STATE OF MICHIGAN
STATE BAR OF MICHIGAN

MEETING of the REPRESENTATIVE ASSEMBLY of the STATE BAR OF MICHIGAN

Proceedings had by the Representative Assembly of the State Bar of Michigan at Lansing Community College M-TEC Center, 5708 Cornerstone, Lansing, Michigan, on Saturday, April 12, 2008, at the hour of 9:30 a.m.

AT HEADTABLE:

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

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REPRESENTATIVE ASSEMBLY 4-12-08

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Unauthorized Practice of Law Informational as considered by the Special Issues Committee

Adjournment

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REPRESENTATIVE ASSEMBLY 4-12-08

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

RECORD

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

I would first recognize Elizabeth Moehle Johnson, our Clerk.

CLERK JOHNSON: Good morning.

Mr. Chairperson, members of the Assembly, I am pleased
to announce to you today that we do have a quorum with over 50 members present.

CHAIRPERSON GARDELLA: Thank you, Clerk Johnson.

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

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

VOICE: So moved.

VOICE: Support.

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

All in favor say aye.

Those opposed say no.

Any abstentions say yes.

The ayes have it.

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

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

CHAIRPERSON GARDELLA: Is there support?

VOICE: Support.

CHAIRPERSON GARDELLA: Any discussion?

Hearing none, all those in favor say aye.
All those opposed say no.

Those abstaining say yes.

And the ayes have it. The motion carries.

At this time I am pleased to announce that

Chief Justice Taylor has joined us to give us a report
on the judiciary for Michigan. This is, I think, a
first that we have had in front of the Assembly.
Hopefully it will be a regular event that we have.

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

Chief Justice Taylor received his undergraduate degree from the University of Michigan and his law degree from George Washington University. After three years in the U.S. Navy, he returned to Michigan and served as an assistant prosecuting attorney in Ingham County, Michigan. In 1972, he joined the Lansing law firm which was later known as Denfield, Timmer & Taylor, where he became a partner of that firm, and he remained in private practice for approximately 20 years. In 1992, Governor Engler appointed Justice Taylor to the Michigan Court of Appeals, where he served until his appointment to the Michigan Supreme Court.
Chief justice Taylor's professional activities include service on the Board of Directors of the National Conference of Chief Justices, also service on the Board of the George Washington University Law and Economics Center, which provides ethical education across the country. He also served on the Michigan Legislature's Commission on the Courts in the 21st Century and on the Michigan Board of Law Examiners. He is the co-author of a three-volume legal treatise entitled Torts, which covers personal injury law in Michigan.

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

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

(Appause.)

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

Before I begin on the substantive part of the speech, I want to thank your good friends at Michigan Government Television for providing coverage this
morning. The Supreme Court has had a fine working relationship with MGTV that dates back to 1996 when Michigan Government Television first aired our oral arguments and in so doing became the second television station in the United States to carry live coverage of that state's highest court.

MGTV also collaborates with the Court on various educational projects. Most recently, CSI: Courts, Speed, and Implications, a webcast that we worked with them on for high school audiences. They are, in short, a valued partner.

Now, when a chief justice stands before a group of lawyers, particularly those who represent the organized Bar, the expectation is probably that what he has to say will be of interest only to lawyers. My remarks here today have been variously billed as a state of the judiciary type of address, which sounds sweeping but pleasantly vague, and as a report from the Michigan Supreme Court, which sounds rather dreary, as though I were about to give a detailed account of how much we spent on office supplies last year, but rather my focus this morning is, I hope, on first principles then duties that we owe, that is we of the Bench and Bar, to the public.

The State Bar of Michigan was founded on the premise that its highest and best function was safeguarding consumers against unscrupulous or incompetent purveyors of the legal services. The defining ethic of our bar was famously expressed by its first president Roberts P. Hudson's, "No
organization of lawyers can long survive which has not
for its primary object the protection of the public."

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

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

In 2003, my Court waded into this thorny

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

Let me back up a little bit at this point and
talk about what the law was up to the point that the
case reached the Supreme Court.
In Michigan, as in a number of other jurisdictions, the approach to the unauthorized practice of law was to tell defendants effectively through our cases we will tell you whether you committed a crime after you have done it. This seemed to be troubling, I suppose for a lot of reasons, most of them facing back to due process and the Court of Appeals in noting its handling of Dressel that the statutes governing unauthorized practice of law do not specifically define the term nor had the Michigan Supreme Court defined it either. In fact, in past decisions our Court had concluded that defining the practice of law was an impossible task.

In our 1976 decision in State Bar of Michigan versus Kramer, for example, the Court stated that the definition was impossible because under our system of jurisprudence such practice must necessarily change with the ever changing business and social order.

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

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

We held, as did the trial judge, the very talented Judge Kolenda, who has just left the bench, a
great loss to the bench, that the preparation of these documents was not the practice of law, but we went further, as Justice Kelly wrote, Our courts have found a violation of the unauthorized practice of law statutes when a person counseled another in matters that required the use of legal knowledge and discretion. We agree and reiterate that a person engages in the practice of law when he counsels or assists another in matters that require the use of legal discretion and profound legal knowledge. This definition, she noted, maintains the integrity of the legal profession without overburdening our normal economic activities with unnecessary restrictions. Also, it provides parties with a common sense approach to conforming their conduct so as to avoid committing the unauthorized practice of law.

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

I should also point out that our colleague, Betty Weaver, did not agree that the Court could or should define the practice of law. She took issues with the Court's departure from earlier precedent and
also cited the difficulty of, quote, arriving at a lasting definition, unquote, and indicated she would have preferred that the Court, quote, remain committed to our prior holdings and continue deciding these cases on a case-by-case basis.

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

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

If potential offenders don't have at least some guidance as to what not to do, they will, of course, continue to encroach on the practice of law
with unfortunate consequences for the public. At the same time, I think the Dressel approach makes it possible for nonlawyers to perform ordinary, routine business services without fear that they are going to run afoul of the criminal statute.

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

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

Another achievement, thanks to our Friend of the Court Office, Michigan ranks sixth in the nation in child support distribution and fourth in collection of past due child support. In short, the judicial branch is making huge strides in everything from technology to public education, as detailed in our annual report, and I am proud, I think justly, of the fine judges and staff throughout our state to make all
What you will also see, if you read the report, is that our state courts generally enjoy what we call in the judging business a clearance rate of at or near 100 percent. The Supreme Court, for example, received 2,612 files in 2007, the most received in the past five years, and disposed of 2,625, which, as its understood, is a clearance rate of over 100 percent.

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

What the public also has a right to expect is the wise use of its tax dollars. So last year I went before the Annual Judicial Conference here and suggested that the state could do with fewer judges. I did not think that making that suggestion would be particularly controversial. After all, for years the State Court Administrative Office had been reporting that some courts had more judges than they needed and that those judgeships ought to be eliminated by attrition.

That suggestion, at least since 2002, went unheeded, as the Legislature continued to approve new judgeships without eliminating any. But last April it
seemed high time to bring the subject up again. Here we were, facing one of the worst budget crises in the history of state government, with Michigan's economy trailing dead last of all the states.

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

With the State Court Administrative Office recommendations in August of last year, reaction in the Capitol ranged from indifference to, again, outright hostility. Stymied yet again was any productive discussion on a very straightforward question, does this state have more judges than it needs and how do we determine that? Some history is helpful here.

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

The commission included representatives from the circuit, probate and district courts, as well as
my colleague, Betty Weaver, who chaired the
commission. There were, in addition, representatives
of the Bar, legislators, local government officials,
court administrators, and the Department of Management
and Budget was represented on the commission by my
wife, Lucille. In short, just about every conceivable
category of stakeholder was represented at the table.

Now, when the Trial Court Assessment

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

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

The case weights that the commission
developed and the quantitative formula for assessing
judicial need were unanimously adopted by the
commission, along with the rest of the financial
report. The weighted caseload approach is what has
been used ever since to determine judicial needs of
each court. Although such weights were updated last
year based on 2006 study involving 86 Michigan trial
courts, the methodology is the weighted caseload
approach approved by the blue ribbon commission in
Indeed, the National Center for State Courts, which worked with the Trial Court Assessment Commission to develop the methodology, has stated that the weighted caseload approach is preferred above all others for assessing judicial workload and judicial need.

