it looks like it's making
8 more money, giving more people legal services, I don't
9 see how it will be resisted here, although when I told
10 you that I thought that that was several years down
11 the road for us to worry about because we have such a
12 balkanized set of rules of professional conduct across
13 the whole country.

14 What's happened in the past year that I
15 wanted to tell you about, it's happened since the last
16 annual meeting, is that a law firm on the east coast
17 has actually brought a lawsuit against the State Bar
18 of Connecticut, the State Bar of New York, the New
19 York State Bar Association, and the New Jersey Bar
20 challenging that rule. And just last Friday I was at
21 a symposium on the law at Michigan State College of
22 Law, and one of the professors there, he has written a
23 paper, the premise of which is that the Robert's court
24 will uphold that challenge on first amendment grounds.

25 So that's the sort of earth-shaking challenge

1 that's coming our way, and if you want to describe to
2 your constituents what that might mean, my shorthand
3 for that is a legal practices aisle at Wal-Mart, that
4 we will have, you know, toothpaste aisle 4, toilet
5 paper aisle 12, testamentary trust aisle 25. That, I
6 think, illustrates how important your work is and how
7 important all of our work is going forward.

8 Before I relinquish the podium, I just want
9 to express my thanks to Victoria, and I want to let
10 you know what a passionate and tenacious advocate she
11 is for what you do on the Board of Commissioners. It
12 has been a pleasure to work with her and for her, and
13 I will miss her very much. Thank you, Victoria.

14 (Applause.)

15 CHAIRPERSON RADKE: Thank you, Janet, very
16 much. I am going to miss the Board of Commissioners,
17 especially our executive director, who is such an
18 advocate for our Bar and its members throughout not
19 only the state of Michigan but around the country.

20 And from this point you are going to hear
21 from Elizabeth. Where are you?

22 MS. LYON: Behind you.

23 CHAIRPERSON RADKE: I am looking all over for
24 her and she sneaks up. Elizabeth Lyon is going to
25 give us our public policy update. Welcome, Elizabeth

1 MS. LYON: Good morning. So the beauty of
2 this vantage point is that there is no clock that I
3 can see, and since we are running ahead of schedule,
4 as far as I am concerned we have a lot of time to hang
5 out and you can ask me lots of questions. I will keep
6 it brief.

7 I always like to start the report with
8 updating you on our status about tax on legal
9 services, since that has been one of the bigger issues
10 that we have talked about when I am able to provide
11 you with public policy updates. I am happy to report
12 that there is still no action that we are anticipating
13 for a tax on legal services to be discussed. The
14 legislature, if you read the newspaper and those sort
15 of things, you know that they have a budget in place,
16 they have an anticipated budget for next fiscal, they
17 have done some major tax changes, and as far as what
18 we are hearing right now, we don't anticipate that any
19 future tax changes they may do will include the sales
20 tax. Although we do hear discussion about what they
21 might do with the personal property tax and those
22 other types of issues that are typically more towards
23 businesses and helping businesses reduce taxes.

24 I think another one of our favorite priority
25 issues is reform of the public defense system. I

1 don't have anything concrete to share with you today.
2 I believe in the spring we talked about the approach
3 of establishing a commission of high level
4 stakeholders that would carefully review the issues
5 and make recommendations back to the legislature. I
6 think this fall you will see some very public activity
7 on that public defense commission concept moving
8 forward and that we will see that starting to really
9 ramp up this fall and through next summer. So in the
10 spring I will have a lot of details to share with you
11 about that, but as we are able to share information,
12 we can do email blasts and let you know sort of as
13 that's happening.

14 Also happy to report that Senate Bill 152,
15 which implements audiovisual recording of in custody
16 interrogations, which is a direct action and response
17 to what this body voted on several years ago under the
18 leadership of Nancy Diehl and others that led that
19 effort. That bill came off the Senate floor
20 unanimously, which is a really tremendous
21 accomplishment, and we anticipate a hearing in the
22 House this fall and to get it off the House floor too.
23 So congratulations to you on the implementation of
24 that legislation that was supported by this body.

25 We will also actively working on legal aid

1 funding. As you know, the federal government has had
2 one or two parols about funding issues and budgets in
3 the last couple of months, and we are certainly seeing
4 that potential impact ripple down to legal aid funding
5 and what that means for Michigan and legal aid
6 providers. Just yesterday the Senate Appropriations
7 Committee marked up that legislation, that bill to do
8 the funding, and did an across the board cut of two
9 percent that included legal aid funding, which is a
10 much more generous sparing of that funding, if you
11 will, than what the House has proposed. So, again,
12 we'll have to see it go into this reconciliation
13 process that we are all getting used to watching on
14 the evening news, and hopefully it does improve.

15 The other issue, and I was asked quite a bit
16 about this yesterday, so I am going to bring it up
17 today, thinking that perhaps the interest exists here
18 too, is the proposal to increase the jurisdictional
19 limit for small claims court, and that was voted out
20 of the Senate Judiciary Committee Tuesday afternoon
21 increasing the level from the current 3,000 to 8,000.
22 That was a substitute bill. It had been originally
23 proposed to raise the limit to 10,000, so we got it
24 down to 8. The Bar only supports an increase based on
25 inflation, which is about 3,800, so there is still a

1 pretty big gap there that we are trying to work on in
2 the Senate floor and out of the House, but that is
3 certainly an issue that I know has gained some
4 interest.

5 As Janet mentioned, I think that we will see
6 a flurry of activity this fall. We are getting very
7 used to working with this administration and the
8 current Republican majority in the House and Senate,
9 which tends to work through issues very quickly. Now
10 that they have done the budget, we will see them
11 digging their heels into more policy tech matters,
12 more substantive law matters, and perhaps in
13 anticipation of the fall election some more partisan
14 issues as well.

15 We do know that there will be sort of a
16 comprehensive package to look at proposals within the
17 judicial branch, and this will mainly be
18 implementation of the recommendations that were
19 released in the Judicial Resources Recommendation
20 report. If you are not familiar, that's a report
21 issued by the State Court Administrative Office. You
22 may have seen the headlines and the editorials that
23 called for the reduction of the size of the bench, and
24 so we are anticipating those bills to be implemented
25 and considered in both chambers pretty quickly.

1 Certainly that's something that the State Bar
2 anticipated while in the Judicial Crossroads Task
3 Force and other recommendations that were encapsulated
4 within those recommendations will also be coming up
5 this fall.

6 We are seeing a lot more use of technology in
7 the court system. Something that will be particularly
8 careful to watch there is that in criminal
9 proceedings, if we start to use technology, making
10 sure that it's two-way interactive or other types of
11 systems are in place to make sure that we are not
12 violating the confrontation clause. That's something
13 that we consider to be very important.

14 We are also seeing a lot of interest in
15 specialized courts and treatment courts. There will
16 be legislation introduced this fall at least to
17 implement in a larger scale veterans courts that help
18 to coordinate benefits and help those who have crimes
19 specifically relating to something to do with service,
20 like PTSD or those other types of issues.

21 We often talk a lot about legislation in
22 these updates, but there is also a lot happening too
23 within the Supreme Court administrative arms and their
24 ability to issue rule amendments. A few of the items
25 that have received some great debate at the Board of

1 Commissioners has to do with a proposal to limit what
2 you can receive for a referral fee in a case. Also on
3 some of the rules, that they are looking at
4 advertising materials. And certainly within the
5 context of communicating the State Bar's positions on
6 the advertising materials, we have reiterated this
7 body's position on what should be done in terms of
8 family law matters, which I know was important to this
9 body and something that you adopted. So there is lots
10 of stuff happening there as well.

11 With that, I would open myself up to
12 questions if anybody has any. You are letting me off
13 easy I see. Feel free to tag me throughout the annual
14 meeting or any time. You know how to get in touch
15 with me. I am happy to answer.

16 MS. SADOWSKI: Elizabeth Sadowski, 6th
17 circuit, Oakland County, Rochester, Michigan. Is
18 anything being done about the mandatory fee paid
19 e-filing proposals that are going on right now? It's
20 of great concern to me as a family law practitioner,
21 because Oakland County is introducing a mandatory fee
22 paid e-filing, which is to me very, very troublesome.

23 MS. LYON: I think that we will potentially
24 see the courts encouraging e-filing more and more. We
25 have heard, and I think maybe Janet is better -- go

1 ahead.

2 EXECUTIVE DIRECTOR WELCH: Is this on? Okay.
3 I can tell you what we are advocating for through the
4 Supreme Court, and that is to make sure that as
5 e-filing is implemented that the rules ensure that you
6 don't have a different system from circuit to circuit
7 and that the fee be uniform. I can't tell you what
8 the fee will be. There may actually be a filing fee
9 charge. That's still up in the air, but if there is,
10 it will take into account the fact that if you e-file
11 that will save money for everybody down the road.
12 What we will be advocating strongly against is the
13 idea that from jurisdiction to jurisdiction there will
14 be a different way of doing it and that the local
15 jurisdiction can set a filing fee wherever they want.

16 MS. SADOWSKI: If I may, there are more
17 complicated issues than that which I would like to be
18 able to address to someone.

19 EXECUTIVE DIRECTOR WELCH: We would love to
20 get your input, and it may be an issue that comes back
21 here.

22 MS. SADOWSKI: Thank you.

23 MR. POULSON: Barry Poulson from the
24 1st circuit. I know you are heavily involved in the
25 public defender initiatives. An aspect just came up

1 in conversation with the Casemaker presenter here in
2 the hall of vendors, and I know the State Bar has
3 provided that as part of our service.

4 My latest move as a public defender, because
5 of increased insurance and flat pay, has been to
6 cancel my WestLaw subscription. I simply can't afford
7 it anymore. The concern I have is the beta for the
8 Casemaker, which is sort of their shepherdizing
9 approach, company comes out of beta and suddenly is
10 going to have a fee. If the collective wisdom at the
11 table will consider whether public defenders could be
12 able to get Casemaker shepherdizing somehow paid for,
13 and I certainly wouldn't rule out the civil community,
14 but I know they have lots of money.

15 MS. LYON: Some of them might disagree

16 MR. POULSON: It is kind of a worry, because
17 now we are dependant on Casemaker, Google Scholar. We
18 can't afford those tools, and the prosecutors, of
19 course, do have them, but not us.

20 MS. LYON: In response to that, I think one
21 of the main jobs of the Public Defense Commission will
22 be to review resources, and that's a pretty long list,
23 including sort of legal resources, you know,
24 investigators, you know, expert witnesses, all of that
25 sort of a thing, so having to look at sort of all

1 those comprehensive things I think should be, and I
2 can help make sure that's there. Thank you.

3 (Applause.)

4 CHAIRPERSON RADKE: Thank you, Elizabeth.
5 And I would recommend that if your constituents have a
6 question they want answered about some pending
7 legislation that Elizabeth Lyon is the person that you
8 need to contact, and she has got her fingers on the
9 pulse of the legislature like nobody else I know. So
10 please utilize that State Bar resource. It is there
11 for your use.

12 At this time I would like to invite Dan Quick
13 from the 6th circuit to come up to introduce the first
14 item of business for consideration by the
15 Representative Assembly. Mr. Quick, you have the
16 podium.

17 MR. QUICK: Thank you. Good morning,
18 everybody. I am proud to be here on behalf of the
19 Civil Procedure and Courts Committee. The proposal we
20 have in front of you is to fix the Supreme Court -- I
21 am sorry, to fix the term of the Supreme Court.

22 You have the briefing materials, but the
23 thought is basically this. The Supreme Court term
24 starts in October. There does not seem to be a
25 particularly good reason for it. The problem with it

1 is that in odd numbered years or even numbered years
2 when there are elections, it often results in
3 arguments taking place in the fall but then not all
4 justices participating in the decision in those cases.

5 The sense of the committee is that this is
6 inefficient, that the election cycle should not be
7 the, or that the term should not be the tail that wags
8 the dog, and that we should reorganize to a calendar
9 year term.

10 I will note for this body that the Criminal
11 Jurisprudence and Practice Committee was advised, of
12 the State Bar, was advised of this proposal, and they
13 have indicated their support. If there are any
14 particular questions about the resolution, I would be
15 happy to take those, otherwise I would move the
16 Rep Assembly to endorse the proposed language to
17 7.301(B) which you see on the screen in front of you.

18 MR. ABEL: Second.

19 CHAIRPERSON RADKE: There has been a motion
20 and support for the proposal. Is there any
21 discussion? I see someone approaching the mike.

22 MR. BOONSTRA: Mark Boonstra from the 22nd
23 circuit, Washtenaw County. I am wondering, since this
24 proposal affects the calendar of our Supreme Court,
25 whether anyone consulted with the Supreme Court as to

1 what they might think about this, and that was the
2 question that occurred to me last week when I was
3 reviewing the materials and realized for the first
4 time that this was on our agenda. And I appreciate
5 the rationale that you put forward, but since that
6 question occurred to me, I did take it upon myself to
7 inquire with our chief justice as to whether he knew
8 about this or what he might think about it, and I also
9 had occasion to speak with the chief of staff and
10 general counsel of the Supreme Court, and it was
11 apparent to me they knew nothing about this. It
12 wasn't on their radar screen.

