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, West Campus, 5708 Cornerstone, Lansing, Michigan, on Saturday, April 21, 2007, at the hour of 10:00 a.m.

AT HEADTABLE:

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

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REPRESENTATIVE ASSEMBLY 4-21-07

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REPRESENTATIVE ASSEMBLY 4-21-07
Lansing, Michigan
Saturday, April 21, 2007
10:02 a.m.

RECORD
CHAIRPERSON HAROUTUNIAN: Ladies and gentlemen, my name is Ed Haroutunian. I am the chair of the Representative Assembly of the State Bar of Michigan, and I call the meeting to order.

Madam Clerk, do we have a quorum?

CLERK KAKISH: Mr. Chair, we have a quorum of
over 50 members.

CHAIRPERSON HAROUTUNIAN: Thank you.

MR. LARKY: Mr. Chairman.

CHAIRPERSON HAROUTUNIAN: Yes, Mr. Larky.

MR. LARKY: Sheldon Larky, 6th circuit. I move that we adopt the revised calendar that is contained on the two pages that are on everybody's desk.

CHAIRPERSON HAROUTUNIAN: The blue sheet revisions, correct?

MR. LARKY: Yes.

CHAIRPERSON HAROUTUNIAN: Is there support?

VOICE: Support.

CHAIRPERSON HAROUTUNIAN: Any discussion?

All those in favor say aye.

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Opposed no.

Abstentions say yes.

The ayes have it.

Krista Licata Haroutunian, do I see you rising for purposes of a motion?

KRISTA HAROUTUNIAN: Yes, Mr. Chair, you do.

Krista Licata Haroutunian, 6th judicial circuit. I rise to approve the September 14, 2006 summary of proceedings.

CHAIRPERSON HAROUTUNIAN: Is there support?

VOICE: Yes.

CHAIRPERSON HAROUTUNIAN: Any discussion?

All those in favor say aye.

Opposed no.

Abstentions say yes.
The ayes have it. Thank you.

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

CHAIRPERSON HAROUTUNIAN: I hear that. I am going to suggest this. Let's put it this way. Let me say this. I am not one to stall a meeting. It's about -- it will be 70 degrees out there today, earlier rather than later, and so what I am suggesting is we are going to move it right along.
good morning to all of you. Elizabeth Moehle Johnson
of the 3rd circuit, and I am delighted to be the
chairperson of the Nominations and Awards Committee
today.

The first item of business before us is the

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

(Applause.)

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

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

Shon Cook for the 14th circuit, Muskegon.
The 16th circuit, Peter Peacock, Mt. Clemens. 17th
circuit, Martin Hillard of Grand Rapids. 20th
circuit, Maureen VanHoven, Jenison. 29th judicial
circuit, Alan Cropsey of Dewitt. 42nd circuit, Julia
Close of Midland, Paul Marcela Midland. The 55th
circuit Roy Mienk of Gladwin. 56th circuit Katherine Gustafson of Eaton Rapids.

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

CHAIRPERSON HAROUTUNIAN: Is there support?

VOICE: Support.

CHAIRPERSON HAROUTUNIAN: Any discussion?

All those in favor say aye.

Opposed no.

Any abstentions say yes.

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

(Applause.)

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

CHAIRPERSON HAROUTUNIAN: Thank you, Elizabeth.

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

MS. JOHNSON: Thank you very much, Ed.

The 2007 award recipients, the first award to be given by the Representative Assembly is the Unsung
Hero Award. Let me first say we were overwhelmed by the volume of nominations and the quality of nominations. It makes me very proud of our profession to know that there are so many incredibly talented people serving us.

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

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

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

CHAIRPERSON HAROUTUNIAN: Is there support?

VOICE: Support.

CHAIRPERSON HAROUTUNIAN: Any discussion?
Ms. Moehle Johnson.

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

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

Many of you on this body already know Alan Kantor, having served on the Representative Assembly for a number of years, and Mr. Hampton has served on many different committees in the State Bar. You will see in your materials an incredible array of recommendations by people that either they work with or have done work with. Their qualifications are set out in the materials and, quite frankly, are too numerous to mention individually, so I will not.

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

CHAIRPERSON HAROUTUNIAN: Hearing the motion,
is there support?

VOICE: Support.

CHAIRPERSON HAROUTUNIAN: Any discussion?

All those in favor say aye.

Opposed no.

Abstentions please say yes.

The ayes have it.

MS. JOHNSON: Thank you very much.

The last item I have for you this morning is a proposal for a special Representative Assembly resolution honoring the late President Gerald R. Ford. You all know that Gerald R. Ford was the president of the United States and before that the vice president, and he served with distinction for many years in congress. But first and foremost in his professional career he was a lawyer, just like all of us here assembled today, so it seems fitting for the Representative Assembly, the body that represents our fellow lawyers, to honor the late President Ford with a special award, a special resolution to honor him for his special service to our state, our nation, and to us as fellow lawyers.

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

CHAIRPERSON HAROUTUNIAN: You have heard the
motion. Is there support?

VOICE: Support.

CHAIRPERSON HAROUTUNIAN: Any discussion?

All those in favor say aye.

Opposed no.

Any abstentions please say yes.

The ayes have it. Motion carries. The resolution carries.