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

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

Not only did the Legislature not take any
action on these recommendations, but the report was
assailed as untrustworthy, flawed, and even
politically motivated.

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

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

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

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

Those who oppose judicial downsizing also
argue that any savings from eliminated judgeships
would be minimal, because the judicial branch
represents such a small part, less than one percent of the overall state budget. Well, it's quite true that our budget is very small compared to the rest of the state government. This argument is one that only a bureaucrat could love. Most taxpayers would, I think, not share the perception that $157,000 per trial judge or around $400,000 for Court of Appeals judges is small change. I think they would expect us to save where we can so as to better put the savings towards areas of real need and promise, such as areas that are underjudged, mental health courts, drug courts and the like. Many of these will go unfunded as things now stand.

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

In 1992 the Court of Appeals had 13,352 filings. In 2007 the court saw 7,590 new files. That is a drop of 43 percent. So if we are not able to consider reducing the court size now, when? What's the magic number? Fifty percent fewer filings, 60 percent?

It's not just the present numbers but also history that's instructive here. What to make of the fact that in 1988 with 18 judges and 17 fewer staff attorneys the Court of Appeals received 8,545 filings and decided 8,508 cases, over 900 more than the 28-judge court decided in 2007. And in 1990 when
total filings reach 12,369, the then 24-judge court decided 10,504 cases, almost 3,000 more than the court decided with 28 judges in 2007. Are we to just ignore these facts, pretend they have no bearing on the present?

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

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

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

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

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

(Applause.)

CHAIRPERSON GARDELLA: Chief Justice Taylor
many, many thanks for being here today and giving your
state of the judiciary address. We appreciate it.
It's very informative, and we hope this can be a
regular occurrence for us. So thank you.
We will take a 15-minute break at this point
and then be back in the room to carry on with
business.

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

CHAIRPERSON GARDELLA: So we can keep on
schedule, I would like to resume the meeting at this
time. Our main goal today is to keep on track of our
schedule and hopefully keep ahead of schedule so
everyone can get back home and enjoy their Saturday.
The next item on the agenda here is the
Chair's remarks, and I have sort of a collage of
different things to address with you, not just one
The first item that I wanted to address is that since our last meeting in Grand Rapids, which by the way was a wonderful event, and hopefully people had a good time there in Grand Rapids last September, but since that time we have encountered some very sad news. Kim Cahill, our former Representative Chair during the 1999-2000 year and our State Bar of Michigan President during the 2006-2007 year, died after a short battle with cancer in January of this year.

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

She would speak to a variety of groups, to elementary school children in the first grade, to senior citizen organizations, to a variety of different Bar organizations and special interest
groups and just did a wonderful job. I saw her on the stump many times, and she had an extra challenge because we had the tax on legal service issue, and she probably had maybe double the usual engagements because of that issue that was of great concern to lawyers.

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

And I would also like to point out that some additional sad news came in, Greg Ulrich -- I am not sure if Greg has arrived yet -- but Greg is one of our Board of Commissioner members. He is also a former chair of the Representative Assembly from Wayne County. Just a few days after Kim's death we were informed that there was a sudden death of Greg's son who was serving in the armed forces, and the funeral was in January of this year. So our hearts go out to their family, and at this time I would ask that you join me in a moment of silence for Kim and also for Greg's son.

(Moment of silence.)

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

As many of you know, when the Representative Assembly was started in 1972 we had approximately 12,000 lawyers at that time, and the State Bar leadership at that point and the Supreme Court, they were trying to do something to make our leadership of the Bar more responsive to the regular, everyday practitioner and be a better link to the practitioner. By creating the Representative Assembly it did serve its purpose, and it still does. We have approximately 39,000 members now, and we are more important than ever in carrying the voices of our local Bar members to this body and communicating our product from our resolutions here to the Supreme Court, State Legislature, and also to the executive branch of government.

So my thanks to you for taking the time out of your schedules and your generous gift of time to
your profession, because it truly is a gift, and
hopefully you will get as much out of it as I have the
last eight, eight and a half years that I have been on
this body. Every time I leave this building I always
get something out of it and say, wow, I never
considered that argument or I never knew that bit of
information, and hopefully it will be very educational
for all of you as you continue to serve.

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

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

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

For our resolutions that deal with
Supreme Court issues and Court Rule issues, we will
draft a letter to the Supreme Court or the Court of
Appeals, whichever would be effective, it’s usually
the Supreme Court, that states this is what we have
concluded, this is the recommendation that we would
make and we would ask the Supreme Court seriously
consider this and approve the recommendation that we
are asking for.
Also, at other times we will send letters to the Legislature or the Governor's office if they deal with legislative issues or administrative issues within the realm of the respective branches of government. But I want to reiterate that your service is extremely important to improving our system of justice.

Another important thing that I have to

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

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

I am also very honored that circuit court Judge Cynthia Stephens of Detroit is our parliamentarian. I was just in her court, let's see, a week ago Friday to make sure that she had this on her agenda, and she does. I think she always looks forward to the Assembly members and the various issues that we address. She will be our parliamentarian again this year, and I thank her for agreeing to serve again. She was formerly a Representative Assembly member and a member of our Board of Commissioners, and I still remember her when she was making the great
arguments from the microphone, not too many years ago, and she has been involved in uncountable projects for

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

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

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

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

MS. RADKE: Right here.

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

And I also wanted to give a special thanks to Ron Paul of Oakland County who helped us work
diligently. He was also a member of the Nominating Committee to fill some of the vacancies.

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

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

Also, the Assembly Review Committee Chair, John Reiser, thank you for a project that many of you don't even know happened, because we had to work on it very quickly this year. During the earlier part of the year, right after the annual meeting, we knew that we had a problem with our bylaws regarding elections, and the chair of the Assembly Review Committee went to work with State Bar legal counsel, Cliff Flood, and
some of the RA officers to make sure that we could get
that, get an amendment done, and that was
accomplished. The amendment basically focuses on --
and you can look at this on the Bar website under the
bylaws for the Representative Assembly.

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

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

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

So the legal counsel and John Reiser went to
work on that. We were able to get an amendment taken
care of. It was approved by the Board of
Commissioners. The Board of Commissioners has to
approve the bylaws regarding elections for the
Assembly, and that’s in place now, and we will not
have that problem, and you can see the details in
terms of how that is resolved based on the seniority of someone already serving on the Assembly, and I won't go into the specific details of it. You can read that if you are interested in the particular details and the ranking as to who gets which slot, but it was a nice way of resolving it, and people worked very hard to get that done at the end of last year right around the holidays. So I thank John for his great work on that.

Regarding what we have before us today, we do have a lot of proposals, and I thank the people who put the work into those. Some of our own members have spent some time, and all of you have also worked with your local Bars to take care of comments from your local areas, and we appreciate the proposals and the commentary letters that we have received. Your seats have various letters that have come in from various offices and organizations and just general practitioner offices, so look at those when we get to the proposals. Some of those have just come in the last few days, and so that's why those were not in your packets, but as we get to the topics you can look at those. People put some very, very thorough thought into those items, and they are very well done commentary items, so I would ask you to look at those as we move along.

I would also state that over the last eight and a half years that I have been in the RA we have become stronger every year. People have been generous with their time to serve on the committees. I would ask that you continue that.
Also, the people who have been liaison's to the other special interest Bar organizations and sections, thank you for your involvement, and I encourage all of you in your role as a Representative Assembly member and liaison to really work with those groups and give them a call once in a while or attend their meetings at least once or twice a year so that you can see what's on their mind. There may be a proposal that they have that they would like to bring to the Assembly but they just don't know how to do that, and you are very important in being that link to those organizations.

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

The other item that I wanted to address, just to give an update, for our past chairs of the Assembly, and this is a carryover to Ed Haroutunian, our past chair who is seated way in the back of the room over there -- thanks, Ed, for being here -- we have now a permanent display that's going to be located on the first floor of the Bar building for all the past chairs of the Assembly, which is coordinated due to the 35th anniversary last year of the Assembly. That's going to be placed as of June or July of this year, whenever we can get all of the photographs complete. We are still working on a couple of photographs from some of our earliest chairs of the...
Assembly. So when you come into the Bar building in
the summer, you may see that up, and that will be a

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

And if your photograph is not there or you
weren't here at the last meeting, Marge Bossenbery is
taking photographs. We have a digital camera that
will transfer the photo this coming week onto that
pictorial directory. We have it alphabetically
organized, and it will also be organized according to
your circuit number in just a few weeks.