13 Frankly, I think they don't appreciate -- or
14 at least some of the justices. I can't represent what
15 they all might think, but don't appreciate the Bar
16 getting out in front of an issue that affects their
17 calendar, that there very likely are not three votes
18 for this on the Supreme Court, and more importantly
19 substantively a rationale was conveyed to me as to why
20 they would not want to do this, and that is simply
21 this, that the end of the court's term is its very
22 busiest time. It's when the justices are busy
23 writing, crafting, polishing, and getting out all the
24 opinions that they haven't yet gotten out for all of
25 the cases that were heard during that term. Currently

1 that means July, and the last week of July in
2 particular, are the very busiest time for our Supreme
3 Court.

4 If we adopt this, we will be asking the court
5 to change its calendar such that the month of December
6 and the holidays, and particularly the week between
7 Christmas and New Years are the very busiest time for
8 the court when they are drafting those opinions. I
9 for one am not inclined to ask them to do that, and I
10 would encourage this body not do that. Thank you.

11 CHAIRPERSON RADKE: Do you have any response,
12 Dan?

13 MR. QUICK: Just to respond to the direct
14 question as to what extent, if any, the Supreme Court
15 was asked to give thoughts on the proposal. Certainly
16 that was not something done by the Civil Procedure and
17 Courts Committee that I am aware of, although I will
18 tell you that there were informal discussions, much in
19 the nature that you had, with some of the justices as
20 to both the historic rationale for the term being
21 organized the way it is, as well as a discussion about
22 the pros and cons of altering it.

23 I ensure, and this will shock nobody, that
24 the different justices have different thoughts and
25 different opinions on this topic. But I don't know

1 that anybody from the committee reached out. Whether
2 or not once it came out of committee folks within the
3 State Bar circulated this to whatever it would be,
4 whether the Supreme Court directly or other bodies,
5 that I do not know.

6 CHAIRPERSON RADKE: Is there any further
7 discussion, any further comments?

8 MR. MCCLORY: Mike McClory from the
9 3rd circuit, and up until I heard this last comment I
10 thought for sure I was going to vote in favor. I am
11 not sure I am going to vote now. I appreciate your
12 rationale, and what I am going to say, maybe Janet can
13 comment on, because she has been in the position of
14 chief counsel of the Supreme Court, but just that I
15 think this body should think strategically.

16 I think it makes sense to change it for the
17 reason that you said, but we want to think
18 strategically that if we go forward with something
19 like this, what impact will that have on the
20 perception by the Supreme Court for every other rules
21 proposal we bring forward? I don't know what that
22 impact would be, but that's a factor we have to
23 consider if we are going to decide to do that.

24 I don't know, Janet, if you want to comment
25 or if that's going out of line a little bit further.

1 EXECUTIVE DIRECTOR WELCH: Let me say this,
2 if the Representative Assembly wanted to ask State Bar
3 staff to engage in conversation with members of the
4 court about proposals that they are considering
5 adopting, we would obviously take that direction. Is
6 that responsive to you?

7 MR. MCCLORY: I just meant that looking at
8 the overall picture in terms of every other thing we
9 are trying to get through, what would be the dynamics?
10 Maybe there would be no difference. Maybe there would
11 be. I just don't know. I am throwing that out there.
12 If they perceive something being kind of dictated to
13 them on their issue, how would that impact other rules
14 that we propose? Maybe not at all, maybe it would. I
15 may be totally addressing a nonexistent issue.

16 EXECUTIVE DIRECTOR WELCH: Just
17 extemporaneously, much of what you pass that requires
18 rule changes deal with the practice of law in the
19 rules, and I think that they see that as a body of
20 lawyers telling them their opinions about the practice
21 of law. I think it's correct that this is, because
22 this impacts the world that they know the best, it
23 does belong in a different category, and so you might
24 want to think about how you approach the conversation
25 with the court about this.

1 CHAIRPERSON RADKE: Mr. Rombach.

2 MR. ROMBACH: Tom Rombach from the 16th
3 circuit. At this time, because of some of the
4 difficulties, and I do believe that Janet is right,
5 that we are a wholly-owned subsidiary of the
6 Supreme Court by rule, and we would rather be a
7 wholly-owned subsidiary of the judicial branch than of
8 the legislative or executive branches, I would like to
9 move to table this proposal so the committee can seek
10 additional input before bringing a recommendation back
11 before the Assembly.

12 VOICE: Support.

13 CHAIRPERSON RADKE: There has been a motion
14 to table and support. We will take discussion on the
15 motion to table.

16 Tom, would you accept a friendly amendment as
17 a motion to postpone consideration rather than to
18 table?

19 MR. ROMBACH: If it were to table, then it
20 could be brought up -- I believe our parliamentarian
21 would say the same thing -- we could bring it up at
22 any time we choose, and, again, I would defer to the
23 leadership. If we postpone it, then it would have to
24 postpone to a date certain, and, again, I am not sure
25 of what the particular discussions would be. Again, I

1 defer to our parliamentarian.

2 CHAIRPERSON RADKE: I am going to do that.
3 Judge Chmura.

4 PARLIAMENTARIAN CHMURA: A motion to table is
5 only in order when there is some problem or something
6 that comes up that prevents discussion on the item
7 that normally would be discussed. So it would be,
8 let's say, very hot in the room and there was a motion
9 to table to take care of the heating problem, that
10 would be appropriate.

11 If you want to defer action on a particular
12 item, it's not a motion to table, it's a motion to
13 postpone to a time certain, which would probably be
14 the next meeting, and that would be the way to do it.
15 And then it would come up at the next meeting, would
16 be on the agenda or the calendar for the next meeting,
17 and the Assembly could take whatever action it decided
18 to take at the next meeting in April or March at that
19 time. I think that's the correct motion.

20 MR. ROMBACH: Again, then I would amend that
21 to a motion to postpone to the next meeting. I
22 believe that would give sufficient time to Mr. Quick,
23 his committee, the Criminal Law Jurisprudence
24 Committee and our staff, of course, to try to extend a
25 hand to the court, because, again, I just don't want

1 to put a gun to our head and claim we have a hostage.

2 CHAIRPERSON RADKE: Thank you, Mr. Rombach.

3 Is there support?

4 VOICE: Support.

5 CHAIRPERSON RADKE: Is there any further
6 discussion on the motion to postpone? Hearing none,
7 we will ask for a vote.

8 All in favor of postponing this issue until
9 the next meeting.

10 Any oppose.

11 And any abstaining.

12 Thank you. The issue is postponed. Thank
13 you, Mr. Quick.

14 Moving along in the agenda, next I will ask
15 Martin Krohner to come forward to present
16 consideration on the establishment of the eye witness
17 identification task force, and I believe that
18 Nancy Diehl and Valerie Newman are going to be
19 presenters. If they are both here, they should come
20 forward as well.

21 MR. KROHNER: Good morning. Thank you,
22 Madam Chair. I am Martin Krohner, 6th circuit,
23 proponent of the issue of the Identification Task
24 Force.

25 Very quickly, this body, as was mentioned

1 earlier this morning, authorized the resolution that
2 established an Interrogation Task Force, which has
3 been very successful. As Elizabeth Lyon has
4 indicated, legislation has already passed the Senate
5 and it's in the House now.

6 So this particular resolution has the support
7 of the Committee on Justice Initiatives, on the
8 Criminal Jurisprudence and Practice Committee, as well
9 as the Committee on Criminal Issues Initiative, and we
10 have been very successful in having a very diverse
11 committee on the Interrogation Task Force, of which I
12 was a member of, and it look a long -- it was a long,
13 arduous process, and the end result maybe didn't fit
14 everybody's satisfaction, but it turns out it's a good
15 result which would be beneficial to the practitioners
16 especially on the defense side, as well as the
17 prosecution.

18 So without further ado, I would like to
19 present Nancy Diehl, who will present a resolution on
20 the Identification Task Force.

21 VOICE: Support.

22 MS. DIEHL: Good morning, everyone.

23 VOICES: Good morning.

24 MS. DIEHL: It's good to come home. I am
25 Nancy Diehl and a long time member of the Rep

1 Assembly, and it's great to see, as someone mentioned
2 earlier, I think it was Julie, some of the faces are
3 the same, so I am going to thank you for sticking with
4 it and coming back and helping us.

5 I was a career prosecutor, and I want to tell
6 you, and I see some other prosecutors in the room,
7 probably the most compelling evidence that can be
8 presented in a courtroom is someone on the witness
9 stand pointing and saying, That's the one. Why aren't
10 you looking at me Matt Abel? May the record reflect
11 the witness has identified Matt Abel.

12 MR. ABEL: Thank you for putting my name on
13 the record.

14 MS. DIEHL: But what we also know as
15 prosecutors is, depending on the circumstances of that
16 eyewitness identification, it can be the most
17 unreliable, and what we know in terms of the
18 exonerations, out of 250 exonerations based on DNA
19 testing, 190 out of those 250 exonerations were based
20 on misidentification.

21 What we know over the years with numerous
22 research studies, there is a better way to do things,
23 and we need to do it better. Even one innocent person
24 being convicted based on faulty misidentification is
25 one too many, and we have the ability to make a

1 difference. And Val Newman just walked in. See, her
2 timing is perfect. She remembers the old days of the
3 Assembly when you were always running behind. I told
4 her not to worry, you are never on time. But I was
5 here early, because I know sometimes you change things
6 up. So let me introduce Val Newman, who will make the
7 motion.

8 (Applause.)

9 MS. NEWMAN: Well, good morning. I apologize
10 for my tardiness, but I see that we were well
11 represented, so I am not going to add to what Nancy
12 said. I don't think anything has to be added. I will
13 simply make the motion.

14 Should the State Bar of Michigan call for the
15 appointment of an Eyewitness Identification Task Force
16 including State Bar members in the criminal defense,
17 prosecution, judicial and law enforcement communities,
18 to develop and promote legislative and/or court rule
19 changes that advances the improvement and reliability
20 of eyewitness identification procedures, and on behalf
21 of myself, Nancy, and Marty, certainly we ask that you
22 vote yes.

23 VOICE: Support.

24 CHAIRPERSON RADKE: A motion has been made
25 and supported. Is there any discussion?

1 MR. KRIEGER: Madam Chair, Nick Krieger from
2 the 3rd circuit. I will be very brief. I just want
3 to say that as, I guess, a career law clerk at the
4 Court of Appeals, and, Marty, you know this, but
5 eyewitness identification comes up all the time, and
6 for those of you who don't do anything in criminal
7 law, this issue comes up all the time, and usually we
8 end up saying, oh, this is a meritless argument.

9 And you will look up the case law. I have to
10 say the Curlchek (sp) case and Anderson, they are all
11 over the place. I can find published, not even Court
12 of Appeals, I can find published Michigan
13 Supreme Court case law saying, oh, you should do a
14 lineup, but if you can't do a corporeal, it's all
15 right, and then I can find something that's directly
16 opposed to that that says, oh, you always have to do
17 an inperson lineup, and if the guy comes in court and
18 doesn't testify consistent with the lineup -- you
19 know, it's so messed up, and I really think this is
20 important, and I want to say, Mr. Krohner and
21 Ms. Diehl and also to Ms. Newman, although I
22 understand where she is coming from on this working
23 where she does, but I think it shows a lot of courage
24 for people on sort of both sides of the, I don't know
25 what you want to say, but both sides of the issue in

1 criminal law to agree that we need to have this. I
2 really think it's important, and I would just ask my
3 fellow members to vote yes. Thank you.

4 THE COURT: Thank you, Mr. Krieger. Is there
5 any further discussion or comment on the motion?
6 Hearing none, we will take a vote.

7 All in favor of the motion, please indicate
8 by saying eye.

9 Any opposition?

10 Any abstentions?

11 Thank you. The motion passes. Thank you
12 very much.

13 (Applause.)

14 CHAIRPERSON RADKE: It never ceases to amaze
15 me that what we plan for up here putting this together
16 never seems to happen. When we allow a lot of time
17 for discussions on an issue because we think it's
18 going to be controversial, you guys just pass it out
19 of hand. That's great. I love being wrong.

20 Once again, I will ask Mr. Quick to come to
21 the podium to introduce to the Assembly consideration
22 of discovery only depositions. Mr. Quick.

23 MR. QUICK: Thank you, Madam Chair. Again,
24 on behalf of the Civil Procedure and Courts Committee,
25 the proposal is to modify some language in MCR 2.302

1 primarily dealing with the topic of discovery only
2 depositions.

3 By way of background, discovery only
4 depositions under the existing Court Rule are
5 permitted either by stipulation or by court order
6 under MCR 2.302(C), which is the general protective
7 order subrule. In practice, the committee was under
8 the impression that parties are unilaterally noticing
9 up discovery only depositions, and there at least is
10 some commentary through Court of Appeals opinions
11 which would seem to condone this process. So part of
12 the Court Rule change is, frankly, is simply to
13 reinforce that discovery only depositions can only be
14 taken either by court order or by stipulation of the
15 parties.

16 Discovery only depositions have particular
17 import as it relates to expert witnesses because of
18 the hearsay rule exception which permits expert
19 witness deposition testimony to be admissible. So in
20 that regard there is some, I would characterize
21 primarily as tweaking of the rule dealing with experts
22 who are expected to testify in 2.302(B)(4)(a),
23 specifying that, again, unless there is a stipulation
24 or an order, the deposition is usable for all
25 purposes.