MS. JOHNSON: Thank you very much, and I would like at this time for you to honor and recognize the Nominations and Awards Committee, and I would like the members to stand when I read your names.

These individuals have contributed a lot of time and effort in getting the vacancies filled and also in meeting for these awards. John Mills of the 6th circuit, Dana Warnez of the 16th circuit, Jeff Nellis of the 51st circuit, Suzanne Larsen of the 25th circuit, Krista Haroutunian of the 6th circuit, David Kortering of the 14th circuit, Michael Olson of the 44th circuit, and then I would also like to give a special recognition to Kathy, to Bob, and to Ed who worked tirelessly, along with Anne Smith and the staff of the State Bar of Michigan, to get our 100 percent vacancies filled and for making these awards possible. Thank you so much.

(Appplause.)

CHAIRPERSON HAROUTUNIAN: The committee did a real job, and, Elizabeth, thank you very much for all your work. It was most appreciated.

MS. JOHNSON: You're welcome.
CHAIRPERSON HAROUTUNIAN: Well, it's now 10:16. I want you to know that my remarks are now about to start, and it says 10:40 on the agenda. I just share that with you.

VOICE: Are you done?

CHAIRPERSON HAROUTUNIAN: Not yet, no. I am not done, but I want to thank whoever asked that question. It was most appreciated.

Let me start this way, I want to take just a few seconds for a moment of silence for the events that have taken place in another part of our country, at Virginia Tech University, and just take a few seconds and to remember these folks.

(Moment of silence.)

Thank you.

I say that because I think we here are all lawyers, and we deal with the real law, and what we saw there was the absolute opposite of that, and so I think we should always keep that in mind.

I want to welcome each of you to this meeting of the Representative Assembly of the State Bar, the final policy-making body of the State Bar of Michigan.

Let me -- by the way, for those who may not be aware, Kathy Kakish, clerk; Bob Gardella, vice chairperson. On this side Anne Smith with the State Bar; Janet Welch, the executive director of the State Bar of Michigan, we will be hearing from her shortly; and Judge Cynthia Stephens, our parliamentarian. So these are the folks who are here.

The new members, we had a chance to go
through an orientation trying to give the sense of

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

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

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

The goal is to be able to change that and in
that process to be able to let people know who we are,
what we do and the fact that we think, and hopefully it's not delusional on our part, that what we do is important for the members of the State Bar of Michigan. There is going to be an article, I think in the August Bar Journal, and someone put that together, and we'll have something there.

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

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

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

President-Elect of the Bar.

Now, Ron is from Marquette, and we went to about five or six Bar associations throughout the
Upper Peninsula, and of course Ron knew everybody. Most of us we didn't know hardly anybody, but Ron knew everybody.

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

MS. MONNETT: Monett.

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

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

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

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

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

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

Therefore, under our rules, as the Chair of the Representative Assembly of the State Bar, I am referring to the Hearings Committee under the leadership of Rob Buchanan, in conjunction with the Special Issues Committee, under the leadership of Steve Gobbo, to hold hearings and to use the RA discussion board on our website, to hold physical hearings also, and to be able to report, come back to us with appropriate recommendations with regard to positions that the Representative Assembly ought to take, and I am asking that that be done by our September meeting.
In addition -- I didn't get any response from Robert or from Steve, so I don't know.

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

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

In addition, in reviewing the rules of the Representative Assembly, some internal inconsistencies were found, and, therefore, I am asking the General Counsel's Office of the State Bar to review the Permanent Rules of the Representative Assembly, the Supreme Court Rules pertaining to the Representative Assembly, and the bylaws of the State Bar pertaining to the Representative Assembly and to advise the officers of the Assembly and the Chair of the Assembly Review Committee, Victoria Radke, for any internal inconsistencies and to determine if any recommendations for changes should be made at the September meeting.

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

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

You might say, well, why? Well, the answer is, Judge Schnelz was a long time member of this organization, and he served many, many years, some
have said several decades, as parliamentarian for the Representative Assembly.

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

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

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

The crowd, Shel, took the comment well, and so I say thanks, Shel. I needed that at that moment. I mentioned earlier the U.P. tour and being on it with the President of the State Bar, Kim Cahill. I must tell you not only on the Upper Peninsula tour but in her traveling throughout the state of Michigan making presentations to many, many Bar associations during this time period between September and April, her presiding at Board of Commissioner meetings, and, as you all know, the officers of this organization are
members of the Board of Commissioners, on presiding
over retreats that the Board of Commissioners may

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

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

(Applause.)

PRESIDENT CAHILL: Good morning everybody.

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

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

I am very, very happy to be back here at the
Representative Assembly. Sometimes I say it was the most fun I ever had without a safety net, and I hope that all of you will enjoy your service in the Assembly as much as I enjoyed mine.

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

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

I think secondary to that is a concern that a lot of our members have about the changing nature of the practice, and for many of our members the practice areas that they started off in, the practice areas that were their bread and butter, just don't exist for them anymore. Two of the areas that are cited to me the most frequently are personal injury work, both the plaintiff's side and the defense thereof, and how the massive changes in the Bankruptcy Code have really eliminated that as a viable area of practice for a lot
of our members.