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

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

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

And I admire Ron, because sometimes I will complain, well, gee, I had to drive an hour to court, and with Ron being in Marquette, I call him the happy traveler, because he sometimes will have to drive from Marquette over to Sault Ste. Marie or over to Ironwood, and, you know, for him to drive from his office sometimes to court, it may take two hours or three hours or over to Mackinaw City or wherever he
has to go to.

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

(Applause.)

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

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

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

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

Number one is making the justice system accessible and affordable to all who need it. Now,
this is an access to justice issue, obviously, but I think it is something that we can all focus on and agree on is an important principle of what we do as lawyers.

The second thing I like to talk about is making a living while at the same time upholding the highest values of our profession. Sometimes easier said than done, but it's something that is a goal that we all have and we want to strive to maintain.

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

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

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

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

Helping our members learn to manage clients
in an age where clients can reach you by e-mail or
cell phone 24 hours a day, and they do their own legal

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

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

And a special concern I have noted in
speaking with lawyers around the state is the growing
prosperity gap between solo and small practitioners on
the one hand and the large firms, and I know in this
room we have solos and we have small firms and we have
the large firms, but this is a concern, this is a
problem, this is something that we are trying to deal
with. And one of the ways that we are dealing with
this is through the State Bar's, some State Bar
programs, in particular the Practice Management
Resource Center, which is geared to helping those who
don't have those in-house abilities to have that kind of information that the larger firms may offer.

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

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

Now, whether it's providing a section with a well written amicus brief or providing pro bono service to a couple who are being evicted from their home, or whether it's simply, you know, doing consulting work at a legal services office, or not consulting, but, you know, doing intakes, and I know Andrea, you could probably use some help in that regard.
So those of us who are planning for retirement, what I am asking you to do is take a look at ways that you might do some work in your retirement. After all, there is only so much golf we can play, and particularly me. So I know there is a lot that can be done.

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

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

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

(Applause.)

CHAIRPERSON GARDELLA: Moving along, I would like to introduce Janet Welch. Many of you know her, but I would like to make a few comments about Janet. Positive ones.
Janet, as many of you know, she was the
general counsel for the State Bar and eventually
became the interim director and now executive director
of the State Bar. She has been for the last year, and
she has done marvelous work in that short time as the
executive director.

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

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

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

When we looked for an executive director, I
was on the Board of Commissioners when we made that
choice, and Janet was definitely the clear choice. We
needed her experience and guidance, and we have that,
and we hope that she will be with us for many, many
years. And her advice has helped the Assembly in so
many ways in helping us take the right direction on
various issues, and I am appreciative of the guidance
she gives to myself and the officers.

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

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

So with that, I introduce Janet, Janet Welch.

(Applause.)

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

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

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

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

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

Each Assembly meeting has produced at least one recommendation that's turned out to be of lasting value to the profession and to the public. Each has had some unexpected element of drama. At some point in each meeting I have realized that I have had not nearly enough sleep the night before. At each point in the meeting I have also experienced a nearly unbearable craving for sunlight that will come later in this day. And at each meeting, without fail, at some point some member will stand up against the apparent tide of consensus that's building and will make a remark so compelling or ask a question so provocative that you can just see the whole body
concentrate its attention on the issue, and that is a really exciting moment, and I am looking forward to that moment today as well. I don't know when it's going to occur, but it will occur.

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

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

From this Assembly come the seeds of change in the profession and in the judicial system, seeds with the capacity to nourish the rule of law and to protect and advance the fairness and efficiency of our system of justice. And so in Kim's memory I am pleased to report to you today on what's happening with just a few of the seeds that you have sown.

As you directed in September of 2005, the State Bar of Michigan created a task force on custodial interrogation recording. To date that task force, which is composed of prosecutors, criminal
defense attorneys and law enforcement, has been working since May of 2006, and they have developed a pilot project for several sights around the state to obtain Michigan's specific information about custodial interrogation, to take the experience that has happened nationally and to bring that to bear in Michigan.

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

One site has already been established in Jackson County. Where is Jackson County? A second site is anticipated soon in Washtenaw. Washtenaw is over here somewhere. I don't know the geography of this room yet. We have researchers from the University of Michigan who are assisting in that project, and there will be an informational hearing on the issue before the House Judiciary on April 30th.

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

In September of 2006 you asked for changes in the state's garnishment forms, and I am here to tell you that the court published for comment your proposal in April of 2007. In response to the comments they
got back they decided not to adopt the proposal as you recommended it, asked some questions, and they have urged us to go back and to work with representatives of the banking industry and the Michigan creditors Bar on that issue, and we are doing that. So that issue has not come to fruition yet, but we are working on that, and it is still alive.

Last, but far from least, in 2002 you adopted 11 principles of a public defense delivery system. You took the ten principles of the ABA for a good public defense system and you added the 11th principle, the Michigan principle as we want to call it now, because we want to be a model for the nation on this, calling for the involvement of defender offices in the design and operation of effective alternative sentencing programs.

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

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

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

These, of course, are just a few of the seeds that you have sown for justice over the years. Kim knew, as you do, that the work doesn't stop with the adoption of a proposal, that, in fact, that's just the opening argument often in making the case, and sometimes the case isn't won for years, but one of the qualities that we have as lawyers is that we are patient. We know that patience is important, even if our clients don't always know that. We appreciate the importance of process, and we know that even if the fight is long, if it's important, the victory is all
that sweeter when it arrives.
So here's to our success in the decades to

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

(Applause.)

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

MS. RADKE: I am here. Thank you, Robert.

Good morning, everyone.

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

I received an e-mail from Anne on Thursday advising me that the seat in the Gaylord, Crawford and Kalkaska circuit, which is the 46th, became open because the representative from that circuit for personal reasons had to resign, and I was advised yesterday by Robert that there is an opening in the 9th circuit. I also am pleased to announce that
wheels have already been set in motion to fill those
seats, and we hope to have them filled by the
September meeting.

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

From the 3rd judicial circuit, John Philo of
Detroit and Margaret VanHouten of Dearborn.
From the 6th judicial circuit, Jennifer
Hastings of Bloomfield Hills, Jeffrey Linden of
Farmington Hills, Angelique Strong Marks of Troy, Mark
Teicher of Bloomfield Hills.
From the 9th judicial circuit, Donald Roberts
of Kalamazoo.

From the 17th judicial circuit, Troy Haney of
Grand Rapids. Also from the 17th judicial circuit,
Hal Ostrow of Grand Rapids.
From the 22nd judicial circuit, Erane
Washington-Kendrick of Ann Arbor.
39th judicial circuit, Gregg Iddings of
Adrian.
From the 40th judicial circuit, Michael
Delling of Lapeer.

From the 43rd judicial circuit, William LaBre
of Edwardsburg.
From the 51st judicial circuit, Jeffrey
Nellis of Ludington.
And from the 56th judicial circuit, Michael
Thomsen of Eaton Rapids.

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

VOICE: Second.

CHAIRPERSON GARDELLA: I hear the motion and I also hear support already. Is there any discussion? Not hearing any, all those in favor of the motion say aye.

Those opposed say no.

Any abstentions say yes.

And the motion carries.

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

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(Applause.)

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

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

Victoria Radke from the 47th judicial circuit. At this time it is an honor for me to put forth to you the names of those people that the Nominating and Awards Committee has selected for the Unsung Hero and the Michael Franck Awards.
The committee was unanimous in its selection for the Unsung Hero Award, and it makes me very proud of our profession to know that everybody who was nominated for both of those awards were very talented or very talented people, and we should be so proud to claim these people as members of our profession.

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

This award is given by the Representative Assembly, that's every one of you, to a lawyer each year who exhibits the highest standard of practice and commitment to others. You will see by the information in your packets, and I am not going to go through and list that for you today, that Ms. Spagnuolo-Dal is an exceptional individual who has served many members of our community and who continues to do so every single day of the week, of the month, of the year.

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

VOICE: Second.

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

All those opposed no.
Abstentions say yes.
Not hearing any, the motion carries.

MS. RADKE: Thank you, Mr. Chairman.
The next award, of course, is the Michael Franck Award, which is the highest award given by this body to an attorney who has made an outstanding contribution to the improvement of our profession, and, again, this was a very difficult decision because the people who were nominated all presented us with fine examples of people who truly give back to their profession.