1 If a deposition is to be discovery only, the
2 court, and the court already has this discretion, but
3 this makes it explicit, would have authority to
4 address and mandate how the fees of the expert are to
5 be handled. There was a lot of debate at the
6 committee level about the pros and cons of discovery
7 only depositions, whether they are fair or unfair.
8 The Court Rule change was brought to you doesn't seek
9 to really change the practice permitting those under
10 certain circumstances but simply trying to make more
11 clear when they are permitted and if they are going to
12 be permitted to make sure the court addresses the
13 court issue which the committee thinks is an important
14 consideration.

15 There are a few other very minor word changes
16 throughout the Court Rule to make it consistent, but I
17 think the intent of the committee in that regard was
18 not to have those be substantive changes, if you will.

19 With that, would be happy to answer any
20 questions or to move the matter for the Assembly. I
21 have to make the motion first?

22 CHAIRPERSON RADKE: You have to make the
23 motion first.

24 MR. QUICK: So I move on behalf of the
25 committee to adopt the proposed changes to MCR 2.302

1 as set forth in the materials of the Representative
2 Assembly.

3 CHAIRPERSON RADKE: Is there support?

4 VOICE: Support.

5 CHAIRPERSON RADKE: I hear support. We will
6 open it up for discussion. We will now take any
7 discussion or comments from the floor.

8 MR. HERMANN: Fred Hermann, 3rd circuit. I
9 rise solely to offer a friendly amendment to insert
10 one word into the fees and expenses of Paragraph C.
11 You are missing "of", I believe, in payment and
12 expenses.

13 MR. QUICK: You are correct, sir, and that is
14 accepted.

15 CHAIRPERSON RADKE: Any other comments or
16 discussion? The chair recognizes Peggy Costello.

17 MS. COSTELLO: Peggy Costello, commissioner
18 from the 3rd circuit. I just have a question more
19 than a concern. Having practiced in civil litigation
20 for many years, I question the need for the rule,
21 and I am not sure I completely understand the
22 rationale. At least during my practice, if a
23 deposition was noticed for discovery purposes only,
24 unless there was objection, the deposition went
25 forward that way.

1 And I am just concerned about the need for
2 stipulations and whether that's just going to require
3 more arguing between the parties about the wording of
4 the stipulation and whether it just makes things more
5 difficult, but I guess it's more in terms of a
6 question as to the rationale for the rule and the need
7 to lay out who is going to pay who and all of this
8 stuff when it was pretty much, if there was no
9 objection it went forward and the party whose witness
10 it was paid the party.

11 MR. QUICK: I can only share with you some of
12 the deliberations at the committee level, and of
13 course the committee is made up of practitioners
14 throughout the state and who do many different things.
15 There apparently are areas of contention in this where
16 a party will unilaterally notice up a discovery only
17 deposition. The other party will oppose, and again
18 that discussion itself will then prompt a fight. And
19 there really is no basis to simply do that, to
20 unilaterally notice it up, and I think that parties
21 feel that the practice at the Court of Appeals, and we
22 cite a case in the materials here, suggested that
23 maybe they also think that parties can unilaterally do
24 this.

25 And there are some lawyers who believe that a

1 discovery only deposition imposes a significant and
2 unfair cost on them and that if it's going to take
3 place that it either should be on an agreement, which
4 would include this consideration of fees and expenses,
5 or by court order where everybody can sort of have
6 their say in court, if you will, on the topic. But I
7 am informed by the members of the committee, and, as I
8 say, there was significant debate on this that this is
9 a problem, an area of clarification that ought to be
10 addressed.

11 CHAIRPERSON RADKE: Any other comments,
12 questions or discussion?

13 Hearing none, all in favor of this motion
14 please say aye.

15 Opposition.

16 Abstention.

17 It unanimously passes.

18 MR. QUICK: Thank you very much.

19 CHAIRPERSON RADKE: Thank you, Mr. Quick.

20 At this point, as you all may know if you
21 were looking at your phones or your watches, we are
22 way ahead of schedule. What I would like to propose
23 and have your consent for is to move up the clerk's
24 election. Okay, we will keep the announcement until
25 after the last presentation, but we would like to,

1 with your consent if you approve, and I will move that
2 we move that vote up to this time. Once we have taken
3 the votes, we will adjourn for the lunch break and
4 expect you all back here at 2:00. Do I have a support
5 for that?

6 VOICE: Support.

7 CHAIRPERSON RADKE: All in favor?

8 Any opposition?

9 Abstentions?

10 Hearing none, I would ask the tellers to come
11 forward, please. You had the little pink tags on your
12 badges.

13 Oh, you know what, I forgot. The candidates
14 get a chance to speak. Well, you know what, I am
15 going to invite the candidates to come up and speak,
16 but I am going to ask Kathleen Allen to be first, and
17 only because I noted that both Mr. Krohner and
18 Mr. Quick had an opportunity to introduce items.

19 And I need to see Bruce Courtade, Mike Blau,
20 and Lauren Rousseau, in that order, because
21 Mr. Courtade, I believe, is going to move the
22 nomination of Ms. Allen. So we will take care of that
23 first and then take a vote and then adjourn for lunch.

24 Mr. Courtade.

25 MR. COURTADE: Thank you, Madam Chair.

1 Ladies and gentlemen of the Assembly, it's my honor
2 and privilege to nominate Kathleen Allen as the next
3 clerk of the Assembly. Kathleen is many things, but I
4 will start out with she is a lawyer's lawyer. She is
5 in the courts every day. She is a legal aid attorney
6 who represents the force of the board and does it
7 among the best of the best.

8 She is a judge's lawyer. I have spoken to a
9 lot of the judges throughout West Michigan before whom
10 she appears, and they know that when Kathleen shows up
11 she is going to have her homework done, she is going
12 to be a complete professional, she is going to
13 advocate, do it within the rules, and do it to the
14 best of her ability, again, for people who could not
15 afford to get a lawyer of anywhere near that quality.

16 I can also tell you that she is a lawyer's
17 lawyer, and by that I mean the amount of time that she
18 dedicates to our profession, and I know, you know,
19 both Mr. Krohner and Mr. Quick will be able to tell
20 you the same thing. I can tell you from my personal
21 experience working with Kathleen, she goes above and
22 beyond on a regular basis. I can think of no person
23 that I would more happily nominate for this position
24 and encourage you to vote for her, so I would move her
25 nomination for Assembly clerk.

1 CHAIRPERSON RADKE: Ms. Allen, please come to
2 the podium to make your remarks.

3 I guess I need to ask Bruce is there support
4 for your motion.

5 VOICE: Support.

6 CHAIRPERSON RADKE: Thank you

7 MS. ALLEN: I am going to make my remarks
8 quick and fast, because I know everybody wants to get
9 out of here shortly.

10 I want to thank everyone for being here
11 today. I know a lot have driven a long distance, and
12 I want to thank those -- I have had contact with a lot
13 of people today, during the last two days, and I want
14 to thank those who are checking their e-mails, their
15 voicemails and return my phone calls. I think it's
16 very important to be connected to the community and
17 being connected to everybody here at the Assembly for
18 what we do on a daily basis and what the State Bar and
19 Rep Assembly does. I want to thank you for your
20 support, and since you have to write in the name, the
21 spelling of my name is Allen, A-l-l-e-n. Thank you,
22 everybody.

23 (Applause.)

24 CHAIRPERSON RADKE: Mr. Blau, approach the
25 microphone, please.

1 MR. BLAU: Good morning again. Mike Blau,
2 6th circuit. I am very honored to place into
3 nomination Marty Krohner for clerk of the Assembly.
4 Marty brings a wealth of experience to that position,
5 practice experience, really seeing the needs of
6 members of the Bar and of the community. He has very
7 extensive community service experience, experience of
8 the Bar, and I have had the pleasure of working with
9 Marty on the Justice Initiatives, and he has always
10 brought very thoughtful perspective comment to any
11 matter that we had to deliberate about and basically
12 understands too the procedure and process involved in
13 trying to enact change where it's necessary. So I
14 strongly recommend and support Marty as the next clerk
15 of this Assembly. Thank you.

16 VOICE: Support.

17 THE COURT: Thank you. Mr. Krohner. Will
18 you please come back to the podium.

19 MR. KROHNER: Good morning. I am
20 Martin Krohner. Very briefly. Yes, I have been
21 around a long time with Bar activities and service,
22 not only the State Bar but the Oakland County Bar,
23 Detroit Metropolitan Bar Association.

24 It's kind of funny, because I only became
25 involved with the State Bar activities because of

1 request of my old boss, the Honorable John D. O'Hare,
2 who wanted to know if people on the staff of the Wayne
3 County Prosecutor's Office would participate in some
4 Bar activities. And so as a result I joined what was
5 then the Criminal Jurisprudence Committee. We had
6 such illustrious Bar members as Seymour Posner and
7 Bobby Mitchell and Pat Meter, who sits on the Court of
8 Appeals as the chair at that time. From there I just
9 built up my time on this particular committee,
10 becoming chair not once but twice, and then when we
11 merged it with the old Defenders Committee, became
12 Criminal jurisprudence Practice the third time.

13 I just completed my term as co-chair of the
14 Criminal Issues Initiative. I have been involved with
15 the Interrogation Task Force, also the Task Force on
16 Attorney-Client Privilege, as well as having the honor
17 of setting up in Oakland County for the Oakland County
18 Bar as a member of the committee, our Ask a Lawyer
19 Program, which went about nine years, where we offered
20 free legal advice generally during the Law Day week,
21 and that was a big job. That was a committee where
22 you really had to work, because you had to go out and
23 recruit people to come and offer their services as an
24 attorney on a Sunday afternoon in May, which was a
25 difficult job. But we got everybody in there, and we

1 generally serviced anywhere from 5 to 700 people in
2 one afternoon.

3 So I would like the opportunity to continue
4 serving this august body, as well as the Bar, and I
5 would urge you to consider me serious for the position
6 of clerk of this body. Thank you very much.

7 (Applause.)

8 CHAIRPERSON RADKE: Thank you, Mr. Krohner.
9 Lauren Rousseau.

10 MS. ROUSSEAU: Good morning, everyone.
11 Lauren Rousseau from the 6th circuit.

12 It's my pleasure and privilege today to
13 nominate Dan Quick for the position of clerk of the
14 Representative Assembly. I have a little cheat sheet
15 here.

16 Dan is a partner and governing board member
17 of the law firm Dickinson Wright, and despite his busy
18 law practice he has been extremely active in Bar
19 association activities and in community service
20 activities as well.

21 In addition to his work with the State Bar,
22 he has been active with the Oakland County Bar
23 Association. He serves as director, sustaining
24 member, as well as past chair of the OCBA Circuit
25 Court Committee. He is on the Executive Committee of

1 the OCBA chapter of America in the Court. In 2009 he
2 was awarded the distinguished service award, which is
3 the OCBA's highest honor, recognizing members who gave
4 exceptional voluntary service to the organization. He
5 has been a member of the Representative Assembly since
6 2007, and I think, as you all know from his
7 presentation, he is currently chair of the State Bar's
8 Committee on Criminal Procedure in the Courts.

9 In addition to all of this, in addition to
10 his busy practice, he is on a diversity committee -- I
11 am sorry, he is the Diversity Committee co-chair of
12 the Federal Bar Association and co-chair of the ABA
13 Copyright Litigation Subcommittee. He has written
14 extensively for numerous publications you have all
15 seen from his resume. On top of all of that he
16 teaches as an adjunct professor at Cooley Law School,
17 which is where I first made his acquaintance.

18 Over the years I have known Dan my experience
19 with him is tha he is a dedicated professional, he
20 works hard, and he is extremely committed to the legal
21 profession and to the legal community.

22 In preparing to make this nomination speech
23 today I asked him why he is so active in Bar
24 association activities, why he engages in all these
25 publications, why he teaches on top of his busy

1 practice, and his response, I thought, was telling.
2 He said that he has always viewed the law as something
3 bigger and more important than his individual practice
4 or even that of his firm. He said he went to law
5 school because the concept of the law, with a capital
6 L, his words, was something admirable.

7 To Dan, making a significant contribution to
8 the law is a humbling and wonderful experience, and
9 it's clear to me that Dan would make an excellent
10 clerk representing this body, and he would also do an
11 excellent job filling the positions that come after
12 clerk, ultimately chair of the Assembly. So I
13 wholeheartedly recommend Dan to the position of clerk,
14 and I request that all of you support his nomination
15 as well.

16 VOICE: Support.

17 CHAIRPERSON RADKE: Thank you. Dan, you once
18 more come back to the podium, please.

19 MR. QUICK: Let me just say two things.
20 First of all, it is a tremendous compliment to this
21 body and a benefit to the State Bar that people like
22 Kathleen and Marty are willing to step up and be part
23 of this Assembly in a leadership role. We all will
24 tremendously benefit from that, and it ensures a good
25 sign as to the health of the State Bar and the level

1 of volunteers that we have. It's fantastic.

2 Secondly, it's often said, but I think it
3 deserves to be constantly said, is that we need to
4 continue to fight for the importance and relevance and
5 participation of this body in the affairs of the
6 State Bar. This is the ultimate policy-making body of
7 the Bar. It needs to be treated as such, and we need
8 to continue to find ways to make sure that our
9 representatives, the people in the Bar from our
10 various circuits, that their voices are heard and we
11 continue to advance their agendas. Thank you very
12 much.