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

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

The other thing that our members are very, very concerned about is the image of our profession, and they are very concerned about the relationship between the Bench and the Bar and especially about the profession's relationship with the Supreme Court, and those are all really big issues, which is why I am glad Ron Keefe, this guy here in the front row.
lawyers were causing problems and this advertising
ing thing was causing problems. He was much more eloquent
than I could ever be. But I thought how unusual it
was, here he was in the 1850s talking about some of
the same problems that we talk about today, and while
I hope that we will be able to solve a lot of the
problems that face the profession, I don't have the
illusion that we will solve every problem. But I know
that all of us working together is going to be able to
provide the very best solutions that we can come up
with, and that's what I am so heartened to see all of
you here this morning, on this beautiful morning,
choosing to devote your morning working on issues that
face our profession. So thank you very much for that.

With that, one of the big challenges that the
Bar had to face this year was the departure of our
previous Executive Director, John Berry. John went
back to Florida. He made the decision in the

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

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

Janet Welch, who most of you know from her
service with the Bar, has recently been appointed our
new Executive Director of the State Bar of Michigan.
If you haven't read the press release, Janet is a Phi
Beta Kappa graduate of Albion College, a Fulbright
scholar, a graduate of the University of Michigan Law School, and also, prior to serving as our general counsel for six years -- six, right? Six, okay. I never get the numbers right. I just say some time -- she was general counsel to the Supreme Court. Before that she worked with both the House and the Senate in their Legislative Analysis Bureaus.

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

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

(Applause.)

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

On the one hand I feel very comfortable up here. There are so many of you that are friends,
people that I have worked with. As Kim has acknowledged, I have been in the job with the State Bar of Michigan as general counsel for six years. I loved that job, so this feels very comfortable. When I worked with the court, I worked very closely with the State Bar of Michigan.

On the other hand, a piece of me will always be the kid from the wrong side of the tracks in Livonia. Pink collar family. No one in my family was a lawyer. No one in my extended family had even graduated from college. In my graduating class of almost 800 people, and I know this because I know the demographics of southern Livonia in 1967, one of the almost 800 graduates had a parent who was a lawyer. I am sure that's changed. And I stand before you now from that background married to a lawyer. I have a son who is a lawyer. I have a daughter who claims she will never go to law school, but she is 20 and it won't surprise me at all if she changes her mind.

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

The Representative Assembly and the leadership of the Bar and the Board of Commissioners really is testimony to what the members of the profession believe about their obligation to society. The State Bar of Michigan is dedicated to serving the
public, to making sure that this profession is the best it can be, to making sure that all people have access to justice and that our court system is the best it can be, and I want to thank you for the role that you play and for letting me play a part to help you do that.

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

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

The other important events that have occurred since the last meeting and now really center around the Bar's specific activity concerning proposals on a tax on legal services, and I want to put that in context for you, because the State Bar of Michigan is limited in the issues that it can respond to, as you know, by the Keller decision and by Administrative Order of the court, so we can't leap in and as a Bar say this is how we would solve the whole budget crisis
We can explain why we think a tax on legal services is the wrong way to go to be a piece of solving the problem and explain how we think that proposal impacts services, and we have been doing that in all kinds of ways, but we are very cognizant of the fact that it's not helpful simply to say no, and while we can't say do this other thing because we are constrained, we really have been working hard at challenging members to understand the magnitude of the economic difficulties facing the State and, in particular, facing our Legislature who has to figure out how to keep the State going and how to meet the needs of the population and how to make Michigan a viable economic entity.

In response to what's going on, we have done a number of things. Foremost among them is to keep you advised of what's going on. You are in the forefront of our outreach, and I hope you have all been getting the communications that we have been sending to you and reading them. I am going to go over some of the highlights of that in the next few minutes and update you a little bit, and you will always be the first, the first wave of who we are communicating with.
out to the general membership, to sections and
committees in particular, because sections have a
wider range of things that they can do than the Bar as
a whole, and we have been actively involving local
bars and affinity bars who are very interested in
what's happening in the Legislature concerning the tax
on legal services.

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

The economic situation in Michigan by all
accounts is deteriorating by the week. In addition to
that situation, even if that weren't going on, the
Legislature would have the challenge of figuring out
what to do with the fact that the single business tax,
which generates almost $2 billion in revenue, is due
to expire at the end of this year.
The current budget deficit, without that expiration, is at about $900 million. That's what the revenue estimating conference, the last one had it at. On May 18th there is going to be another revenue estimating conference, and no one will be surprised if the number isn't considerably, significantly higher. Those are big numbers.

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

What's happened so far, on March 22nd the Senate defeated Senate Bill 307, which was the Senate version of the Governor's proposal to put two percent tax on services, including a tax on legal services, and I want to emphasize at this point that the lobbying that we have been doing on a tax on legal services has been only a tax on legal services. We have not spoken to taxation of other services.

The budget cuts agreed to to date have added up to $344 million, Executive Order 2007-3. The Governor and the Chamber of Commerce have agreed on a deadline of June 30th to enact the replacement to the single business tax, and so there will be a good six months to gear up for whatever it is that takes the place of single business tax at the end of this year. Some possibilities for revenue enhancements for replacements to the single business tax, the
Governor has a Michigan business tax plan. The Senate has passed what's called the best plan that's been revised. Some quip that the revision is the second best plan, but that's a viable alternative.