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

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

VOICE: Second.

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

Hearing none, all those in favor say aye.
Those opposed no.

Those abstaining, say yes.

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Hearing none, the motion carries.

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

(Applause.)

CHAIRPERSON GARDELLA: Thank you, Victoria.

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

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

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

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

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

You have the proposal before you and in particular from Michigan it modifies the ABA's recommendation to this extent, it does not delineate combat zone as a criteria, and, frankly, there is a
reason behind that. There are some administrative or logistical aspects of determining combat zone participation, because actually the rear echelons of a deployed unit are considered part of a combat zone deployment, so you may have people in other parts of the world or here in the United States.

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

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

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

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

VOICE: Second.

CHAIRPERSON GARDELLA: Just as a point of procedure, we need a motion from one of the members of the body on this matter. Do I hear a motion on this matter?
VOICE: So moved.

VOICE: Support.

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

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

MR. ULRICH: My information is, based on the ABA, is the ABA had a limitation, I believe, of three years, doesn't have to be consecutive. Four years was to move beyond that. I understand your concern, because you could have a deployment plus additional reserve service as active duty that could extend five years supposedly or even seven years, depending on when you had finished your active stint.

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

MR. ULRICH: I need to talk to Janet first, because I am not sure about the fiscal impact to that. Janet was reminding me of the ABA's analysis. One was that if it were open ended that you would have, and extending to everybody who was on active duty, the potential was that you would have some
people who are in reserve or National Guard service
who would seek that active duty status.

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

So I think the prudent thing at this point is
to put it in place, try it out, and then it can be
revisited if it looks like there is a greater need.

Does that answer, Judge?

JUDGE KENT:  It does. Thank you.

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

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

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

CHAIRPERSON GARDELLA: Is there any other
discussion on the matter? Any other commentary? On
the prior comment there was no need to do any

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

All opposed say no.
All abstaining say yes.
After the vote, the ayes have it, and the
motion passes. Thank you, Greg.

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

(Applause.)

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

MS. VESTRAND: This is a proposal to prohibit
the officers of the Representative Assembly from
endorsing a candidate for judicial or political office
during their term of office as a Representative
Assembly member. Yesterday this same proposal was put before the Board of Commissioners, and it was tabled yesterday.

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

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

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

MS. STANGL: Good morning. This proposal under item 12 came up through the pro bono initiative under the Committee on Justice Initiatives, and it is a proposal to adopt another ABA Model Rule that was developed in response to the events of Hurricane Katrina, and, as President Keefe mentioned, the idea of disaster response is something that Bar associations are looking at around the country, and it's my understanding that at least 15 states are at various stages of considering the adoption of this rule.

The rule essentially has two components. The
first one is to address the legal needs of people who are displaced who may need pro bono assistance, and it would allow a state that has a disaster to -- if Michigan had a disaster, for example a flood, tornadoes, whatever, civil disaster, it would allow our court to declare that disaster and allow other attorneys to come into Michigan, and if they worked under the auspices of a pro bono program, through a Bar association or a legal services office or otherwise authorized by the court, those pro bono attorneys could practice law on behalf of victims of a disaster and not be violating unauthorized practice of law. They could not get a fee for the service. They would have to register within 30 days with the Supreme Court, and they would be subject to the ethical rules of this state. They would have to get pro hac vice approval to appear in courts of this state unless the Supreme Court specifically authorized as a group pro bono practice in one or more kinds of cases. So it's a limited pro bono allowance that would be under the control of the Supreme Court to address the needs of people, either residence of Michigan or people who may come to Michigan from another state. You know, as we saw with Katrina, people went to Mississippi from Louisiana and had legal needs there. So volunteers were trying to go down to that neighboring state or help them out in that neighboring state. The second part of the proposal would deal with the needs of lawyers themselves, so if, for example, there were a major tornado in Northern Ohio
and Toledo was wiped out and those attorneys had no
where, no physical office, and the Ohio Supreme Court
would he have to define that they had a disaster, our
Supreme Court would have to recognize there had been a
disaster and then could authorize an Ohio attorney to
be physically located in Michigan for the time
approved by the court where they agree that that's
necessary. They could not take Michigan cases, they
could only do the legal work arising from their Ohio
practice, but if they were taking calls, holding out
themselves in Michigan doing that work, they would not
be susceptible to being accused of doing unauthorized
practice of law.

So that's the limited issue that they are
trying to address. So they are saying I am a lawyer,
I am doing my Ohio work, but I happen to have a
Michigan address here. For that purpose, it would not
be a problem.

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

VOICE: Support.

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

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

Those opposed no.

One no. Any abstentions, yes.

One abstention. And hearing that result, the
motion carries. The matter is passed and approved.
The next item, moving along, we still have 20 minutes before lunch, item number 13, consideration of Michigan Court Rule 6.201(B) regarding preservation of electronic recordings. Our proponent is Matt Abel from the 3rd circuit. You can approach, Matt.

MR. ABEL: Good morning. Now that I have already made myself really popular this morning, let me introduce myself. I am Matthew Abel from the 3rd METROPOLITAN REPORTING, INC. (517) 886-4068

judicial circuit. I am a criminal defense lawyer by trade, and I decided that -- you know, I have been on the Assembly actually for quite a long time off and on. I figure I started running when I first passed the Bar in 1986, took five years, and eventually there was an uncontested race, and here I am. And it's been an interesting ride.

But I have always felt that to serve on a body like this I should dream up some things and let them fly rather than complain about the things, you know, the way they are all the time.

I know there is some controversy in some of these items, but the first one is about preservation of electronic recordings, is that right? I am sorry. It is electronic recordings, right.

The problem that this rule is intended to solve is the type of situation where there is a traffic stop, an illegal search of a car. My client says, I didn't consent to the search. The officer and his partner both testify to the contrary, and there was a videotape, which my client tells me, which he has no reason to lie to me, that not only was the cop swearing and cussing at him, but when my client said,
I don't want you to search my car, and the officer pushed him out of the way and searched the car anyway

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

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

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

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

But as a defense attorney and for a defendant, the cards are stacked against us highly
enough. This rule would just put a modicum of justice into the justice system. I think it's needed. I would be happy to answer any questions.

I move passage of this proposal.

VOICE: Support.

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

I would recognize Vice Chair Kathy Kakish.

VICE CHAIR KAKISH: Mr. Chair, Kathy Kakish, Vice Chair of the Representative Assembly, also from the 3rd circuit.

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

With respect to this particular amendment, I stand here in agreement with the attorney general in believing that it should be opposed. I see from the amendment that there is no wiggle room for evidence to be inadvertently destroyed. The language of the proposed Rule 6.201
clearly indicates that failure to preserve such
evidence shall entitle the accused to a jury
instruction that such evidence not produced should be
presumed by jurors to have been adverse to the
prosecution.

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

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

CHAIRPERSON GARDELLA: Thank you. If you

could state your name and circuit for the record.

MR. KROHNER: Martin Krohner, 6th circuit. I
also have a privilege and honor to be co-chair of the
Criminal Jurisprudence and Practice Committee. We had
our monthly meeting two days ago where we discussed
all these proposals. The committee did support this
particular proposal in a vote. However, we did
discuss the issue, the electronic recording evidence.
We did come up with what we consider to be a friendly
amendment that after the word "evidence" in the first
line there be a comma with the words "which is
introduced at trial," so we are looking for items that are actually introduced at trial, not items that are kept.

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

MR. ABEL: Mr. Krohner, question. Does that mean if the item is destroyed before trial and never introduced then nothing is ever said about it?

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

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

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

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

MR. KROHNER: The fact of the matter is if
the item is not introduced at trial, do you want it kept, you know, ad infinitum?

MR. ABEL: I see what you are saying.

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

MR. ABEL: No, I think this guts the intent -- one of us is misunderstanding here.

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

VOICE: Second.

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

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

MR. CRAMPTON: Jeff Crampton from the 17th circuit. I also oppose this amendment, but I think you can accomplish what -- I think both ends can be accomplished by taking that language and moving it to the next sentence. So any electronic recording evidence made by a governmental agency or agent pertaining to the matter known to the prosecuting
The attorney would stay in as something that must be produced by the government and saved by the government. Such records which are introduced at trial shall be preserved by the prosecuting attorney until after all appeals have been exhausted. I think it accomplishes what I think is the intent of this proposed amendment and would be fine. Certainly if it's been introduced, it should be preserved until all the appeals have been exhausted, and if it's not been produced, then there is no point in saving it any longer.