13 (Applause.)

14 CHAIRPERSON RADKE: Thank you, Mr. Quick,
15 Mr. Krohner, and Ms. Allen. I just want to say one
16 thing at this point, and that is you do realize you
17 will also be a member of the Board of Commissioners.
18 If that doesn't scare you away, that's fine. They
19 will look forward to having any of you on the board.

20 At this time I would like the tellers to come
21 up and collect the envelopes for distribution to the
22 members. Anne Smith has them over here on my left.

23 It's been pointed out to me that we can also
24 have nominations from the floor. Is there anyone who
25 would like to nominate another member at this time?

1 No. Okay. Thanks.

2 I also would like to remind everybody,
3 because this is a contested election, if no one
4 candidate receives a majority of the votes, we will be
5 revoting after lunch. So I don't mean to sway your
6 votes, but I do want to remind you that we are doing
7 it in two parts. The announcement will come later if
8 somebody has a majority, and if they don't have a
9 majority, we will be revoting. Thanks.

10 The two top vote getters then will go head to
11 head.

12 (Voting taking place.)

13 CHAIRPERSON RADKE: I you are here and you
14 haven't received a ballot, will you stand up, please.
15 In the back, 6th circuit. Ms. Haroutunian, thank you.
16 Anybody else that did not get a ballot?

17 At this time if your ballot has been filled
18 out, just hold it up, and the tellers will come around
19 and collect them.

20 Since it looks like we have all of the
21 ballots at this point, I am going to ask the tellers
22 to retire to go count the ballots. The announcement
23 will come where it is presently on the agenda after
24 the first presentation this afternoon.

25 At this time I am going to let you adjourn.

1 Please remember the luncheon starts at 11:45, so it
2 would behoove you not to be late so they can start on
3 time. I am going to ask you to leave at 5 to 2 so you
4 are back here by 2:00 so we can resume the afternoon
5 session.

6 I would commend you to the vendor exhibit
7 area. If you haven't already been there and you have
8 got a few minutes now, you might want to take the
9 opportunity to do that. Otherwise, have a good lunch.
10 I will see you at 2. Thank you.

11 I am sorry, we have a question. You've got
12 to go to a microphone. Hold one second, please.

13 MR. MEKAS: Peter Mekas, 49th circuit. We
14 have an unused ballot in our row. I believe that it's
15 from someone that was also circulating ballots.

16 CHAIRPERSON RADKE: I will let Anne Smith
17 take care of that.

18 MR. MEKAS: 47th circuit.

19 CHAIRPERSON RADKE: Yeah, that's
20 Anne McNamara. She is one of the tellers. We will
21 take care of it. Thank you.

22 (Lunch break 11:10 a.m. - 2:02 p.m.)

23 CHAIRPERSON RADKE: I am now going to ask the
24 Assembly to come to order so that we can commence with
25 the afternoon session. Please take your seats.

1 Thank you. It is now my distinct pleasure to
2 introduce the Honorable Thomas P. Boyd, the chief
3 judge of the 55th District Court in Mason, Michigan,
4 and the Honorable David F. Viviano, from the
5 16th Circuit Court in Mt. Clemens who will give us the
6 presentation on the new jury reform court rule. There
7 is going to be a question-and-answer session when they
8 finish. They have assured me that their presentation
9 has been greatly shortened, so there will be lots of
10 time for questions afterward. Ladies and gentleman,
11 Honorable Thomas Boyd and David Viviano.

12 (Applause.)

13 JUDGE VIVIANO: All right. Good afternoon,
14 everybody. I am Judge David Viviano, and Judge Boyd
15 and I are going to sort of intersperse our remarks or
16 go back and forth. We are going to try to move
17 quickly through the presentation, because I understand
18 there are some questions about jury reform which we
19 are anxious to answer, and so if we are moving
20 quickly, a little bit more quickly than you thought, I
21 apologize in advance.

22 Before talking about the specific reforms, I
23 want to give you just a little bit of background about
24 the jury reform movement. I want to make some general
25 observations about the reforms and then make some

1 general observations about the reforms that were
2 recently adopted.

3 First, the jury reform movement actually
4 began about two decades ago. It actually was
5 initiated by the American Bar Association on a
6 symposium called the Future of the Civil Jury System
7 in the United States. The movement includes, as you
8 might imagine, lawyers and judges, but also includes
9 academic, social scientists, psychologists, and others
10 who are interested in improving the effectiveness of
11 juries. The movement has been led these past two
12 decades by the Litigation Section of the ABA and also
13 very actively led by the National Center for State
14 Courts, which has a center for jury studies. The
15 topic is now actually on the national agenda of
16 several prominent national attorney organizations,
17 including the American College of Trial Lawyers, the
18 American Board of Trial Advocates, and the
19 International Association of Defense Counsel.

20 In terms of the purpose of the jury reform
21 movement, I think there has been a recognition that in
22 the modern age juries are asked and called upon to
23 decide cases that involve new and more complex matters
24 but they are not given the tools they need to analyze
25 and understand increasingly complex evidence. And so

1 there is a growing consensus, there has been, that
2 something needs to be done, some changes need to be
3 made. The goal, obviously, is to implement reforms
4 that are designed to help the jurors process
5 information and to improve the overall quality of
6 juror decision making and, of course, the overall
7 functioning of the court system.

8 Courts in other states have already been
9 doing these reforms for several years. Courts in
10 Arizona and New York led the way back in the early
11 '90s. They inspired much of the rest of us to follow
12 by looking at our own jury systems. Currently over 30
13 states have either adopted or studied reforms to the
14 jury system.

15 If you look at the slide just briefly, in
16 Michigan you can see that jury reform started as a
17 proposed rule change. That was in 2006. It then was
18 converted into a pilot project in 2010, and then, of
19 course, the rules have recently been implemented
20 effective September the 1st, the new rules. So that's
21 the first slide.

22 The next slide shows briefly all the judges
23 who participated. I think there were 12 or 13 of us
24 district and circuit judges across the state who were
25 asked to test the reforms and to give feedback to the

1 Supreme Court, which we all did and we were all happy
2 to do.

3 Just as a general observation about the
4 reforms, the way that I look at things, having
5 participated in this pilot project now, is that the
6 jury reform changes in Michigan caused me as a trial
7 judge to try to look at things from the perspective of
8 the jury box, something I hadn't done. I guess I was
9 a relatively new judge when I started on this pilot
10 project. Most of the reforms or the changes or the
11 new rules are actually discretionary with the trial
12 judge, so they will be implemented in different ways
13 in different courts by different judges and certainly
14 on different types of cases.

15 Our job as judges in the pilot project was to
16 evaluate the reforms. It was not to advocate for any
17 particular reforms, and we are not here to do that
18 today, although I think Judge Boyd and I both will
19 take some license in telling you which of the reforms
20 we think have worked very well in our individual
21 courtrooms.

22 The next slide I think Judge Boyd will take
23 over.

24 JUDGE BOYD: Thank you, Judge Viviano. Good
25 afternoon, ladies and gentlemen.

1 Let me just begin with a couple preliminary
2 notes. First, in your package of information behind
3 tab 15 is a copy of the Supreme Court's order in
4 Administrative File 2005-19 which contains the new
5 rules. The balance of our presentation this afternoon
6 is going to be walking through a couple of the rules
7 that have had some changes that we think you would
8 like to know about. So if you want to follow along,
9 that's where you find that information.

10 I would next like to thank Dawn McCarty and
11 the good people at the Michigan Judicial Institute who
12 were instrumental in helping Judge Viviano and I
13 prepare the information that we are presenting to you
14 today.

15 The next slide is introduction -- sorry.
16 2.512, instructions to the jury. There is really
17 nothing new here. Some of the things have been moved
18 around, and some of the things that are most
19 strikingly new aren't because the language is new,
20 it's because their placement within the rules are new.
21 So, for instance, rules that used to be at 4.614,
22 which is a felony criminal rule, are now going to be
23 found, and we will talk about some of them, at 2.513.

24 Well, obviously the significance of moving
25 something from 6.414 is to 2.513 is now they apply to

1 all trials. Not just felony criminal trials but civil
2 trials and misdemeanor trials. So some of the things
3 that we are going to talk about are not really, the
4 words aren't that much different, but their placement
5 in the rules creates a significant difference for all
6 of us.

7 The next slide is 2.513(A). Now, in the
8 pilot project, one of the things that we spent a lot
9 of time on is preparing written instructions for the
10 jurors and giving them to the jurors and allowing them
11 to follow along. Some judges have done that all
12 along, because it used to be discretionary on the
13 court. Now it's mandatory on the court.

14 As you can see in 2.513 in the highlighted
15 portion of sub A, the court is responsible -- now two
16 major changes -- to provide to the jurors every
17 element of all civil claims and all charged offenses,
18 as well as the legal presumptions and burdens of
19 proof. They have to give that to the jury before the
20 proofs. So in a criminal case, historically the
21 elements might be given at the end of the proofs.
22 Kind of counter-intuitive when you have done it the
23 other, which we did in the pilot project.

24 Judge Viviano and I, we did take a little
25 license. It makes a lot more sense to tell the jury

1 what they are looking for before the evidence instead
2 of after. So this is a change that makes a lot of
3 sense. It is not discretionary, it is mandatory. The
4 judge must inform the jurors of these things.

5 The next sentence says, they must provide
6 each juror with a written copy of such instructions.
7 Major change, not discretionary, should have happened
8 1st of September. If you had a trial since then,
9 depending where in the state, they may not have done
10 that yet, but that rule is effective. All these rules
11 are effective two weeks ago.

12 Now, the next slide is 2.513(B), the court's
13 responsibility. This is an early and good example of
14 no change in language but significant change in
15 impact. That's because this language used to be in
16 6.414 for felony criminal trials. Now it's in
17 2.513(B), it applies to all trials.

18 The rule itself isn't significant. I don't
19 believe you are going to see any change in any trial
20 as a result of this language being in 2.513. Every
21 trial I have ever been in, not only this side of the
22 job but on your side of the job, has included this. I
23 don't think it's any different, but now it's mandatory
24 in civil to do it this way as well as in a misdemeanor
25 criminal case, as opposed to just a felony criminal

1 case.

2 In 2.513(C) opening statements. The language
3 is moved to 2.513(C) from 6.414(C). There is some
4 suggestion by lawyers that this now applies not only
5 to jury trials. The consensus rule is in this place
6 and worded this way that the opening statement is
7 mandatory in a bench trial. May not make a lot of
8 difference, probably that's how bench trials start,
9 but now that's mandatory that the trial is going to
10 start with an opening statement. Not a big deal
11 probably because that's probably how we are doing it
12 in reality, but now we don't have any choice. It's a
13 change.

14 The next slide is 2.513(D). You know, this
15 is new. This is entirely new. This is something that
16 has, you know, brought some comments from people, and
17 that is that each party may in the court's discretion
18 present interim commentary at appropriate junctions of
19 the trial.

20 I can tell you I did, I don't know, something
21 like 20 jury trials during the pilot project. I am a
22 district court judge. You don't need interim
23 commentary. I mean, the trial lasts a day, a day and
24 a half. So if the jury forgot something, you have got
25 other problems other than interim commentary. But

1 what I can tell you that as a lawyer, as a prosecutor,
2 I would have loved to provide interim commentary at
3 certain points of longer trials. It doesn't have to
4 be an opening statement. That's not what the rule
5 says. It says at appropriate junctures in the trial.

6 So, for instance, I did a long, very
7 complicated fraud case once, and my last element that
8 I needed to prove was the value of the thing that was
9 stolen, which was an item of intellectual property, a
10 lot of very highbrow witnesses, was worth more than
11 \$20,000. I had a very lowbrow, low-tech witness. His
12 concession to the fact it was a felony trial was he
13 wore a new shirt. Old blue jeans, but a new shirt and
14 no tie. As soon as I called him, he came in from out
15 in the hall, and the jury looked at me like, man, we
16 have been here way too long already, and it wasn't
17 until about ten minutes into the questioning that they
18 understood, oh, I get it, this is why this guy is
19 here.

20 If I were able at that time, and I am sure
21 the defense attorney wouldn't have minded, and I bet I
22 could have got the judge to agree, to say the next
23 witness is here for the purpose of valuing that asset
24 that we have been talking about for a week, it would
25 have been a much smoother transition. This rule

1 allows little things like that, and it allows large
2 interim commentary if there has been a week-long break
3 in your trial. Again, it's discretionary in the
4 court.

5 JUDGE VIVIANO: Moving to the next slide is
6 reference documents or notebooks. Again, this rule is
7 discretionary. It speaks to having the lawyers
8 provide a notebook or a booklet of mostly instructions
9 and exhibits for the individual jurors. In my
10 courtroom we use a one-inch wide three-ring binder
11 that my secretary prepares for each of the jurors.
12 It's been very popular with the jurors. We put in
13 there the instructions that we are required to put.
14 Judge Boyd just went through the rule, so we put the
15 elements of a cause of action or the charged offense,
16 the presumption of innocence, the burden of proof in a
17 civil or criminal case.

18 Again, logically, we are giving the jurors
19 what they will need to decide the case while they are
20 hearing the evidence. Instead of giving them the
21 question at the end of the case, we are going to give
22 them the question earlier. You are asked to decide
23 whether these elements are being proved beyond a
24 reasonable doubt, so they know that as they are
25 evaluating the witnesses.