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

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

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

There has been a bill introduced by Representative Fred Miller for a six percent tax on services, on a limited set of services, which would exclude legal services. Taking the principal -- that bill represents the principle that nondiscretionary services ought not to be taxed. There is also the suggestion for a six percent tax on all services, including legal services, and that that would replace the entire single business tax and personal property tax for businesses. The tax on utilities to replace Public Act 141 of 2000, a fuel tax earmarked for roads.
Those are just, you know, some of what we have heard are out there. The two percent tax on services, including legal services, is always an option until there is something else that's been adopted.

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

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

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

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

We are looking to you as leaders in the profession to help spread the word. We are using all
the communication devices that we have -- the Bar
Journal, the E-journal, e-mail blast -- to educate the
members, but you are all our best ambassadors of the
message that this is a very serious situation and

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

JUDGE STEPHENS: Welcome to sleep.

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

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

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

(Applause.)
CHAIRPERSON HAROUTUNIAN: Thanks, Janet; thanks, Kim.

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

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

You have the materials, and let me just say, the Doherty case that I cited in those materials clearly posits the answer to the question is a receipt of money by a referral fee the practice of law, and it is not. The question that is propounded to you came about as a result of a discussion with the Ethics Committee back in 2006 in August, Senior Lawyers Section, and it was an attempt to be thorough, precise, as much as we could to avoid ambiguity and confusion in addressing this issue. Hence, the suggestion that three rules might have to be changed.
I have seen Bill Dunn's communication. I think he is on board with respect to just the
modifying the one rule pre-ap, and that may be the eventual decision, but we propounded, as I said, the
two other rules just for clarity and to avoid confusion and ambiguity.

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

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

MR. KINGSEPP: I am.

VOICE: Second.

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

MR. KINGSEPP: Good question. I submitted the proposed language changes merely as a matter of clarification and assistance to you in framing the appropriate resolution should you want to do something different than the proposal that's in your packet, and why I posited that was in response in part to Bill Dunn's communication.
Quite honestly, I think the simple solution would be to adopt the resolution that's in your handout and then let the Board of Commissioners and the State Bar administration determine what is the appropriate suggested change to address to the Supreme Court.

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

MR. KINGSEPP: It's a new section.

CHAIRPERSON HAROUTUNIAN: And this is what is being suggested, that is, that for the purpose of a division of fees allowed under MRPC 1.5(e) an emeritus member shall be considered to be a lawyer and the receipt of referral fees is not the practice of law. Is that the initial provision, and then do we move on to the second and third, or is it this first one that we are looking at only?

MR. KINGSEPP: I leave it to the sense of the body. As I said before, my suggestion would be to adopt really the proposal that's in your handout and leave it to the administration to determine the appropriate rule change, because I don't exactly know the politics that may be involved in dealing with the Michigan Supreme Court, although I surmise, having appeared before them before, and as a result I don't
know those dynamics that might come into play. So I don't want to be limited nor do I want the administration be limited with regard to what it has as an option, so that's why I suggested maybe the initial handout. This is merely a suggestion of what we perceive to be the changes that are necessary, but that's not the ultimate question once we get to the Supreme Court if you adopt the resolution.

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

MR. KINGSEPP: It's the one, the emeritus members of the State Bar should be entitled to receive a referral fee so long as the emeritus members are not engaged in the practice of law, period. That's what you would be adopting, then the implementation would be in conjunction with the administration of the State Bar.

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

VOICE: Yes, correct.

CHAIRPERSON HAROUTUNIAN: Is there any discussion?

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

CHAIRPERSON HAROUTUNIAN: Please, please, come to the microphone, and please give your name and
your circuit, if you will.

MR. MCCLORY: I am Mike McClory from the 3rd circuit and the immediate past chair of the Probate Estate Planning Section, and, you know, nothing is better than someone who has just looked at something and has the dangerous if their own mind, but the thing that jumped out at me just in terms of unauthorized practice of law issues that our section has dealt with, and I just want to make sure I understand the proposal is this last thing here which says the receipt of a referral fee is not the unauthorized practice of law.

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

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

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

Now, if someone wants to change the
resolution or to suggest that one or all of these
rules be adopted in some fashion, that would be
different, but what we are dealing with at this point,
Mike, and it's a fair point that you have raised, is
only this proposition at this moment.

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1         MR. MCCLORY:  You mean we are supposed to
2         read what's up there.  The information I read in the
3         book this week -- I am sorry to waste everybody's
4         time.
5                  CHAIRPERSON HAROUTUNIAN:  No, no, no, you
didn't waste any time at all.  You raised a valid
6         point, and I just wanted to make sure I said that.
7                  MR. KINGSEPP:  Mike, I think your point is
well taken, and that's why I suggest we go with the
initial language, because there are these nuances, and
they are entirely appropriate, and that doesn't mean
they are going to be ignored by adopting this
resolution in this general format, and that's why I
said, I think at other levels we have to determine
exactly what the nuances are so we can address all
these concerns.  Thank you.
8                  MR. ROMANO:  Vince Romano, 3rd circuit.  I
only want to be sure that this body expresses its
support of Bill Dunn's clarifications of the proposal
and that our leadership, both elected and executive,
act consistently with that expression of this body.  I
don't want to tie them to it, but I want to be sure
that they are aware of that in some official capacity.
9                  CHAIRPERSON HAROUTUNIAN:  So, Vince, you
would be speaking in favor of this proposal?
MR. ROMANO: In favor of the proposal.