Chairperson GardeLLA: Just as an order point, we can't do another amendment while that motion is pending.

Mr. Crampton: I understand. I oppose this amendment because I think you can accomplish both goals by doing it that way.

Chairperson GardeLLA: Is there any other discussion on the amendment that is pending? Please state your name and circuit.

Mr. Linden: Jeff Linen, 6th circuit. I would also oppose the amendment. I agree with Mr. Abel, that if I understand the purpose of the original proposal is to address the situation where some sort of electronic evidence or recording is created at pre-trial and that is destroyed inadvertently or intentionally. If you have an
introduction in trial requirement, there is no way of
having any sanction levied for what would be the
destruction of evidence, you know, whether it's
favorable or not favorable to the defendant.

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

CHAIRPERSON GARDELLA: Thank you. Any other
The noes have it on this matter.
Now we move ahead. Further discussion relating to the overall underlying motion.
Mr. Elkins.

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

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

Accordingly, I would move that to amend, after the word "prosecuting attorney" at the end of the first sentence, add the language "or the police agencies involved." Agencies involved.

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

MR. ELKINS: I understood it might be. The reason, of course, is that there is very little burden on the prosecution when they have received a request to preserve evidence, simply to send a letter to the police department saying don't erase it. Because of a policy many of the police departments do erase these in the, quote, normal policy matter of the passage of
CHAIRPERSON GARDELLA: I think I also have to ask the person who gave the support, is that agreeable to the person who supported the motion, wherever you are?

MR. BARTON: Yes.

CHAIRPERSON GARDELLA: Any further discussion?

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

MS. MCQUADE: Nothing to say to the amendment.

MR. POULSON: Barry Poulson, 1st circuit. This is really the gist of what goes on, right, the police destroy the recordings. Now, I come from a more advanced or maybe enlightened county where I recently won a Walker hearing because the police didn't record an interrogation on videotape. Judge simply asked them, Do you have videotape? Why didn't you record it? The confession, so-called, goes out. And so that's the standard now, at least for the sheriff's department in our county, but I think that may not be universal across the state, right?

What we are asking here is that the evidence simply not disappear, and if it does disappear, to say what we often say in our summations at jury, the prosecutor had the evidence, they didn't bring it to trial. The reason they didn't bring it to trial, because it helped the defendant, right? So that would allow the court, the point of this amendment is to get to the people who are really destroying the actual evidence and tell them if you are going to destroy it,
it's going to look bad for you in court. So I support that amendment with that in mind. Thank you.

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

MS. MCQUADE: Discussion on the merits then?

CHAIRPERSON GARDELLA: On the overall proposal.

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

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

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

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

conession. Maybe it's Charles Manson confessing to

CHAIRPERSON GARDELLA: Thank you.

Mr. Debiasi.

MR. DEBIAS: William M. Debiasi from the 3rd
circuit, and I would like to echo the sentiments of my colleague. We have the same problem with this presumption.

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

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

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

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

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

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

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

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

records that are already created.

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

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

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

MR. ABEL: My other comment is that I think we could take judicial notice that the cost of
electronic storage goes down at a rapidly progressive rate and has historically for the last 20 years and is going to continue to go that way, so it gets cheaper and cheaper. You really want to debate that issue? I don't think so.

MR. DEBIASI: As my final point, with respect to the presumption, under cases such as Greenfield case, as my colleague pointed out, the judges still have authority under a case-by-case basis to fashion whatever instruction they believe is in the interest of justice in terms of the circumstances surrounding what a videotape may contain, whether the prosecutor even knew it existed, whether the prosecutor had even seen it and what relationship it may have had to any particular issue in the case, and there is no reason to, by virtue of this amendment, to take that judicial discretion away, which would be more properly applied in a case-by-case basis.

CHAIRPERSON GARDELLA: Thank you. Next.

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

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

The reason why I think this rule is important is because in preserving this evidence I think it often leads to resolution of matters, that being how many times I have actually had a tape that I could show to my client and demonstrate you were, in fact,
weaving all over the road, all off the road and into the field, whereas they have a much different recollection or other factors that you find in those tapes that can be helpful.

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

CHAIRPERSON GARDELLA: Thank you. Next.

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

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

Also, I am sorry I neglected to mention that

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

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

The second thing is, placing the burden on the prosecuting attorney to do this preservation is
also unrealistic. As we do not hold evidence, generally we do not testify. Generally that's held by a police agency. And I can jump up and down and say, hey, sheriff, don't get rid of that stuff, so could this guy right here, okay, it doesn't mean anything. So putting that obligation on the prosecution is also something that's very cumbersome.

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

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

CHAIRPERSON GARDELLA: One point of procedure, permanent procedure does prohibit any member from speaking twice on the same motion, so if you have already spoken once, you cannot speak twice. So Mr. Nellis, I would recognize you.

MR. NELLIS: Jeff Nellis from the 51st circuit. I am here to speak in favor of this
amendment. I think why this is really important is because I think it might be the impetus that law enforcement needs to sort of reevaluate their practices as far as how they save this information.

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

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

CHAIRPERSON GARDELLA: Thank you.

MR. LINDEN: Jeff Linden, 6th circuit. I had a comment on the first proposed amendment to the proposal. I did not comment on the actual proposal
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C H A I R P E R S O N G A R D E L L A :  I f t h e C h a i r c a n
interrupt for just a moment. Mr. Abel does state he would agree to that as a friendly amendment if the person supporting would agree.

MR. BARTON: I do.

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

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

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

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

Both sides can argue the circumstance, it was inadvertent, it was intentional. You the jury are the arbiter of credibility. You decide whether or not this evidence is missing under circumstances which should allow a presumption against the prosecution or really not and the defense is just trying to make spaghetti stick to the wall.

I think that amendment, the proposal with this amendment alleviates much of the concern, and I think it is an advance of justice in our judicial system.

MR. REISER: John Reiser, 22nd circuit, Ann Arbor, also an assistant prosecuting attorney. I think this is sweeping what we are trying to do. I don't know of another Court Rule which creates a duty on the administrative branch of government regarding the collection, replication, cataloging, and storing of evidence, nor do I know of another Court Rule which attempts to meddle with substantive law, that is the creation of presumptions of what are told to the jury.

So we are trying to do with a Court Rule what -- I would submit that the proponents are trying to do with a Court Rule what they have been unable to do before the Michigan Legislature or the Michigan Court of Appeals or the Michigan Supreme Court or the United States Supreme court.
Frankly, this is a substantive issue of law, due process, that type of thing, and I don't think it belongs in a Court Rule, but as long as we are talking about it, I got a little bit more, not too much.

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

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

You know, Matt, I am with you on the third one regarding PSI reports. I am ambivalent on the second one, but I am really against you on this one, not you personally, just what you have to write down. So thank you very much.
MR. NINOMIYA: Chris Ninomiya, 41st circuit, lifelong prosecutor, so admittedly bias here, but I agree with some of my colleagues, particularly Kathy's, as well as Tom's. This really has a potential to create some absolutely absurd results.

It's my understanding that there is a task force, I think Janet already mentioned that, on electronic recordings that's already in place. At the table there are judges, prosecutors, defense attorneys. They may already be running some pilot projects with respect to requiring electronic recordings. It's my understanding that that body will be making some recommendations to the State Bar eventually, and I think it makes a whole lot of sense at this point, we can argue about this all day long and probably not get anywhere. We beat the dead horse before, we will do it again, but I think it makes a lot of sense to probably table this matter at this time until we have had those recommendations from that body.

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CHAIRPERSON GARDELLA: Is that a motion to table?

MR. NINOMIYA: It is.

VOICE: Support.

CHAIRPERSON GARDELLA: There is no discussion on a motion to table. At this point I would call for those in favor of the motion to table say aye. Those against say no.

At this point I believe there is division. I would call for a raising of hands. If we could have the tellers.
MR. ABEL: This is so unfair to do right before lunch. I move to adjourn for lunch and we vote after lunch.

VOICE: Support.

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

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

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

Those opposed to the motion to table, please raise your hands and keep them up.

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

Those abstaining, raise your hand.

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

(Applause.)

CHAIRPERSON GARDELLA: We can go to lunch now.