1 We are also, in my mind there is, and I guess
2 we are required to invite the lawyers to present
3 exhibits that have been admitted or that are
4 stipulated. Seems to make sense. The lawyers in my
5 courtroom, for whatever reason, didn't really take
6 advantage of that, but it's a great way in a court
7 like ours that doesn't have much courtroom technology
8 to publish your exhibits to the jurors, particularly
9 important ones that you are going to be referring to
10 over and over again, again to help the jurors process
11 that information.

12 Our binders also include pages for notes, and
13 we will get to notetaking in a moment, and they also
14 included, we would put scraps of paper in there so the
15 jurors could write down written questions that they
16 might have for a witness, and we will get to that as
17 well in a moment.

18 This minor thing that we did, this minor
19 change was very popular with the jurors. As you all
20 know being here today, when you show up for a seminar
21 you are typically handed materials, so it makes for a
22 more professional presentation. The jurors are able
23 to stay organized in their thoughts and information
24 they are given, and they are able to use that
25 information when they are back in the jury room

1 together deciding the case. It's inexpensive and easy
2 I thought to prepare and very popular with the jurors.

3 Moving on to the next new rule, MCR 2.513(F),
4 is deposition summaries. Again discretionary with the
5 court. The idea is -- well, first of all, we should
6 encourage the parties to do it, and if they do it,
7 then we should provide copies of the summaries to the
8 jurors. The idea is to get rid of the antiquated and
9 extremely boring practice of having people read
10 depositions into the record in open court.

11 I will tell you in my four and half years on
12 the bench that has not happened. It seems to me a bit
13 of a relic of the past. It's pretty easy to get video
14 depositions and play them in court now, so this
15 doesn't happen very often. But I think, again looking
16 at it from the perspective of the jurors, everybody's
17 least favorite thing to do is to spend a Friday
18 afternoon having somebody read a three-hour deposition
19 into the record, so we are trying to avoid that if at
20 all possible.

21 The next slide talks about scheduling of
22 experts, new rule 2.513(G). It's discretionary, and
23 one change from the pilot proposed rule to the rule
24 that was adopted is this is only applicable now in
25 civil cases, and also the court eliminated maybe not

1 the possibility but the suggestion of one potential
2 way to organize expert testimony by having panel
3 discussions of the experts.

4 Instead, the suggestion is that we as the
5 judges can schedule the experts sequentially, have one
6 expert testify and then have the opposing expert on
7 that issue testify next. Again, from the jurors
8 perspective when we asked them to focus as lay people
9 on highly technical issues and have either doctors or
10 other experts come into court and testify about those
11 issues, it really typically used an entirely new
12 language, a new jargon or terms that people aren't
13 familiar with. It's much better to have the jurors
14 evaluate all that testimony at the same time when they
15 are focused on those issues and then have the ability
16 to look at and perceive the opposing expert's
17 testimony right after the initial expert and make a
18 judgment who was more credible, who was more
19 persuasive, who had a better handle on the issues,
20 et cetera. And I think that's the goal there. It's
21 not something I have tried yet, but it's something I
22 think will work well in a lengthy civil case involving
23 complicated issues.

24 The other suggestion in that rule is to allow
25 the opposing party's expert to be present in court and

1 assist the lawyer in formulating questions for
2 cross-examination, which again I think makes sense in
3 helping the lawyers to handle technical issues in
4 their presentation to the jury.

5 The next rule is on notetaking, 2.513(F) -- I
6 am sorry (H), and jurors are permitted, of course, but
7 not required to take notes. This represents no change
8 at all from existing practice. The existing standard
9 jury rules in both civil and criminal cases provide
10 for this if the judges decide to allow it. Most
11 judges already do allow notetaking. All of us took
12 notes on our way through law school, and when we are
13 trying to remember something, just makes sense to
14 allow the jurors to do that as well. Really, if you
15 think about how your mind works, it helps you to, when
16 you are not only listening to something but also
17 taking notes, you are using two senses instead of one
18 and hopefully retaining more information, and I think
19 Judge Boyd may want to make a brief comment about
20 this.

21 JUDGE BOYD: I just wanted to add, you know,
22 when I started, it's a one-day trial I used to say.
23 You don't need to take notes. It will just interfere
24 with your paying attention to the evidence. You all
25 heard that standard expression, right? But, you know,

1 it was right at the beginning of this pilot project
2 and a colleague of mine from Grand Rapids says, Well,
3 Tom, what do you do during the trial? I said, Well, I
4 take notes. So ever since I have let the jurors take
5 notes, and it's never interfered.

6 JUDGE VIVIANO: I would just say it fits in
7 with the reference notebook, because, although I don't
8 require it or even encourage it too much, I encourage
9 it from the standpoint of providing everybody with a
10 notebook with pages and a pencil if they want to take
11 notes.

12 The next slide or the next rule is juror
13 questions for witnesses. This also is something that
14 is not a change. It's there in the existing civil and
15 criminal standard jury instructions. I have to
16 confess as a new judge before I was asked to be on
17 this pilot project it's something I wanted nothing to
18 do with. The last thing I wanted was to have an
19 unpredictable question from a juror throw a wrench
20 into a trial that I had hopefully been conducting
21 efficiently and according to the law and later won't
22 be reversed on appeal, and so I just ignored that
23 instruction and never gave it essentially.

24 Under the pilot project though, after having
25 gone through this, I have to say my view has changed

1 dramatically. We have to have a procedure for
2 allowing questions. We have to explain that
3 procedure. We, of course, don't allow jurors to ask
4 the questions themselves. They submit them in
5 writing. In my courtroom I have gotten to the point
6 now where at the end of each witness' testimony I
7 actually look to the jury and ask if any of them have
8 questions for the witness, because I want them to feel
9 that this is a natural part of the proceedings and
10 there is no barrier to them asking questions. I want
11 them to be comfortable and feel that it's a natural
12 thing for them to do.

13 It has never caused any problems in my
14 courtroom during trials. The lawyers then are given a
15 chance to object to the questions. If there are
16 problems with them, typically we can either work them
17 out and reformulate the question in a way that's
18 satisfactory to everybody, or if it's a question
19 that's out of left field or obviously not allowed by
20 the rules, then I just explain to the jury that the
21 rules don't allow us to ask your question and we move
22 on.

23 In terms of looking jurors and looking at it
24 from the jury box, again, what every speaker knows, if
25 you want to give a talk and hopefully keep the

1 audience engaged, hopefully we are doing that today,
2 what do you do? You invite questions from the
3 audience, so you make them feel engaged in the
4 process, more focused on the evidence.

5 Also, with jurors, when they are listening to
6 witnesses and thinking about things that they may have
7 a question about, obviously allowing them to ask those
8 questions and ask them of the very witness who
9 testified is making them, again, be more engaged in
10 the process and helping them to do the very difficult
11 task that we ask them to do.

12 From a lawyer's perspective, this is one of
13 the only ways, and I guess it's the only way now that
14 the lawyers will have, skillful practitioners, of
15 learning a little bit about what the jurors are
16 thinking during the trial while you have a chance to
17 do something about it. I let lawyers follow up
18 questions of that witness so they can address those
19 issues then and, of course, the lawyers can then try
20 to address those questions in the presentation of
21 other evidence during the trial.

22 There is a concern that's raised, mostly by
23 criminal defense attorneys, that this allows jurors to
24 participate in the presentation of evidence. If you
25 can imagine a case where the prosecutor just blows it

1 and forgets to ask a question that goes directly to
2 one of the elements of the offense, and then if the
3 juror asks that question, now the juror has elicited
4 significant testimony in the case.

5 I think we need to be conscious of that
6 concern, but I have to tell you that at the end of the
7 day this whole process, the jury trial and the court
8 system, is a truth-seeking function, and I don't
9 think, as I am sure you all don't think that that
10 system should be only determined or entirely
11 determined by the skill of the lawyers, and if the
12 jurors are smart enough to ask an intelligent
13 question, my own view is we should let them do that,
14 and I now do it, as I have already suggested, in every
15 trial. I think Judge Boyd has something to say on
16 that as well.

17 JUDGE BOYD: This is really a juror
18 engagement issue. I mean, you have all been in a
19 trial where juror number three is like sound asleep.
20 I remember one trial I had to hit my wedding band onto
21 the bench every now and then just to wake up juror
22 number two.

23 Doesn't happen. They are paying attention,
24 they are taking notes. They know that at the end of
25 each witness the judge is going to turn to them and

1 say, Does any juror have a question for this witness?
2 They are engaged, they pay attention. Again, it's a
3 day-long trial. I don't know what would happen in a
4 month, but I have not lost a soul since they have
5 responsibility, ongoing responsibility in the trial.

6 Second point is Judge Viviano and I both
7 presented last week at seminars for judges to help
8 them get up to speed. We had a panel, the district
9 court judges, including prosecutor, defense attorney
10 and two jurors who had served under the pilot, and the
11 defense attorney said I was so terrified about this,
12 but it never, ever hurt me, and I found a couple times
13 where it really helped.

14 JUDGE VIVIANO: The next slide -- we are
15 going to keep moving, because we got to get through
16 all this -- jury view. Not much change on this rule.
17 I think this was one of the rules that was moved from
18 the criminal 6.414, I think that's the rule, into
19 2.513(J), so now it applies to civil cases as well as
20 criminal cases. Also, I think the rule makes it clear
21 it can be done on the motion of a party, it can be
22 done sua sponte by the court or, interestingly, at the
23 request of the jury, again giving them an outlet if
24 they have a curiosity about the scene if the judge
25 thinks that it's appropriate.

1 And then one other small note, I suppose, is
2 that the parties have a right to be present, except in
3 criminal cases the judge has to make an assessment of
4 whether the criminal defendant should be there for
5 safety and security reasons.

6 Next slide, juror discussion, 2.513(K). This
7 is a dramatic departure from current practice, and
8 it's probably the most controversial of the changes
9 that I regularly implemented or used in my court under
10 a couple of procedural notes. One is, of course,
11 again, it's discretionary with the court. The judges
12 do not have to allow that, so it's up to the
13 individual trial judge. The attorneys, of course,
14 have an opportunity to object.

15 Secondly is, under the current rule effective
16 September 1st, it only applies in civil cases. That's
17 done for a very specific reason, and that is one of
18 the cases where I allowed the jurors to discuss the
19 case before the end of the case, I guess for those of
20 you who don't know, letting them discuss it while they
21 are all in the jury room together while the case is
22 pending before the end of the case, so before final
23 deliberations. One of the criminal cases where I did
24 that is now on appeal. I was affirmed at the Court of
25 Appeals. It's now all the way up to the

1 Supreme Court, and they are going to decide this case,
2 and depending on the outcome of that case, they may
3 change the rule to include criminal cases for jury
4 discussion.

5 Of course there is a concern when you do this
6 that jurors will decide important issues in the case
7 before both sides are given an opportunity to present
8 their views, or their evidence I should say. We are
9 instructed and have to advise the jury and caution
10 them, and I regularly did so, that they were not to do
11 that. Although we were letting them discuss issues,
12 they weren't to reach any ultimate conclusions on any
13 issue in the case until both sides had had their
14 opportunity to present their side.

15 I would even do it at night before they went
16 home, you know, don't talk to your spouse, don't look
17 on the internet and, by the way, remember, you are not
18 allowed to discuss or to decide any issues in this
19 case until you have heard all the evidence from both
20 sides.

21 I am a strong proponent of this reform. I
22 think the, first of all, from the concern -- the
23 negative side would be, obviously, we don't want
24 juries deciding cases before they hear from the
25 defense. I think, though, when they are instructed

1 that jurors have an innate sense of fairness, and it's
2 not a difficult concept to them that they shouldn't
3 decide the case until both sides have an opportunity
4 to be heard. It helps the jurors, again in the way
5 that their mind works, focus on evidence and discuss
6 evidence close in time to when they hear from a
7 witness.

8 So you can imagine in a two-week trial, if we
9 make them wait until the end, they are not going to
10 have nearly as good a recollection about what the
11 first few witnesses said as they would if you let them
12 discuss that testimony close in time, so they are able
13 to break down that testimony, what the strengths and
14 weaknesses were. It will affect their analysis and
15 examination, I think, of other witnesses as the trial
16 progresses as they are accumulating that information,
17 and so I think it helps them do their job.

18 It was very popular with the jurors. It does
19 tend to shorten final deliberations, because they have
20 already started analyzing the evidence. I think it
21 also gives them a chance to formulate some questions
22 they might have for witnesses, so it works in
23 conjunction with one of the other changes.

24 Also, when you think about, again, human
25 nature, I think it gives jurors an outlet to do what

1 all of us want to do when we are confronted with what
2 jurors always find to be a very interesting life
3 experience, and that is they are taken out of their
4 daily lives, they are placed into the court process,
5 they are placed in a room in a criminal case with 14
6 other individuals whom they have never met before and
7 who are all different demographics, age groups,
8 gender, ethnic groups, and they are brought together
9 in a common cause and asked to do something that's
10 very important in our society and in our government,
11 which is to decide a case. And even jurors who are
12 hesitant at the beginning of the trial and don't want
13 to serve almost always tell me by the end how glad
14 they were for that experience.