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

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

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

In my continuing practice of referring but not for fees clients, I do find that I am doing at least five things which sound a lot like the practice of law, and one is determining the objective of the client, the subject matter or field -- the subject matter for the client and the field in which the lawyer to whom the matter was referred would be practicing or would need to be practicing, the merit
of the matter, because I am not going to send a client
on a wild goose chase nor would I want to burden a
practicing lawyer with a meritless claim, so I am
making some evaluation of that. The language and
culture of the client and the cultural competency of
the lawyer to whom I am referring because, again, I
don't want to make a bad match, and also the fee
structure of the lawyer and the economics of the
client.

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

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

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

Now, that doesn't mean he is not a competent
lawyer, but those things would have raised enough
concerns on my part had I known that they were going
on that I wouldn't want to refer at least certain
clients to him under those circumstances.

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

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

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

I think this is fine. I think that this is
okay, and I think that we should adopt this proposal,
because maybe this is the way we pay back ourselves
for all the good work we have done in the past and
then possibly for the clients in the future. For us
to take a referral fee when we get to that emeritus
status I think makes sense and I am going to vote yes.

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

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

MR. KINGSEPP: That's an appropriate question. Again, bear in mind that there are nuances to what this proposal is, particularly in this day and age, and we were mindful of that, but it's hard to sort of indicate how are we going to translate that into language. The good thing is 3(F) does make it clear a lawyer cannot practice law, and I suppose that then becomes an issue of how much you advertise and how much money you put in do you really go over the line.

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

And I would suspect that when someone is
engaged in that type of activity as an example, that really is more than the emeritus status. That really does become close to practicing law. But it is a legitimate concern.

MS. PRATER: Thank you. Ann Prater from the 56th circuit. I want to make a comment in regards to whether -- obviously I am nowhere near the emeritus status at any time soon, so I am probably a little bit younger to be making any comments whatsoever, but my comment is this. As far as referring attorneys being a practice of law, how is that any different from a person going to a non-lawyer and saying, Do you know a respected attorney in the community that I could go to?

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

I do not see how that is a practice of law by helping somebody select an attorney that you may or may not know whether you are a lawyer or not. That's my comment. I don't see how referring somebody as an attorney is necessarily practicing any kind of law. I don't believe you are necessarily sitting there -- it depends on the circumstances. Are you sitting there and doing a full analysis of the case, or are they saying, hey, I am thinking of getting divorced and I need a family law. I don't see how that's practicing law in any way. Thank you.
CHAIRPERSON HAROUTUNIAN: Any other comments? Questions?

MS. LIEM: Veronique Liem, 22nd circuit. I would just point out that approving this rule might allow transfer of practice a little more easily for solo practitioners where they would work with a referral fee perhaps, to transfer may be a bit of a practice, which is easier for the larger law firms to do within the firm. So I think it would benefit the smaller firms or solo practitioners, and I would support it.

CHAIRPERSON HAROUTUNIAN: Yes.

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

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

MR. KINGSEPP: Let me just respond, if I can, on that last point. I purposely omitted the consistency, because I felt as I read the rule, if you read the original language in (e), it sort of goes, it sort of says you are practicing law because there is some connection in the continuing relationship, so I
didn't want that to happen. I merely posited it in

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

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

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

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

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

MR. ANDREE: Gerard Andree from the 6th
circuit. I would just like to have the Representative
Assembly step back and just consider where this entire
emeritus status came from. It wasn't based on the
fact that you happened to live to be 70 years old. It was based on the fact really that there was a class of attorneys out there who were no longer practicing medicine, or practicing law -- I don't want to mix up my clients with my colleagues -- no longer practicing law, and because they were no longer practicing law found it onerous to pay the Bar dues, and that's really what we created this classification for.

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

So now we have a situation where people say now I am emeritus and I am not paying Bar dues but I still want to make money. Now, it seems to me you just can't have it both ways. If you have got enough of a practice still, if you have got such standing in the community that people are still coming to you and looking to you as their source as an attorney, and you are, in fact, in my opinion engaging in law when you make all the analysis to find out what kind of a case the person has and who you should refer them to, then you should pay your Bar dues, and I think to propose this is for people who want to have their cake and eat it too, and I just can't believe there is that many
people out there that are making -- I mean, how much are our Bar dues? Are there referral fees out there that are not going to exceed a couple hundred dollars? No.

CHAIRPERSON HAROUTUNIAN: Thank you.

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

MS. VESTRAND: Joan Vestrand, 6th circuit. I want to echo the concerns that began with Nelson Miller. I just spent my whole career in legal ethics, and I appreciate the effort. I have a father who is a retired lawyer, he is 74. This may benefit him. But I think that you do have to make a choice to pay your Bar dues, then you can collect referral fees, because I think Nelson is correct, referrals can involve the practice of law. As soon as we begin to evaluate the type of matter, we are engaged in legal advice in helping them go to a specific individual for a purpose.

I have another concern. There is a rule that governs the sale of a law practice with regard to any lawyer who retires, and we cannot engage in the piecemeal sale of cases. And I think this rule change
would open a can of worms, because it would, in
essence, permit lawyers to be selling cases on a
piecemeal basis due to receipt of a referral fee that
could be as much as one third of a fee.