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

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

MS. RADKE: Good afternoon, Mr. Chairperson, Victoria Radke, 47th circuit. I am making a motion to amend the meeting minutes from earlier to include the name of John Mucha from the 6th circuit as a new
member of the Representative Assembly and would so
move him to be seated.

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

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

CHAIRPERSON GARDELLA: Is there support?

VOICE: Support.

CHAIRPERSON GARDELLA: Any discussion? Not

hearing any, all those in favor say aye.

Those opposed no.

Any abstentions.

The ayes have it, motion is approved.

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

MS. RADKE: Thank you, Mr. Chairman.

CHAIRPERSON GARDELLA: Mr. Barton.

MR. BARTON: Mr. Chairman, Bruce Barton,

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

VOICE: Second.

CHAIRPERSON GARDELLA: We are doing this by
consensus if there is support. Any discussion? Not
hearing any, I would call for a vote.
All those in favor say aye.

Those opposed no.

Any abstentions say yes.

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

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

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

VOICE: No.

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

(Applause.)

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

Number 15 consideration of MCR 6.425(C)
providing copies of pre-sentencing reports to the
defendant and defense counsel, Matt Abel from the 3rd
circuit is our proponent on that.

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

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

I don't think this is very burdensome. This
would provide the defendant and his lawyer with a copy
of the pre-sentence report so the defendant,
especially those sentenced to prison, can take it with
them, which will expedite a lot of things. This is
just intended to solve some problems, not to create new ones. Thank you.

I move adoption of this proposal.

VOICE: Support.

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

MR. LARKY: Sheldon Larky, 6th circuit. My concern with this is I have a concept problem. I agree with Mr. Abel that a defendant and her counsel ought to be able to read and examine the reports. I have no problem with this. This says making provision for the copies to be provided to the defendant. If Mr. Abel by the intent of this proposal says that the attorney or the in pro per can walk out with that report, it bothers me. It bothers me because, as pointed out by the attorney general MCL 791.229 says that all pre-sentence reports, and it's on page three of the attorney general's letter to us, all pre-sentence reports are, in fact, confidential. They are confidential documents that are created by an arm of the court and, in fact, are court documents. And my concerns are the confidentiality of the information.

I agree that a good, vigorous defense attorney should know all of the contents of the report. I agree that a defendant should have the opportunity to examine the document. I believe that it's a necessity, and I agreed with Mr. Abel that many courts on the moment of before sentencing a document is handed and there is really not sufficient time to develop the information, especially when you have a
defendant who is in custody, that even makes it worse yet.

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

The concept, I think, is the perfect concept. I think that too many pre-sentence departments, probation departments play games, very honestly, and they don't allow defense counsel enough opportunity to investigate. I think sometimes the prosecutors get advantage over the situation, because many prosecutors will have pre-sentence reports days before defense counsel, and I really have a significant problem with this, not so much on the concept but on the idea that this report is going to leave, leave the building with the defense attorney, and there may be information contained in it that's not correct.

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

CHAIRPERSON GARDELLA: Judge Kent.

JUDGE KENT: Wally Kent, 54th circuit. I would agree that the Legislature describes the documents as confidential, but once the defendant and his counsel have seen them, that confidentiality has
been breached. They have a need to know. We all, I think, I hope we all agree that the defendant and his
counsel have the need to know.

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

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

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

CHAIRPERSON GARDELLA: You are right at six.
MR. KROHNER: Five days prior to date of sentencing. At least five days before sentencing.

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

MR. ABEL: Can I make an inquiry?

CHAIRPERSON GARDELLA: The chair will give a short allowance.

MR. ABEL: I don't necessarily have a problem with that, but I think there may be other people that do have a problem with that, specifically court administrators, and my understanding is the rule now -- there is a rule, I don't know if it's statute or court rule, that requires the pre-sentence report to be provided at least the day before sentencing. I don't have a problem to make it, you know, a year before sentencing. I am being facetious here. I
mean, to me, sometimes you don't even get them the day before. Five days would be great, but, you know, if I get a report the day before sentencing and there are more complex issues, I will ask for an adjournment.

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

MR. ABEL: Five days, Martin?

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

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

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

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

MR. KROHNER: At least one day before sentencing.

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

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

MR. KROHNER: At least one business day, because I just heard a comment, what happens if it's a Sunday and you have got sentencing on Monday.

CHAIRPERSON GARDELLA: Mr. Krohner is saying at least one business day before sentencing. Mr. Abel is accepting that as a friendly motion. The person
who supported the motion, do they agree with that, wherever they are?

VOICE: Yes.

MR. KROHNER: Ron, thank you.

CHAIRPERSON GARDELLA: Any further discussion?

It's on the underlying motion

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

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

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them to prison.

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

You want to make sure that you understand everything that's in that pre-sentence investigation report and redact anything that is in error or could potentially be harmful to your client.
For example, if your client had acted as a confidential informant, you want to make sure there is no mention of that in the PSI, because that could be very harmful to them if one of their fellow prisoners sees that while they are in prison in their trustee position in the record room.

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

In the federal court system it's been my experience that the court requires that the PSI be submitted to defense counsel, I think weeks ahead of the sentencing.

JUDGE KENT: Fourteen days.

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

CHAIRPERSON GARDELLA: Thank you.

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

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

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

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

From our perspective, if we have got a family full of victims and a bunch of people attending the sentencing, the last thing I want, and these people are expecting closure of this case at this point on the sentencing date, the last thing I want is the defendant walking into court that same day and saying, Hey, I never got a copy of this report. You are absolutely required to give this to me at least a
business day before sentencing. We are requesting an adjournment because of that. And I think that the way this language is written it certainly brings that into the realm of possibility where defendants could cause their own delay in proceedings, and, again, it's going to affect the efficiency of the courts as well if we have that situation.

CHAIRPERSON GARDELLA: Mr. Nolan.

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

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

And so I don't really particularly care about one business day, but I don't understand. I think that puts the prosecutor in worse of a position for a defense attorney to say, Well, I need an adjournment. I think if it's 14 days and he gets it seven days before and the judge in his discretion determines whether or not there is some prejudice, but when you are there on the day of sentencing and you're handed the report and you are running from another circuit court in a different jurisdiction and you get there and you are already, if not late, bordering on being late and the judge recognizes you and says, Mr. Nolan, are you prepared for your sentencing, and you say, Your Honor, I just need to look at the pre-sentence report.

You look at them, and generally they are not voluminous, they are not 28-page reports like the federal. But it does put you in a little bit of a compromise. You ask your client to sit there and read it. Some of your clients can't really read or comprehend what you are saying, and you are kind of at a position where you say, you know, do we go forward here or do I ask the judge can you give us an adjournment. Usually the judge would accommodate you and say you have an hour or something or a half hour, why don't you go in the conference room and meet with your client.

However, it doesn't lend itself for really
being the best defense lawyer being handed something, because you get back to the office and you say, jeez, I should have responded to this, but you didn't think of it because you were coming from some other jurisdiction.

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

CHAIRPERSON GARDELLA: Thank you.

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

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

MR. ABEL: I don't usually read the Court
As criminal practitioners for the defense and prosecutors know, most of 6.0 applies only to felony cases and only a few things apply to misdemeanors, so at the outset are we talking about felony PSI's, misdemeanor PSI's, or all PSI's?

MR. ABEL: All of them.

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

JUDGE STEPHENS: No.

MR. REISER: It does not? So we are talking really about felony PSI's, is that what we -- because it can apply to misdemeanors if the scope contained in 6.102, or whatever that is of the Court Rules, enumerate those few Court Rules that apply to misdemeanor cases.

CHAIRPERSON GARDELLA: Mr. Abel wants to address.

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

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

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

MR. REISER: So just so you all know, when
you do your little updates for your newsletters, we are only talking about felony discovery.

MR. ABEL: Right, apparently so.
MR. REISER: Another question.
MR. ABEL: Not discovery PSI.

MR. REISER: Under the synopsis it says, And to maintain the report both in their files for future reference, what about the suggested changes, which I understand only to be things that are lined out, give the attorney the right to keep it? I am not talking about the red. I am talking about the original proposal as submitted has the word "or" lined out and "if not represented by a lawyer," and there is not any additional text which says "with said report to be retained or maintained by," and I am wondering how you can make that promise without it being contained in the wording?

MR. ABEL: Can I respond?
MR. REISER: Or am I missing something?