15 People find this interesting. You know, it's
16 on television, all these shows about law and order and
17 all these things. People find the criminal justice
18 and the civil justice system to be interesting. So
19 what do we ask them to do? We tell them, You are
20 going through this very interesting life experience.
21 You are not allowed to talk to your spouse, your
22 co-worker, you are not even allowed to talk to the
23 people that you are going through this experience
24 with, and I think it tends to be an instruction that's
25 very difficult for people to follow.

1 So at least by letting them talk to their
2 fellow jurors in the jury room under this cautionary
3 instruction, you are giving them an outlet to talk
4 about the case, and you are making the process much
5 less frustrating, and I think you are making it more
6 likely that they are going to abide by the court's
7 instruction. Again, this was something that was very
8 popular with the juries.

9 The next slide is summing up the evidence.
10 This one is probably the most controversial element of
11 the jury reform rules. Although, as Judge Boyd had
12 encouraged me to do, I finally did some research in
13 this area. So first let me tell you what the rule is,
14 and then I will briefly tell you about the history of
15 the rule or the history of this area of the law.

16 The rule says, after the close of evidence
17 and the arguments of counsel, the court may, so it's
18 discretionary, fairly and impartially sum up the
19 evidence. We have to also instruct the jury it's the
20 jury's responsibility to determine the weight of the
21 evidence and the credit to give witnesses and, of
22 course, the juries are not bound by the court's
23 summation. We're not allowed to comment on
24 credibility or state a conclusion on the ultimate
25 issue of fact before the jury.

1 First I would say the rule is not without
2 historical precedent. I am told by some people who
3 are more experienced than I that this was something
4 commonly done at the 16th judicial circuit court in
5 Macomb County 30 or 40 years ago. One time I watched
6 television myself with my life, Law and Order U.K.,
7 and guess what they talked about, how the judge just
8 got done summing up the evidence. So apparently, if
9 that show is to be believed, it's something that
10 happens in England up to the current day.

11 Perhaps not surprisingly, the rule or this
12 authority of judges has a lot of authority and
13 precedent in the law. There is actually the former
14 court rule, prior Rule 2.516(B)(3), allows judges to
15 do this, to comment on the evidence, et cetera. The
16 legislature has a statute that authorizes us to
17 comment on the evidence and the testimony of character
18 witnesses, which we are apparently not now allowed to
19 do. And there is a lot of case law on this going all
20 the way back to the 1800s and up to the present date.
21 Believe it or not, this issue was litigated, the most
22 recent case I saw was in July in an unpublished
23 decision of the Court of Appeals.

24 The Supreme Court spoke most definitively or
25 thoroughly on this issue most recently in People

1 versus Anstey, which was a 2006 decision. Actually if
2 you read the Anstey case, you will learn a couple
3 things. First of all, all the various phases of this
4 rule come right out of the case law, number one. And,
5 number two, this was another way that the court
6 changed the rule from the pilot rule to the one they
7 ultimately adopted and they actually narrowed our
8 authority in this area, because now the rule says
9 summing up the evidence. They got rid of our ability
10 to comment on the evidence. If you read Anstey, you
11 will understand that summing up the evidence is only
12 one of the ways that you can comment on the evidence.
13 So they have tried to narrow it, I think to satisfy
14 some of the justices when they adopted these rules.
15 Again, we can fairly and impartially sum up the
16 evidence, but we cannot comment on the evidence more
17 broadly.

18 Having said all that, this is not something
19 that I have done. I don't think any of the judges in
20 the pilot project do it, although this apparently was
21 part of our system. For some reason it's something
22 that no one apparently feels comfortable doing
23 anymore. Speaking from my vantage point, we are
24 extremely busy in our court, and although I think I
25 could do this properly in a neutral way, it would take

1 a lot of time to make sure my notes are thorough and
2 accurate and then to go through them again and make
3 sure that I am presenting them fairly and impartially
4 to the jury, and after a two or three-week trial, I am
5 not willing to take a day or two to do that to delay
6 the proceedings further, so it's not something I have
7 done. With that, I am going to turn things over to
8 Judge Boyd for the final three slides.

9 JUDGE BOYD: Let's go to final instructions
10 to the jury. Some different things here again.
11 Actually if we go to next one, 2.513(N)(2), the judge
12 has to solicit questions from the jury. The rule says
13 they shall invite the jurors to ask questions in order
14 to clarify the instructions before they retire to
15 deliberate.

16 Now, we didn't do that in the pilot project.
17 This rule was there, but I never saw it, and I never
18 did this, and I don't know how to do this. We are
19 going to be all learning how to do this together,
20 because the juror asked the question -- I guess I have
21 them submit in the writing, things like that, but you
22 can't discuss it in front of them, so each judge is
23 going to be trying to figure out how to do this.
24 That's a shall. There is very few mandatorics from
25 the judicial side, a lot of discretion. This is one

1 of the shalls.

2 The next shall in the same rule is shall
3 provide a written copy. Interestingly, as opposed to
4 2.513, I think it was (D). Here it's a copy. In the
5 other rule with the preliminary instructions, it was
6 each juror must have a copy. Now, I intend to do what
7 I have been doing for years, which is to give each
8 juror a copy of every instruction. A judge might
9 decide, and you might argue, that this rule says a
10 instruction, and one is good enough. I don't know why
11 you want to do that, but I think you could.

12 The next slide is 2.513(N) (3) and (4). This
13 is talking about the final jury instructions I just
14 mentioned. It's new. This rule also talks about
15 impasse, and there is new power at impasse, and that
16 is it gives the court discretion to, quote, when it
17 appears that a deliberating jury has reached impasse
18 or is otherwise in need of assistance, the judge may
19 invite the jurors to list the issues that divide or
20 confuse them in the event the judge can be of
21 assistance in clarifying or amplifying the final
22 instructions. Totally new.

23 So, of course, I think this is going to be
24 done in cooperation with the parties. If the jurors
25 send out questions or send out lists of issues. I

1 certainly know Judge Viviano in our conversations will
2 be working with the lawyers to see if there is
3 additional information or things that could be pointed
4 to in the record for clarifications of the other
5 instructions that could be used in response to those
6 items, but that's a new power there in 2.513(N) (3) and
7 (4).

8 If we go to 2.513(P), the last slide. This,
9 again, isn't a new rule. It was in the 6.414, the
10 felony criminal rules. What it says is that if a
11 juror, jurors, the jury, asks questions during
12 deliberations about testimony, you can't refuse a
13 reasonable request. You can't say, Well, yeah, you
14 know, just go back and use your collective memory
15 about what Jane Doe said during her testimony and
16 whatever you think is fine.

17 What I have done because of this rule is
18 start offering alternatives. You know, Jane Doe
19 testified for 22 minutes, because now we have digital
20 recording. It's easy for me to figure that out. It
21 will take 90 minutes for the court recorder to type
22 that up for you and you can read it. You can come
23 back and all sit in the courtroom and we can replay it
24 over the speakers in the courtroom, or you can use
25 your notes and collective memory and you just figure

1 out yourselves what Jane Doe said. Please go back in
2 the jury room, send me a note, tell me how you would
3 like to proceed.

4 The one time this happened to me, they
5 decided they would like to hear Jane Doe's testimony
6 again. It was about 15, 16 minutes. They came in the
7 courtroom, we flipped it on, flipped it off, they went
8 back and deliberated for less than two minutes,
9 because whatever it was they were stuck on was
10 answered in that question. As soon as they all went
11 back, they said, Okay, we got it, we are done. So
12 that's the new rules.

13 CHAIRPERSON RADKE: At this point we are
14 going to take questions for Judges BOyd and Viviano,
15 and I knew Barry was going to stand up, but I would
16 like to thank the judges for their presentation today.

17 (Applause.)

18 JUDGE BOYD: I am new here. Does clapping
19 before the question, is that a bad sign?

20 MR. POULSON: I have to say that I am an old
21 country lawyer, but I am still afraid when they say a
22 judge and --

23 JUDGE VIVIANO: Let me just interrupt.
24 First, I am happy that we went so quickly. I
25 apologize. I know I talk really fast, but we did so

1 because we were looking forward to a robust
2 questioning session, so I hope that you will feel free
3 to express yourself fully.

4 MR. POULSON: Oh, please, I have a nature
5 that way, and that's scary to me though, and I know my
6 client over here, Mr. Abel, looks at this whole
7 spectrum as the system, and, in fact, many of my -- I
8 am a public defender, as you can probably tell, and
9 many of my clients think I am part of the system, and
10 they are afraid, and the only people they trust in
11 there is the jury. And I come in the courtroom, I
12 carry my bond money, I carry it every day, because I
13 am in front of a judge saying what's on my mind, but
14 what worries me about these things is number (M).

15 (M) is about comments by the court, and you
16 mentioned seeing some TV. I think that was Law and
17 Order, and I remember the episode, but maybe Rumpole
18 of the Bailey is another way to say. Judge Bullington
19 is always commenting on the evidence, much to the
20 dismay of the defense. And I am not saying that
21 judges comment unfairly. My county, my judges, fair
22 trials, there is no question whatsoever, but I don't
23 think that it's psychologically possible to comment on
24 the evidence without influencing the jury, because the
25 jury sits in awe of the bench. They look for the

1 slightest hint, the eyebrow, the judge leans his head
2 a little bit, is he sleeping, whatever. And then they
3 watch every conceivable step.

4 To me there is a mechanism to do this
5 already. It's called a bench trial, and a bench trial
6 let's the judge comment on the evidence and then
7 decide. And I don't see (M) as being any different.
8 Frankly, I think it deprives the jury completely of
9 its ability to make a decision.

10 Now, you experimented on these cases here. I
11 hope there were no criminal cases in there, because
12 you experimented on live human beings, violation of
13 Nuremberg Convention. I was an engineer before this.
14 We didn't experiment on people. This could all have
15 been tested scientifically.

16 But I deeply, deeply am afraid of item (M),
17 and so my question is what were they thinking when
18 they wrote down item (M)? I can picture --

19 (Applause.)

20 MR. POULSON: I can picture the attorney
21 general sitting up one night on his Royal typewriter
22 watching Reefer Madness once yet again thinking, Now
23 what can I do? And so I just think that (M)
24 eliminates jury trials. Jury trials are the
25 civilizing factor of western civilization, and if

1 Michigan is the first to abandon them, even an
2 artifice like this, then we will go down in history as
3 here began the end of our western civilization.

4 JUDGE VIVIANO: I would say to that, and I
5 tried to give some of the history of it, but a couple
6 things. First is, in a way I represent this modern
7 trend which you are also a part of, which I didn't
8 know was a modern trend until I learned about the old
9 way of doing things, and that is the trial judge is
10 supposed to sit there and be as emotionless and
11 expressionless as possible and not inject him or
12 herself into the proceeding and really not try to
13 influence the jury in any way.

14 As a young judge, I don't smile a lot in
15 court, I don't make light of many things. Despite my
16 presentation today, I actually do have a sense of
17 humor, but I try to be very straight down the middle
18 for that exact reason, and so this rule sort of struck
19 me the way it struck you, and I didn't do it for that
20 reason.

21 I would say also to sort -- I shouldn't
22 bolster your question, but if I had more time in my
23 presentation what I would have said is that all of the
24 judges or people in my building who told me this
25 happened before would also say, and by the way, you

1 always knew how the case was going to come out right
2 when judge so-and-so was done summing up the evidence.
3 In fact, the Law and Order episode, if you actually
4 did see it, I think the lawyer said the same thing, we
5 have no chance in this case. Didn't you hear how
6 judge so-and-so summed up the evidence?

7 So there is a strong concern. I can't speak
8 for the Supreme Court except to say, and this is
9 Judge Boyd's fault, he made me learn this, this is
10 something that's been going on that's in the rule,
11 that's in the statute books, that's in the case law,
12 that comes from the common law that's apparently been
13 done a lot. So when you say we have apparently
14 evolved away from it, if we evolve back to it in the
15 progression of the world at that time that we were
16 negative, I can't speak to that.

17 The last point I would make is just to
18 reiterate, I think the Supreme Court felt some of this
19 blowback and they narrowed the scope by getting rid of
20 commenting on the evidence, which they didn't do a
21 press release on. I never would have figured out,
22 except I did some research and it dawned on me now
23 that they deleted this part of the rule that was
24 traditionally part of what we were allowed to do

25 MR. POULSON: Thank you for commenting on my

1 question. I appreciate that's part of this new
2 mechanism, and I will only add that we fought a
3 revolution not to have to hear English judges.

4 JUDGE VIVIANO: Didn't work very well though.

5 JUDGE BOYD: A couple observations first on
6 the rule. It is not entirely new. It is actually, if
7 you look at the old Rule 2.516(B)(3) it's a civil,
8 it's -- I am sorry, and then in civil cases there is
9 also, gave the court discretion to comment on the
10 evidence, testimony, and character of the witnesses as
11 the interests of justice require. So in some ways
12 this is a more restrictive, more jury-empowering rule
13 than the rule we had 21 days ago. As to the end of
14 western civilization, I am going to reserve judgment.
15 There is lots of other issues going on.