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

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

MR. KINGSEPP: Let me say this, the last two
comments, again, have legitimacy, and I am not saying
The emeritus status allowing for referral fees with guidelines attached to it or rule amendments that preserve those guidelines is one way to assure it rather than not have anything done now and have the practice just continue without any regulation whatsoever. Thank you.

CHAIRPERSON HAROUTUNIAN: Coming to the question. All those if favor of the proposal say aye. Those opposed no. Abstentions say yes. VOICE: Division.

CHAIRPERSON HAROUTUNIAN: Division, that's fair. And I would ask that it be done by the raising of hands and, Madam Clerk, could you have some tellers assist, please.

CLERK KAKISH: Yes, Chair.

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

(Hands raised and being counted.)

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

(Hands raised and being counted.)

CHAIRPERSON HAROUTUNIAN: Lower your hands.

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

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

VOICE: Second.

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

MR. ABEL: What committee?

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

Got a lot of business on your plate.

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

Opposed no.

The noes have it. The motion is defeated.

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

(Appplause.)

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

MR. REITER: Good morning everyone. I am
We are proponents of this proposal for a couple of reasons. First of all, last year Michigan State Medical Society came out with proposed legislation that would basically abolish medical malpractice and in its place there would be special health courts. The proposal or the proposed legislation would have no attorneys, no defense attorneys, no plaintiff's attorneys, no rules of evidence, no constitutional protections, no court rules, no experts, no practice as we know it, and so we as an organization, MTLA, is against the MSMS proposal and proposed legislation.

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

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

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

As Jesse indicated his group's opposition to
one of the alternative courts that was proposed in the
last Legislature, and I would point specifically the
only difference, there is one word difference in the
first sentence. It says, Following guiding
principles, as opposed to the above guiding
principles, because obviously the sheet of paper was
laid out differently than your packet.

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

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

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

Secondly, his concern about the redundancy. Right now, quite frankly, the State Bar of Michigan has no policy with regard to specialized courts, and obviously as a former chair I would love to empower the Assembly and I want the Assembly to speak on this topic and give guidance to our Board of Commissioners on which I now sit. We have ten very fine executive committee members that sit on both bodies, and I am sure they will take into consideration our feelings on this, but we need to give guidance to them.

At the same time I am for vesting them with
enough discretion where they can react in a very fluid legislative environment. We just have one standard, we say this is the perfect court environment and we do nothing, we really don't have a lot of legislative credibility if we say no to everything that anyone ever proposes.

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

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

On the other hand, this would have allowed the Bar to engage in the treatment court, you know,
often referred to as the drug court concept, that we could divert people in the criminal justice system to treatment options and allow that to be done once they enter a plea to be able to do that more administratively, and then if they fall short of their contractual obligation of the court, then they would be referred back to the criminal justice process, and this would enable in those very limited circumstances for the Board of Commissioners to consider supporting that.

Additionally, for criminal law practitioners, for instance, there is a proposal that I am sure Senator Cropsey could tell you about that, that's coming up in front of his group that would allow diversionary program for mental health issues proposed by Liz Brader. Again that would mirror the treatment court but would be broader than that so you wouldn't have to have a drug problem, instead you could have a mental health problem and still have that type of treatment. And, again, it would allow the Bar to consider that on its merits rather than if we simply said we are opposed to any type of alternative, then it puts us in the unenviable position to have no credibility at all when we walk into the legislative process.

So we are trying to confine as much as we can, but this is at least a first step in consideration by the Bar to have a policy with regards to alternative courts, and, again, I think that speaks that to Mr. Hyman's concerning.
And right now none of the legislative proposals that Jesse is familiar with or I am familiar with some of the alternative courts right now, to say that we are going to take these outside of lawyers and outside of our profession and outside of the court system would pass muster with these guidelines. That's why we specifically identified that the strength of our court system be the same requirements of an alternative court. And this would just allow the State Bar to be flexible, to pick and choose what legislation that we feel meets our high standards and would garner our support. So that's why I am speaking in particular in favor of this proposal.

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

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

CHAIRPERSON HAROUTUNIAN: Is there support for that substitution?

VOICE: Yes, support.

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

All those in favor of the substitution say aye.

Opposed no.

Any abstentions say yes.

It's substituted.

Now, that being the case, is there any
discuss the substituted issue?

VOICE: Yes.

CHAIRPERSON HAROUTUNIAN: By the way, is there a second on the proposal?

VOICE: Second.

CHAIRPERSON HAROUTUNIAN: Yes, please.

MR. REISER: Good morning, Ed. John Reiser, 22nd circuit. I am also an assistant prosecuting attorney in Ann Arbor and was an assistant prosecuting attorney in Oakland County where I was assigned to, for a while, a drug court, and in Ann Arbor we have a sobriety court, and that's for repeat drunk driving offenders. We also have a street outreach court for those who are homeless. We also have a domestic violence court. In 14-1 district court where I am usually assigned there is a special docket for sentencing students who are in college or in high school who have committed retail fraud or MIPs. It involves their parents, things like that.