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

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

MR. REISER: Don't you have to give it back right now? A lot of courts you have got to give it back to them, you don't get to keep it, and that's the rub. Can't they still demand it back? You want it in
advance and you want it permanently, and I get how
this gives it to you in advance, but how does it let

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

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

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

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

MR. REISER: Provided a copy.

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

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

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

MR. ABEL: I thought we were close.
MR. REISER: Actually I think you should, I really think you should modify it if you want to be able to keep it, but the thing I do want to talk about is about --

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

MR. REISER: Yes, sure.

CHAIRPERSON GARDELLA: What are you asking?

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

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

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

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

VOICE: Yes.

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

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

The other thing I want to point out is what concerns me about providing the entirety of victim impact statements, which sometimes are attached to PSI reports, is they contain personal identifying information of stalking and domestic violence victims, and while that information is contained in a police report, that sometimes changes after the charges are
brought. So I don't want the defendant with one of these assaultive crimes knowing the personal identifying information of the victim, and, remember, it could be months, maybe a year or so, between the time of the offense and the PSI report and that information has changed. So, you know, as a guardian of victim's rights, that's one of the things that really concern me. Ah, but what to do about it?

CHAIRPERSON GARDELLA: Thank you.

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

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

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

MR. ABEL: I have no objection.

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

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

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

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

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

CHAIRPERSON GARDELLA: Mr. Reiser, there is
already a (D) in the Court Rule as it exists, so we
have to renumber or reletter it.

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

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

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

VOICE: Yes.

CHAIRPERSON GARDELLA: Any further
discussion?

MR. HILLARD: Martin Hillard, 17th circuit.
I don't particularly have a dog in this hunt. I found
the debate rather interesting. Mr. Reiser has
addressed part of what I wanted to say, and that is,
as originally presented, all it really changes is what
happens with the represented defendant versus the
pro per defendant. It does not really address whether
copies are given or shown. Adding the word
"permanent" does affect that somewhat but kind of
makes it linguistically awkward. It would seem that
the original intent was to provide copies and that the
courts that don't and take them back aren't complying
with the Court Rule to begin with.

But, in any event, the primary substantive
change is that the unrepresented defendant now has or
the, excuse me, the represented defendant has the same
rights to the report as the unrepresented, so I would
guess any defendant that wants to make nefarious use
of the report would merely fire his attorney and then
demand the rights as a pro per.

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

CHAIRPERSON GARDELLA: We can read the entire paragraph.

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

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

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

Mr. Elkins.

MR. ELKINS: Michael Elkins, 6th circuit.

Two points if I may. The first is in paragraph (B), it's a linguistic matter. The word "permanent" was added, I believe a permanent copy is one that won't fade. I think the intent was it must permanently provide, so I would make a friendly amendment to delete "permanent" and add permanently before --

CHAIRPERSON GARDELLA: Mr. Abel accepts.

Supporter, are you accepting? Yes.

MR. ELKINS: Thank you.

CHAIRPERSON GARDELLA: We will make that amendment.

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

CHAIRPERSON GARDELLA: Mr. Elkins, are you suggesting a friendly amendment to change (D)?
MR. ELKINS: I would suggest, Shall not contain the personal identifying information saving names or excepting names of crime victims.

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

MR. ELKINS: Thank you.

MR. ABEL: But thank you.

CHAIRPERSON GARDELLA: More discussion? Mr. Crampton.

MR. CRAMPTON: Jeff Crampton, 17th circuit. Matt, I really appreciate your bringing this up. As a criminal defense lawyer, you know, I feel your pain every day. We go through this a lot. It seems to me that we are trying to solve several problems with this. We want the reports, we want them before sentencing, we want to be able to keep them, we want our clients to be able to have them, and we are, I think, at least sensitive to the fact that there are some personal identifying information that shouldn't be brought to the defendant. It seems to me that we really need to think about this a lot more, and we need, frankly, all of us ought to have the entire Court Rule in front of us, because I think the first friendly amendment was not necessary since it already says before sentencing.
or before the day of sentencing, not just before sentencing. It already said at a reasonable time before the day of sentencing, so the first friendly amendment wasn't really needed.

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

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

VOICE: Support.

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

MR. CRAMPTON: Yes.

CHAIRPERSON GARDELLA: -- instead of table it? So rather than table it, you are moving to refer it to the Special Issues Committee?

MR. CRAMPTON: Sure.

CHAIRPERSON GARDELLA: Is there support for that motion?

VOICE: Support.

CHAIRPERSON GARDELLA: Any discussion?

Hearing none --

MR. ABEL: I have discussion. I have a
comment. Listen, people, this is a no-brainer. The defendant is -- Matthew Abel from the 3rd judicial circuit.

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

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

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

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

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

MR. BARTON: First of all, I am in favor of the motion to send it to Special Issues. My name is
Bruce Barton, 4th circuit. I am a past president of the Prosecuting Attorneys Association, past chair of this Assembly. I have been in private practice as a defense attorney for 30 years.

Something that I meant to speak to or wanted to speak to, this is a very important topic in another sense that nobody has considered. Most people don't know that the first thing that the Parole Board looks at is the pre-sentence report. Most people realize, I think, that a lot of us have a good idea sometimes what the judge is going to do and so we don't challenge things in the pre-sentence report, and without a pre-sentence report that you can take back to the office, think about it before you make your sentence, your comments at sentencing, you are winging it. If you don't have that thing in front of you, you are definitely winging.

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

Now, I am not sure I like the language of
this particular proposal, so I am speaking in terms of the motion to table, or I am sorry, the motion to
refer. If that sounded maybe redundant for me, I am sorry, but it is something that we shouldn't just shrug off. It is something that perhaps we can refine the wording of, and I definitely support the referral to the committee.

CHAIRPERSON GARDELLA: Mr. Gobbo.

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

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

CHAIRPERSON GARDELLA: Are you talking about the question and referring it to the Special Issues
Committee? The motion on the floor is motion to refer the issue or the proposal to the Special Issues Committee.

MR. GOBBO: Express no opinion on that motion.

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

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

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

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

One of the problems is that the rule, as written without any of the amendments today, requires disclosure providing a copy of the pre-sentence report to counsel before the day of sentencing. The real problem is arising from courts, through either the judges or their clerks, who are not doing that and are requiring you to look at the report on the fly in court, not keep a copy.
When you have to argue scoring, many times the issues involved in scoring are factual, which require some investigation background. Many times they are legal, which require some legal research, which you can't do on the courtroom steps or you can't do in lockup if you have an in-custody client.

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

The issues -- the most important issue is access to the information and access to the information in a meaningful way that allows counsel to provide adequate representation and guidance to the court and to the client. I don't think that any of the amendments address the issue of the courts that are not complying with the rule, even as written, or adding language to say "must provide," "must provide a copy for retention." You can easily argue that the rule, as written, which states "must provide copies prior to the day of sentencing," says that already, yet that's not happening.

So I think some further thought, some learned thought and attention is necessary to find a way to rephrase the rule that actually addresses the problem, which is noncompliance of the rule by the court, and I would move and support the motion to refer the matter to the Special Issues Committee.
CHAIRPERSON GARDELLA: Any other discussion?

Hearing none, we will vote on the motion pending.

All in favor say aye.

All opposed no.

All abstentions say yes.

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

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

MR. ABEL: Good afternoon. Again, I am Matthew Abel from the 3rd circuit. I am a little hesitant to say this is a no-brainer, because the last one I said is a no-brainer went out the window, but, ladies and gentlemen, this is a no-brainer. It looks like a no-brainer, it walks like a no-brainer, it talks like a no-brainer. This has to do with your use of cell phones in courthouses.

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

And then in Wayne County juvenile court, you can't take a cell phone in there, but in Frankfort --
VOICE: They will steal it.

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

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

VOICE: No.

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

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

VOICE: Support.

CHAIRPERSON GARDELLA: Any discussion on the matter?

VOICE: Call the question.

CHAIRPERSON GARDELLA: We have people who want to address the issue.

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

MR. ABEL: How about, Other electronic devices?
MR. POULSON: Well, that's pretty broad, and I don't even know. I mean, that could mean TV's.

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

VOICE: Yes, I am.

CHAIRPERSON GARDELLA: Any further discussion?

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


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

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

CHAIRPERSON GARDELLA: And you are asking if
that would be a friendly amendment?

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

MR. POULSON: I object to the striking.