16 The second thing I want to say is the
17 observation that we were practicing on live specimens
18 that they outlawed at Nuremberg. We did a lot of
19 trials in this, and for a purpose unrelated to the
20 pilot process. It was actually in preparation for
21 some testimony on the indigent defense system in
22 Michigan before the legislature. I went back and I
23 looked at one of my criminal acquitted counsel,
24 indigent defense counsel, and she had selected ten
25 juries during the period of time between when the

1 pilot project began and that particular testimony.
2 And in those ten juries, in those ten picks, one her
3 client came in and pled guilty before the trial
4 happened, two the case was nolle pros'd by the
5 prosecutor before the trial happened, and the other
6 seven she had acquittals, so she was 9 for 10 under
7 the new system. I am not saying anything other than
8 perhaps bad choice of cases by the prosecutor and good
9 choice of cases for her. But the point is I don't
10 think the deck is thoroughly stacked up against the
11 human subjects of our experiments.

12 CHAIRPERSON RADKE: Other questions?

13 MR. REISER: Good afternoon, Your Honor. My
14 name is John Reiser. I am assistant prosecutor from
15 Ann Arbor, 22nd circuit, and are there going to be
16 jury instructions that are going to be published soon?
17 I have got jury selections coming up next week, and I
18 want to be ahead of the game here. Where can I look
19 to for what the jury will be told?

20 JUDGE BOYD: The Model Jury Instruction
21 Committee has actually put out some proposals. I
22 don't think they are final. For instance, in my court
23 it's not a standard instruction. I have got it
24 written in an order that's out to the parties ahead of
25 time. So, for instance, under the pilot project when

1 I was instructing the jury on the elements of an
2 offense or the elements of a claim prior to proofs,
3 which doesn't really fit in, I would just do it last.
4 The model jury instruction for me has suggested that
5 come in a criminal case after the reading of the
6 complaint or information.

7 No big deal. I mean, I can change it. The
8 point is I think you work with your opposing counsel
9 in the court to determine what words are going to be
10 used in these narratives, but there are model jury
11 instructions that have been written by the committee.
12 I just don't think they are final yet. They are
13 available. You can go online and find them. I am
14 sorry I don't have the site with me right now, but I
15 have them.

16 MR. REISER: You think the ICLE site or
17 something like that would have them?

18 MR. BOONSTRA: Mark Boonstra, also from the
19 22nd circuit. We should talk. I happened to serve on
20 that committee actually, and that was one of the
21 comments that I was going to make. We did meet very
22 quickly after the rules were adopted and put together
23 a draft model jury instructions, and they are out
24 there. We wanted to make time for comments, so we did
25 not adopt them without a comment period. They are

1 available both on the ICLE website and the
2 Supreme Court's website, so you can find them there.

3 And we had recommended at least in the
4 interim, because we have the comment period is open
5 until October 1st, and so we will meet, we are
6 scheduled to meet October 4th to consider the comments
7 and adopt them finally, but in the meantime we have
8 recommended that people use those proposed model jury
9 instructions.

10 MR. REISER: Thank you.

11 MR. BOONSTRA: You're welcome. I want to
12 make one more comment, if I could.

13 JUDGE VIVIANO: Before you go, you are on the
14 Criminal Jury Instruction Committee?

15 MR. BOONSTRA: I am sorry, I am on the Civil
16 Jury Instruction Committee.

17 JUDGE VIVIANO: I think the same pertains to
18 the Criminal Jury Instruction Committee.

19 MR. KRIEGER: They are not online though the
20 same way that the model --

21 VOICE: They will be after Saturday

22 MR. BOONSTRA: The other comment I wanted to
23 make, in addition to thanking you both for the
24 presentation and for serving on the pilot project for
25 two years, is I also happened to be asked to serve as

1 a moderator if anybody wants to hear even more about
2 this subject for a webinar that ICLE put on a few
3 weeks ago, and I did that with Judge Hicks from
4 Muskegon, who also was part of the pilot project, and
5 Mitchell Ribitwer, criminal practitioner in Royal Oak,
6 and the three of us sat down for 90 minutes, talked
7 about both the changes to the rules and the Model
8 Civil Jury Instruction changes. If anybody wants to
9 hear more, you can find that on the ICLE website.

10 Also, there are some written materials that
11 we put together, both what we called our top five
12 changes, and while I appreciate the gentleman's
13 concern about summing up the evidence, we didn't put
14 that one even in our top five, simply because, and
15 Judge Hicks was adamant ain't never going to see that
16 happen, but I don't know.

17 JUDGE BOYD: I can tell you that not one of
18 the judges who agreed to do the pilot project ever did
19 it in a trial. Some of us tried. I got to the end of
20 my first trial and I had copious notes. I sat down
21 with counsel, and I spent 15 or 20 minutes, and I said
22 I can't do it. So not one did ever. I don't know
23 what that foretells for the future.

24 MR. MORGAN: Hello, my name is Ken Morgan. I
25 am from the 6th circuit. My practice is commercial

1 litigation, and the nature of it tends to be fairly
2 detailed, technical, so jury trials in that area, I am
3 particularly concerned about how the information is
4 presented to the jury. Now, I have three objections
5 to the proposed rules. One is a general objection,
6 and then two specific ones.

7 My general objection is it strikes me that
8 the policy underlying the rule is to elevate the
9 interest of the jurors more than currently, and I
10 would argue not appropriately. My obligation is on
11 behalf of my client, one of the parties, not on behalf
12 of the interest of a particular person who happens to
13 have appeared at a given time to be a juror. My
14 client will have spent a great deal of money and time,
15 and I think they are properly entitled to a system
16 that does not put a thumb on one side or the other of
17 the scale or can't be argued to have done so. So I am
18 concerned about the rules, in particular (M) and (K),
19 I believe.

20 I would strongly object to the idea that the
21 jurors would be encouraged, and I think that's what
22 the rule says -- it may not say that in this text, but
23 I think that's the meaning of it -- to discuss prior
24 to all of the evidence and the argument of counsel
25 what their observations should be. We are all

1 experienced in getting a last piece of information and
2 having it be more meaningful than something earlier.
3 We have to present the evidence in a serial fashion,
4 and I think that requiring the jurors wait until all
5 evidence is in and arguments are there, I think that
6 that serves a very appropriate purpose, so I would
7 strongly object to the notion they be encouraged to
8 discuss it beforehand.

9 I also have some strong objection, but
10 perhaps less so, to the idea of the judge commenting.
11 Judges are able to do so now. If we have a judge who
12 is inclined to tip the scale that strongly, they will
13 have done so at summary judgment or otherwise. But I
14 still think that the evolution of the system to where
15 it is now prior to such a rule favors the presentation
16 of evidence by counsel and then a very deliberate
17 process. I have no objection to the notetaking. In
18 fact, during my presentation I will often tell the
19 court and a jury why I am calling a given witness. I
20 don't need a rule to give me that ability.

21 Mostly these are guidelines. That's how I
22 read them. The only rules that seem to be in this are
23 (K) and (M), and I object to both.

24 JUDGE VIVIANO: Thank you. I am trying to
25 think exactly how to respond. We already talked about

1 summing up the evidence, so I am not going to say any
2 more about that.

3 The overall point is an interesting point
4 that I have heard before. I have had, being on the
5 pilot project, the opportunity to speak a lot on this
6 topic in front of a lot of groups, and that concern
7 that we are tipping the scales, I think is the word
8 you used, somehow favoring one side over the other by
9 making these changes, it's one that you hear from
10 attorneys. Depending who they represent or what type
11 of law they practice, they are concerned that their
12 client or their industry or whatever it is that they
13 stand for is going to be negatively affected.

14 When you look at the system as a whole, it's
15 a truth-seeking system, and we have to develop and
16 devise rules of the game that help us to achieve those
17 goals. For example, if you look at Justice Hathaway's
18 dissent to the rules, she talks about making sure you
19 have input from the attorneys, which I think is
20 important, but I will tell you as a judge I have to
21 always remember that the lawyers are advocates for
22 their clients. They are not always advocates for the
23 system. They are advocates for their clients and for
24 the rules that are going to favor their clients the
25 most in that trial.

1 And guess what, I mean, we are all adults
2 here. Your client's interest may not be the truth,
3 may not be putting a sharp focus or a clear spotlight
4 on what actually happened in a case. And that's how
5 our system works. It's a testing adversary system.
6 You test the evidence. Sometimes a criminal defendant
7 just doesn't have a defense, but still we have a trial
8 and we test the prosecution's case. But the rules of
9 the game should be set up to allow and to help jurors
10 to make good decisions and to focus on the evidence
11 and hopefully to find the truth.

12 So as we are doing things, I understand there
13 will be objections and different people are going to
14 object for different reasons, and obviously all of us
15 judges will entertain those and work our way through
16 them on a case-by-case basis, but the whole idea of
17 the pilot project, and I didn't know I was working
18 with laboratory mice, but of making changes to the way
19 we do business in government, it's an obligation that
20 we all have. It's something that's been going on all
21 around the country. Michigan being in this area, as
22 in most others, is not a leader, we are a follower.
23 We are 20 years behind.

24 And so the idea is we are not doing new
25 things and tipping the scale and doing all these

1 terrible things. We are looking at how we do business
2 and how our court functions and how the jury system
3 works. We are not denigrating it or saying it's bad
4 or we should throw the whole thing out. We are saying
5 how can we make it better. I think we have an
6 obligation to do.

7 We did it as a pilot project. That's how
8 many, many other states have done it. It's very hard
9 to do these changes, to get all the analysis that we
10 would like to have and statistically valid samples and
11 all these things before we take a half step here or
12 two steps there, but we are making these changes, and
13 I think we have to be mindful of what the effort is
14 all about, and then we have to honestly assess each of
15 the individual changes.

16 I think summing up the evidence is just
17 culturally something a lot of us aren't comfortable
18 with on either side of the bench. The jury
19 discussion, also controversial. Having done it, I am
20 more comfortable with it. I have talked with lots of
21 jurors who have gone through that process. I have
22 asked them specifically did you decide issues early in
23 the case or did you wait until the end? They have
24 assured me that they listened to my instruction, which
25 I repeated a lot, because I am concerned about that,

1 but that it didn't affect their ability to deliberate
2 at the end of the case by letting them do what all of
3 us do all the time. It's being a three or four-week
4 commercial litigation case, and I used to do
5 commercial litigation and tell the jurors you can't
6 say one word to the person sitting next to you for
7 four weeks about any of this and then expect them to
8 actually have intelligent discussion about it at the
9 end is just not going to happen.

10 I guess I will go one thing further, which is
11 a lot of times in my court, now that I think about the
12 jury more, I think to myself they have no idea what
13 just happened. The lawyers are talking about some
14 document or some issue, they are flashing it around,
15 they are never putting it in front of the jury, they
16 are opening up a hundred page contract and they are on
17 page 63, clause 4, and it's not in front of the jury,
18 and they are expecting the jury at the end of the week
19 or two weeks to go back and find that exhibit and open
20 it up and find that page and then know what somebody
21 is talking about, and it's just not happening. So we
22 need to start doing things, recognizing that these are
23 human beings and that they are thinking people and we
24 have got to give them the tools they need to make good
25 decisions.

1 JUDGE BOYD: The only thing I would add is
2 this is a very distinguished group, and each of you in
3 your own practices have done things that I will never
4 do and had experiences I will never have. Based on my
5 experience (K) didn't tip the balance one way or the
6 other. As I said, the defense did very well under the
7 pilot. I did it for two years, and it wasn't a
8 problem. Doesn't mean I don't respect your view or
9 your opinion and if at the end of two years more we
10 see in complex commercial litigation that rule is a
11 real problem, I will be standing right with you asking
12 for it to be changed.

13 JUDGE VIVIANO: I have to agree with
14 Judge Boyd, as I usually do, not to interrupt, but
15 obviously we are where we are today. If the body of
16 statistics and research backs up that concern, then I
17 think we have to move, and certainly in criminal
18 cases, obviously, if it becomes a factor and people's
19 liberties are at stake.

20 Yes, sir.

21 MR. FLESSLAND: I had a question about the --
22 first, my name is Dennis Flessland from the 6th
23 circuit. I had a question about the interim
24 commentary and reference document, the mechanics of
25 that, how practitioners are to handle that. These

1 interim commentaries, I am not clear what that is. I
2 mean, I can't get up and say, you know, his witness
3 was a damn liar. I mean, I can't --

4 JUDGE VIVIANO: As much as you would like to.

5 MR. FLESSLAND: I think that would be out of
6 bounds. I mean, what kind of things do you
7 anticipate? Is it more, like you discussed, the
8 transitional sort of thing, I am going to call
9 Mrs. Jones now who was standing on the corner and saw
10 the accident and will explain what she saw, is that
11 what's going on?

12 JUDGE VIVIANO: It's, again, to help the
13 jurors understand what's going on. So, as Judge Boyd
14 said, in a short trial it's not really necessary with
15 a couple witnesses. As the trial gets longer, a lot
16 of things happen in trials. We schedule witnesses,
17 for example, usually at the convenience of the court,
18 the convenience of lawyers, the convenience of the
19 witness. Usually the jurors are fourth or fifth in
20 line. So we are presenting a complicated story, a lot
21 of times out of order because a witness couldn't be
22 here or we have to take the expert and go ahead of
23 time because the doctor has surgery on Friday.

24 And so in my courtroom all I have allowed the
25 lawyers to do under that rule is to do what Judge Boyd

1 said, you stand up and say we are going to hear from
2 Dr. So-and-so out of order to accommodate his
3 schedule. He is going to testify on this topic, then
4 we are going to pick up with the rest of our
5 witnesses.