The concern that I have is that I don't know that any of the five courts that are specialized dockets or courts that I just spoke about increase the access to justice. The police department in our office gives them invitation, so they have the access already. So I guess that maybe it should say not hinder or shall have no detrimental effect upon the access, because that's -- my only concern is I don't want people to take a second look at the positive
dockets and positive specialized courts that we have that really don't increase access, and that's my only point. I am in support of this concept and am planning to vote for it but have that one reservation. Thanks.

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

Secondly, to address your substantive concern, John, it would be that beauty is in the eyes of the beholder. I would certainly say that by having these additional designer courts that you have that increases our access to justice as a concern. The reason you have designer courts is because you believe that the goal of justice is being achieved by there. So, in other words, it would increase that access to that inevitable goal, and, therefore, that's how would I define it fitting within those
characteristics.

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

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

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

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

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

    The only way to avoid it, I believe, and to
serve the purpose of the motion is to delete entirely
the language "or courts" and, therefore, to propose
that we go on record that when considering support or
opposition to proposals to create specialized dockets.
That way we do not open the door to administrative
courts being created and, furthermore, we preserve the
right of the public who appear before the courts to
appear before a magistrate who is answerable to the
electorate and not to some appointing authority.
Thank you.

CHAIRPERSON HAROUTUNIAN: Thank you, Judge.

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

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

CHAIRPERSON HAROUTUNIAN: Yes.

MR. LARKY: Mr. Rombach is giving speeches.
We should have the right to talk, and he can respond
later, but that's not the rule.

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

JUDGE KENT: I am proposing a friendly
amendment.

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

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

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

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

The reason why I need court in there is because we are talking in legislative terms. As, again, a legislator could tell you, that's how they define the stuff when they come in with the legislative process, so if I take out court, it necessarily precludes us from engaging in that discussion. Because, for instance, I don't consider this mental health diversion program a court, but the Legislature considers it a court, and, therefore, we have to deal in their terms to be able to engage in their process, and that's what I am trying to do.

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

The same thing with treatment court, that's considered a treatment court. It's not considered a treatment docket, so if anyone that's a proponent of
the drug court or the treatment court has to have
court in this proposal in order to deal with it,
otherwise you are going to disqualify the State Bar
from engaging in that discussion, and that's the
reason I am against it.
I am a hundred percent in favor of your
observation, and I want to preclude that. The problem
is I don't know how else to draft it to enable us to
engage in the discussion. That's why I don't consider

MR. REITER: And, Judge, just to add to that,
my organization is a hundred percent against these
courts and special health courts, and we have talked
about this a lot among our past presidents and
officers. We wouldn't be supporting this proposal if
we didn't think it was the most effective way for the
Bar to get involved and object to proposals like this.
But we are 100 percent against this type of thing.
Also, I agree with Mr. Hyman in that respect.
I just think this is the best way to set a minimal
criteria and standards for the Bar to get involved.

MR. BUCHANAN: Mr. Chair, Robert Buchanan
from the 17th circuit. I support this proposal. I
think what the proposal is doing is, in essence,
allowing the Bar to have a voice in these efforts by
the Legislature to impose legislation, give us special
dockets. I can say I am a civil litigator. I think
this affects us maybe more than the criminal docket.
And, for example, I think we have had the experience
where I work, everyone believes we are out there
filing frivolous lawsuits, and, frankly, in my years of practice I don't think I have seen a frivolous lawsuit, and if it is it's thrown out. But the public believes that, and they talk to the Legislature, and the Legislature, therefore, tries to pass legislation dealing with the perceived problem that doesn't exist. I think this proposal gives the State Bar the ability to speak on these issues and to have a position. Basically, because of Keller, it allows them to say, no, we don't agree with this proposal, or, if you are going to do it, this is how it should be structured. So it's basically just giving the State Bar, our organization of lawyers, a voice in this legislation. It's not saying that we want this stuff. It's not saying we want these special dockets, we want these special courts; it's just saying as a Bar we want the ability to have a voice in it and either take a position in favor of it or against it, and I think for that reason I am in support.

CHAIRPERSON HAROUTUNIAN: Any other discussion with regard to the amendment? There is an amendment on the floor, and the amendment is add the word "s" after the word "dockets" in the second line and delete the word "or court." That was the amendment that Judge Kent put on the floor, and it was seconded. Any other discussion on the amendment? Seeing none, all those in favor of the amendment say aye.
All those opposed to the amendment say no.
Any abstentions say yes.
The noes have it. The amendment is not passed. We are now on the main motion. Any other discussion?

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

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

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

So I would move that instead of using the word "guarantee constitutional rights" that perhaps a
word I would suggest substituting it by saying
"consider constitutional rights," or I would be open
to any other word other than something that says
guarantee that is going to do away with specialized
courts that we have already. Small claims courts
there is no right to trial by jury, and Workers'
Compensation or juvenile courts, things like this. So
if we are going to come down and say we won't support
any kind of specialized dockets or courts unless they
guarantee trial by jury, you know, this is going to be
an unintended consequence that I would like to nip at
the bud.

CHAIRPERSON HAROUTUNIAN: Is there support?

VOICE: Support.

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

Seeing none, all those in favor say aye.

Opposed no.

The noes have it. The amendment is defeated.

We are back on the main motion.