That's a different thing.

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

VOICE: Yes.

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

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

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

MR. POULSON: Thank you.

CHAIRPERSON GARDELLA: So that will stay in.

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

CHAIRPERSON GARDELLA: We are on the main motion now.

VOICE: Point of order.

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

MR. BARTON: Bruce Barton, 4th circuit. This particular issue raised more comment in our Bar than anything else on the docket. In fact, I received comments from two people, one of whom wanted to amend,
the other wanted to come up with the pocket calendar issue because he had to take his matter into court. The first gentleman was not particularly happy with having cell phones in court, and those two gentlemen were both in the same firm, for what it's worth.

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

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

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

MR. BARTON: No.

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

VOICE: Yes.

MR. BARTON: Bottom line is there are some judges in this state I would rather give any remedy I can rather than sending a lawyer to jail, because there are some judges that would love to send the lawyer to jail. Beyond that, most lawyers, I think as was commented by Mr. Abel I believe, would just as soon not lose their cell phone. So it almost may be a greater punishment than anything else there. And the
word that perhaps is important in the present language
is the word "may result" in a fine, incarceration,
confiscation of the cell phone or a combination
thereof.

CHAIRPERSON GARDELLA: Thank you.
Mr. McClory. I am sorry, Ms. Radke.

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

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different jurisdictions, as I do, it is necessary to
keep in contact with your offices, and, you know, you
are not going to be going out and sitting in your car
when it's 40 degrees below zero in Manistique.
So I would rise in support and with the
amendment as suggested and I think that we should call
this question.

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

VOICE: Yes.

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

Those opposed say no.

Those abstaining say yes.

There is someone saying abstaining. You can
state your reason for abstaining if you wish, but you
don't have to.
It's the ruling of the chair the ayes have it. Want to call the question, debate is cut off on the issue of the underlying motion as it is currently stated on the screen with all the friendly amendments. We will take a vote.

All in favor say aye.

All against or opposed say no.

And those abstaining, you can say yes if you wish.

The ayes have it. The motion is approved.

(Applause.)

MR. ABEL: Thank you all very much.

CHAIRPERSON GARDELLA: Moving along, number 17, consideration of unauthorized practice of law education activities resolution. Mr. Stephen Gobbo, if you could approach. And also Josh Ard, who is the chair of the State Bar Standing Committee for Unauthorized Practice of Law.

MR. GOBBO: Good afternoon. After the earlier debates, I am not going to warranty anything about this particular resolution. What I will say, though, just in an opening comment, which will be real quick, we had at our last session some discussion that was educational in nature to bring the Representative Assembly up to speed in terms of some of the issues involving the unlicensed practice of law and any type of enforcement activity that might, kind of the Bar would move forward on and look at amendments to statutes and the like.
In the course of the investigation through the Special Issues Committee where Josh Ard is the chair of the UPL Committee had participated to some extent, we found that the Bar has had some programs in place to provide education to the general public, and earlier today we heard from the Chief Justice about some of the issues involving unskilled persons posing a danger to the public, and the Bar certainly has some, I guess, mandate to educate the public, and up until recently there was some cooperative aspects with other groups, the AARP as an example, that was providing funding for brochures and the like, but that group has decided to move on to other areas. And the resolution that you have before you simply is a first step to ensure that the Bar can look at using its own resources to continue with the educational activities, and, therefore, I shall move the adoption of this particular proposal.

VOICE: Support.

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

Those this favor say aye.
Those opposed say no.
Those abstaining say yes.
The ayes have it. The proposal is approved and the resolution is approved.

MR. GOBBO: Thank you.

(Applause.)

CHAIRPERSON GARDELLA: We are now going to have Josh Ard speak on some of the activities of the unauthorized practice of law.

MR. ARD: I am in a bad position. You know, I am the guy that's preventing you from seeing your families or other loved ones, and that's not a great position to be in. I guess the only thing I have got going for me is that the weather is not pretty, because if it were, you would be out of here by now. So I have been asked to make just a few brief remarks with regard to UPL and what's going on.

I would like to comment a bit on what Chief Justice Taylor said this morning. I mean, we are all in favor of notice and clarity, but we are not there yet, and that's one of the issues.

Even take the matter of deeds which was in dispute in the Dressel case. Can the preparation of a deed be purely mechanical? Well, sure it can. But can the preparation of a deed involve profound legal knowledge and legal discretion? Well, certainly it can too. So what kind of guidance do we have for people out there as to what they can do if they are not an attorney in regard to deed preparation.

We don't really have that kind of guidance right now, and that's one of the problems. And this has been extended pretty far.
I heard a conversation where some people were saying, well, you know, going to court doesn't always require that much profound legal knowledge and legal discretion. Take landlord/tenant cases. Why do we need attorneys? We can just let ordinary folks go in and represent people, so what kind of guidance do we have right now as to what is clear and what is not clear, and that's one of the problems and one of the things that we would need to address.

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

We have had numerous trainings around the state, and Kim Cahill was a speaker at one in St. Clair Shores. And we have had some of those were to address the trust mill presentations. We had a special one that involved AARP, OFIS, and the Federal Securities and Exchange Commission to address what's the new wrinkle, and these are the free meal financial seminars where if you buy their real poor investment products they will throw in an estate plan as a freebie. So that's an interesting thing to show how much they think legal service is like if it's just the freebie thrown in like the transistor radio you can get for reupping your subscription.

We have done that. We are working on a number of brochures trying to get some information...
out. Some of these are on topics like immigration law, real estate law, probate and estate planning. And for those of you who practice in other areas, if you are aware of some UPL activities going on, we would be more than happy to work with you to see if we can get some information out to encourage people to really get quality advice in what they are doing, and so you can see me or contact some people in the Bar about doing that.

I have also been engaged in a project, this is one thing AARP is still interested in, to try to work with libraries and senior centers and other places that will open their buildings for these people who say I want to do an educational presentation where they are really trying to sign up customers for UPL activities. We are trying to educate them as to what to look for. We are talking about possibly requiring a code of conduct, some various things that might discourage them from unwittingly helping UPL guys out.

And of course there are other people out there who have done a lot of work, in particular, interestingly, the Securities and Exchange Commission has done quite a lot in this area. One reason also, of course, to look at remedial activities is that -- I mean to look at prevention and educational activities is there are, quite frankly, some challenges in remedial activities. One challenge the Bar is facing, and I don't know how many of you are aware of this, but the two staff people at the Bar who primarily work on UPL activity are both leaving the Bar, and so the Bar is looking
for replacements, but it will take a little bit of
time for those replacements to come onboard.

They did a lot of good work. Catherine
O'Connell is working in D.C. and Victoria Kremski is
going to become a prof at Cooley in Grand Rapids.
The statutory scheme also creates some
challenges for us. For one reason is the complaints
we normally hear from attorneys is I saw that ad

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

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

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

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

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

We need to have a more direct way to address
the deceptive market, and there are some ways of doing that. I don't want to go into detail about all of that, because it's not clear that the Representative Assembly can take these positions because of the Keller issue, but there are things that can be done and perhaps you can do by talking with your local legislators of saying this is a concern, this is something you would like for them to get involved with.

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

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

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

CHAIRPERSON GARDELLA: Josh has worked very, very hard, along with Steve Gobbo, on the Unauthorized Practice of Law Standing Committee for the State Bar, so if any of you have questions, I would encourage you to ask. Their committee has worked diligently for
numerous years trying to come up with proposals that will address these issues that will be effective and also get some results so that we can stop some of the people, especially in immigration area, estate planning, wills and trusts, and many other types of business issues too. So go ahead if anybody has any questions.

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

JUDGE STEPHENS: We could express appreciation for his work.

(Applause.)

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

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

MS. RADKE: Move to adjourn.

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

The other thing is there is a mileage voucher in your packet. The per cents mile or cents per mile is 50.5, so you can fill that out and send that in to
the Bar as a little benefit of you driving over here
today and giving your generous contribution of time.
I thank you for your participation in the
meeting. The debate was excellent, as it usually is.
A lot of thought goes into it, and we will see all of
you at the next meeting. Is there a motion to
adjourn?
VOICE: So moved.
CHAIRPERSON GARDELLA: I hear support. All
in favor.
VOICES: Aye.
CHAIRPERSON GARDELLA: Motion approved.
(Proceedings concluded at 2:27 p.m.)