6 MR. FLESSLAND: On the longer cases do you
7 anticipate the lawyers sitting down with the judge and
8 say I would like to make an interim commentary on
9 Dr. Smith's testimony and this is what I want to say
10 and then we argue about it? Is that what you are
11 thinking?

12 JUDGE VIVIANO: I would. I think lawyers
13 will push the limits a little bit and say, you know, I
14 would like to make a commentary on this subject, and
15 then we'd have to -- I'd have to decide, we all have
16 to decide is that appropriate or not. Obviously if
17 you allow one side, at least in my courtroom, to say
18 something, I am then going to allow the other side to
19 say something too to balance it out.

20 MR. FLESSLAND: But it's something you
21 anticipate we talk with you about ahead of time, not
22 just start firing on your own?

23 JUDGE VIVIANO: Absolutely. I would never
24 allow the lawyers to directly address the jury without
25 the court's permission.

1 MR. FLESSLAND: Then with respect to the
2 reference documents, do you anticipate us coming in
3 with, you know, 12 or 15 copies of a photo that we can
4 hand to each juror if it's admitted into evidence?
5 You know, because a lot of times our fight's over
6 whether it's admissible.

7 JUDGE VIVIANO: I never required anybody to
8 do anything on evidence, although I am thinking of
9 doing it more. What I would like to see is the
10 lawyers actually think ahead, before the trial, and
11 say, you know what -- we used to call them the hot
12 documents. I know there are a hundred exhibits, but
13 there are five or six or ten that you are going to
14 refer to over and over again, and then if there is a
15 stipulation to their admission, obviously we are not
16 publishing them before they are admitted, let's get
17 them in front of the jury.

18 And, frankly, in my court, if you admit
19 something and it's an important document, it wasn't by
20 stipulation but you admit it while you are talking to
21 the witness and then you want to publish it by
22 providing 14 three-hole punch copies to the jurors, I
23 would let you do that. I would certainly work with
24 the lawyers in a way that's helpful. To me it's how
25 you are presenting your case. Are you presenting the

1 information in a way that the jurors can understand
2 it, and if we are going to look at that hundred page
3 contract on page 63 fifty times -- well, it comes up a
4 lot in medical records. You know, we have these big
5 things of medical records but really only three or
6 four pages are important. Let's get those and get
7 them in front of the jurors so they can look at them
8 so you don't have to open this big book every time.
9 Let's move the case forward.

10 Anything else? Thank you.

11 CHAIRPERSON RADKE: We are way over time on
12 this subject. Is this a real pertinent question?

13 VOICE: No, it's not.

14 (Applause.)

15 CHAIRPERSON RADKE: Privilege of the chair.

16 Thank you Judges Boyd and Viviano for taking
17 time from your very busy schedule.

18 (Applause.)

19 CHAIRPERSON RADKE: We are going to move this
20 right along, try and catch up so we can get out of
21 here.

22 If there was anybody who wasn't here this
23 morning and didn't get a ballot and hasn't had an
24 opportunity to vote, raise your hand so we can get you
25 a ballot. I see one, two, three, four -- whoa. Six.

1 All right. Let's get them ballots, please. The
2 tellers will pick them up. I am going to ask the
3 tellers then to reconvene. Keep your hand up until
4 you get your ballot, please. Way up. I have one over
5 here. I can't tell where she is though. I think
6 that's the 37th circuit.

7 Please vote, turn them back in. Tellers, you
8 will need to reconvene, retally, and bring them back
9 to us.

10 The rest of you can have a five-minute break.
11 Please come right back so we can move through the rest
12 of this very quickly. Thank you.

13 (Break was taken 3:02 p.m. - 3:08 p.m.)

14 CHAIRPERSON RADKE: Ladies and gentlemen,
15 please resume your seats. Ladies and gentlemen, take
16 your seats. We are ready to announce the election of
17 a new Assembly clerk results.

18 First of all, I want to thank all three
19 candidates for throwing their hat in the ring, to step
20 up to lead the Assembly. It is a position of great
21 responsibility that ultimately results in you standing
22 behind this podium and running a meeting, and I know
23 that the members thought long and hard about who they
24 wanted to see up here in making their decision, and I
25 am very pleased to announce that Kathleen Allen has

1 been elected clerk by the majority of the votes.

2 (Applause.)

3 CHAIRPERSON RADKE: Welcome to the Executive
4 Committee of the Representative Assembly and to a new
5 commissioner on the Board. Thank you.

6 All right. This is the juncture in which we
7 recognize Assembly members who are completing their
8 term of service. I am going to read your names and
9 then I am going to pass your folder off to
10 Steve Gobbo, who will meet you over here and hand you
11 your certificate.

12 Eric R. Fox. John F. Mills. Please come up
13 to accept these. James T. Weiner. Thomas W.
14 Chadwick. Alan Koenig. John P. Lozano, Chad Peltier.
15 Where are you, Chad? I saw you. There you are.
16 Michael R. Osaer. Jeffrey S. Crampton. I know this
17 guy is here, Mark T. Boonstra. He is the one that
18 talked several times. John W. Reiser, III. Dennis P.
19 Grenkowicz.

20 I want to thank you all for your service. I
21 know that some of you have been reelected and will be
22 coming back for another term. For those who are not,
23 we will look for you to come back in the future if you
24 are so inclined, and you are certainly most welcome.
25 Can we have a round of applause.

1 (Applause.)

2 CHAIRPERSON RADKE: Also at this time I would
3 like to present to the committee chairs for the
4 2010-2011 Bar years a little token of our appreciation
5 for you chairing your committees. Krista Haroutunian,
6 who I know is not here, and if one of her family
7 members would please come up and accept this for her,
8 I would appreciate it.

9 Michael J. Blau. Martin Krohner. William
10 Josh Ard. John W. Reiser, III. And Jeffrey C.
11 Nellis. I want to thank each of the committee chairs
12 for all of their hard work this past year. Thank you,
13 Jeff.

14 (Applause.)

15 CHAIRPERSON RADKE: At this time I would like
16 to introduce our parliamentarian, the Honorable John
17 Chmura who will be doing the honors for Mr. Gobbo.

18 PARLIAMENTARIAN CHMURA: Thank you, Victoria.

19 Steve, first of all, I would like to say
20 thank you for asking me to perform the swearing in for
21 you. It's quite a honor for me to do that, and I am
22 very proud that you asked me. Thank you for allowing
23 me to swear you in, Steve.

24 Now, because I was the parliamentarian, I
25 wanted to make sure we do this according to Robert's

1 Rules, so I looked up Gobbo in Robert's Rules under G,
2 and you'd be surprised to know, Steve, that you do
3 have your own section in Robert's Rules on how to do
4 this. It's the last section in the book, but it is
5 there, so we will follow that section when we do this.

6 Raise your right hand, please. Repeat after
7 me.

8 I do solemnly swear --

9 VICE CHAIR GOBBO: I do solemnly swear --

10 PARLIAMENTARIAN CHMURA: -- that I will
11 support the constitution --

12 VICE CHAIR GOBBO: -- that I will support the
13 constitution --

14 PARLIAMENTARIAN CHMURA: -- of the United
15 States --

16 VICE CHAIR GOBBO: -- of the United States --

17 PARLIAMENTARIAN CHMURA: -- and the
18 constitution of this state --

19 VICE CHAIR GOBBO: -- and the constitution of
20 this state --

21 PARLIAMENTARIAN CHMURA: -- and the
22 Supreme Court rules --

23 VICE CHAIR GOBBO: -- and the Supreme Court
24 rules --

25 PARLIAMENTARIAN CHMURA: -- concerning the

1 State Bar of Michigan --

2 VICE CHAIR GOBBO: -- concerning the

3 State Bar of Michigan --

4 PARLIAMENTARIAN CHMURA: -- and that I will
5 faithfully discharge --

6 VICE CHAIR GOBBO: -- and I will faithfully
7 discharge --

8 PARLIAMENTARIAN CHMURA: -- the duties as
9 chair --

10 VICE CHAIR GOBBO: -- the duties as chair --

11 PARLIAMENTARIAN CHMURA: -- of the
12 Representative Assembly --

13 VICE CHAIR GOBBO: -- of the Representative
14 Assembly --

15 PARLIAMENTARIAN CHMURA: -- of the State Bar
16 of Michigan --

17 VICE CHAIR GOBBO: -- of the State Bar of
18 Michigan --

19 PARLIAMENTARIAN CHMURA: -- according to the
20 best of my ability.

21 VICE CHAIR GOBBO: -- according to the best
22 of my ability.

23 PARLIAMENTARIAN CHMURA: Congratulations.

24 (Applause.)

25 CHAIRPERSON RADKE: Steve, I would like, on

1 behalf of the Executive Committee and the
2 Representative Assembly as a whole, to present you
3 with this gavel as a symbol of your chairmanship.
4 Thank you.

5 CHAIRPERSON GOBBO: Thank you very much. For
6 those of you that know me, I may not be brief
7 sometimes, but I will try to be as brief as possible.

8 To begin with from a personal point of view,
9 I would like to welcome my wife Mary, my son Nicholas,
10 and his wife, my daughter-in-law, Jessica, who came to
11 attend the swearing-in ceremony. Four of my other
12 children are not here because they are in school or
13 working out of state. There are others that have a
14 lot of meaning in my life that aren't here, including
15 my parents, who are both deceased, but what I would
16 like to say this is not about me, this is about you.
17 I would like to engage the Representative Assembly and
18 its membership in some of the important things before
19 us.

20 You have heard over the last couple days, for
21 those of you who weren't here yesterday, you heard
22 during the inaugural luncheon Julie, who is one of my
23 predecessors, Victoria's predecessor as a chair of
24 this body, that there is a focus on the unlicensed
25 practice of law. This body will be actively engaged

1 with a proposed rule that will be coming before --
2 most likely in April.

3 There are committee members of the Assembly's
4 various committees that have been appointed, along
5 with members. The final tally, so to speak, will be
6 issued, because we now know who the new clerk of the
7 Assembly is. Congratulations to Kathleen.

8 In this room there are many persons who have
9 served as the chair of the Representative Assembly.
10 You could only serve once, so I indeed feel privileged
11 that the body elected me as the clerk two years, three
12 years ago, and I look forward to discharging my duties
13 as best as my predecessors have, and I have tried to
14 learn from them.

15 And when I talk about engaging the Assembly,
16 I have made certain appointments to the Assembly
17 Review Committee, because I have listened and Victoria
18 and Dana and I have taken to heart some of the
19 concerns that you have had, at least some members have
20 had about the efficiency of the Assembly. So that
21 committee is going to be charged with looking at bylaw
22 amendments, looking at how we can run meetings maybe
23 more efficiently, how to interface with the Bar and
24 perhaps the Supreme Court on some issues.

25 One of my first steps actually was by asking

1 our parliamentarian to swear me in, not only because
2 he is a good parliamentarian but for the efficiency of
3 having somebody here already so we didn't have to wait
4 around for somebody in black robes to come in and get
5 things going.

6 So I just wanted to say those few comments,
7 and I look forward to working with each and every one
8 of you during my tenure this year as the chair. Thank
9 you.

10 (Applause.)

11 CHAIRPERSON GOBBO: I have to also perform
12 another duty, and that is for the outgoing chair,
13 Victoria, there is a plaque that we would like to
14 present to her which says, the State Bar of Michigan
15 honors Victoria A. Radke, Representative Assembly
16 Chair 2010 through 2011; Vice Chairperson 2009 through
17 2010; Clerk 2008 through 2009, in appreciation for
18 distinguished service to the Assembly, the State Bar,
19 and all Michigan lawyers, dated today September 15,
20 2011. Victoria, please.

21 (Applause.)

22 CHAIRPERSON RADKE: All right. Before I
23 bring the gavel down on this session, I have just a
24 couple of reminders. First of all, we have changed
25 the cycle of the committee assignments. Your requests

1 to fill out are due at the end of the April meeting.

2 Don't forget, you can't leave until you have
3 filled out your attendance forms. If you want your
4 mileage, you need to fill out your mileage form and
5 get it to Ann Smith.

6 I also want to remind you again about the
7 Diversity Reception this evening at the Henry Ford
8 Museum starting at 6:30, and if you haven't already
9 signed on to the diversity pledge, please do so either
10 online or in person tonight.

11 For those of you who didn't get to the vendor
12 exhibit hall, I would commend it to you once again,
13 and if anybody is interested, there are discount
14 tickets for both Macy's and Ann Taylor that have been
15 made available through the Hyatt Regency Hotel. I
16 will tell you that the Ann Taylor discounts are good
17 through January 3rd of 2012, but the Macy's ones are
18 only good for the next three days.

19 That being the case, I just want to take
20 another opportunity to thank you all for letting me be
21 of service to this body. I have so enjoyed my time on
22 the Executive Committee and as a member of this body.
23 Thank you so much, and enjoy the rest of your week.
24 We are adjourned.

25 (Proceedings concluded at 3:22 p.m.)

1 STATE OF MICHIGAN)
2 COUNTY OF CLINTON)

3 I certify that this transcript, consisting
4 of 137 pages, is a complete, true, and correct transcript
5 of the proceedings and testimony taken in this case on
6 Thursday, September 15, 2011.

7
8 October 6, 2011

9 Connie S. Coon, CSR-2709
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