MR. WEINER: I guess after reading

Mr. Hyman's docket, the thing that he says that comes
out to me most often, and I do a lot of administrative

law, I deal with a lot of specialized issues, is the
idea of general judges. I would really like to see
something like this where we promote on these
specialized courts or specialized dockets, would
promote at least a rotation of the elected judges
through there so that a judge doesn't get on there for five, ten years and do the same thing day in/day out, and that would really address Mr. Hyman's issue.

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

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

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

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

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

CHAIRPERSON HAROUTUNIAN: Okay. Promote --

MR. WEINER: Of generalist judges.

CHAIRPERSON HAROUTUNIAN: Promote the use of generalist judges.

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

CHAIRPERSON HAROUTUNIAN: Is there support to
the amendment?

VOICE: Support.

CHAIRPERSON HAROUTUNIAN: Did somebody say support?

VOICE: Support.

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

JUDGE KENT: Wally Kent, 54th circuit. As much as I favor the thought process of the former speaker, I am afraid we are going to clutter this with too much, and I think it's covered under the improve the functioning of the courts. I think we can do very well without it, and there are debates to be had whether we should have rotation or not. If that's his purpose, I oppose it for a number of reasons that are not now relevant. But I think we are just going to clutter the resolution if we start adding bits and pieces, and I think it's well covered already, and, therefore, I oppose the amendment.

VOICE: Call the question.

MR. ROMBACH: As an advocate, I want to have a word on there, and I believe that I am entitled to it. I share Judge Kent's concern here. This has been a pretty carefully balanced and carefully negotiated compromise here, and I don't want to run afoul the judges, because right now they do have a lot of community specialized dockets already as far as civil and criminal judges or domestic judges, and they rotate according to their own rules, and I know that Judge Kent, in fact, has his own probate docket. So I
don't want to impose a different layer of requirement on something that, on a proposal that is sight unseen. That's why I would respectfully speak against. I think you understand the intent, Mr. Hyman's intent and our intent, but that's why I really can't add it right now. I don't know the nature of the proposal.

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

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

MS. MCQUADE: Good morning, Barbara McQuade, 3rd judicial circuit.
I have maybe just a question that I hope can alleviate some of the concerns that have been expressed about small claims court, workers' Compensation, et cetera.
The word "create," does that mean that this is intended going forward only and not to undo any courts that currently exist and are functioning well? This is just about creating new courts looking forward, so passing this proposal would not undo the work that's currently going on in small claims court, is that correct?

MR. ROMBACH: Yes.

CHAIRPERSON HAROUTUNIAN: That was the
shortest thing I have ever seen.

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

CHAIRPERSON HAROUTUNIAN: Please give your name.

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

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

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

There is a difference in the language between the lead paragraph, which talks about support or opposition to proposals, and the following paragraph, which talks about consider supporting a proposal. Is
that language intentional, and would you explain it, please.

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

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

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

   Again, it's only supposed to be a threshold. We can require whatever we want going upward beyond
that, and we didn't think we needed any criterion to
oppose it, because if they don't meet these, we could
choose to oppose or we could choose to ignore or
remain silent in that regards. That's intentional.
But thank you for pointing that out.

CHAIRPERSON HAROUTUNIAN: Bob.

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

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

are so important. Very few members of the Legislature
are attorneys, and so the non-attorneys will often
come to the State Bar saying what do you think, is
this legite, is this appropriate, and we have to have
the guiding principles that are in this proposal, in
the substitute proposal, and also we have to have the
backup that not only do these representatives of the
State Bar, our executive director, and our
governmental relations director, it's not just their
philosophy. It's backed up by the entire Bar. This
is what we think needs to be done. This is the
foundation for these types of specialized type dockets
or specialized courts within an existing court system.

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

CHAIRPERSON HAROUTUNIAN: Thank you. Any
other discussion?

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

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

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

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

MR. REITER: When this proposal came out last year, MSMS's proposal, and I can't speak to this proposal, but in terms of MSMS's proposal for special health courts, Michigan Trial Lawyers Association was against it, Michigan Defense Trial Counsel, the other side of the coin, was 100 percent against it. There was an article in Lawyers Weekly I think in September where I don't think there was any support among any trial organization that was asked to comment on this. So both the plaintiffs and the defense attorneys were definitely against the special health courts.

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

I see that there is already the existence of many special courts, and the judges within the laws as they currently sit right now are able to, at least in the criminal sense, they are able to force folks to
engage in therapeutic remedies rather than just
locking them up and so forth, and seeing as how a lot
of those, the judges have the power to give those
therapeutic remedies already, I am not really keen on
falling over myself to provide additional legislation,
at least in the area that I practice, but you have to
play the terrain that you are on.

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

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

So if, particularly an interested legislator
comes to us or what if it's one of our best friends
and say how can we help you out, right now the State
Bar only has the option of remaining silent, which
allows anything else to happen without our input,
which is a huge problem, or if something comes up
that's particularly pernicious and it comes to our
attention quickly enough and we were able to get our
group together fast enough -- this group is simply not
nimble enough to do that, nor is perhaps the Board of
Commissioners, then we vacate our ability to formulate
the questions.

And we know as trial advocates that if we get

MR. GOBBO: Mr. Chairman, Stephen Gobbo from
the 30th circuit. I have one concern and basically
one only issue to address perhaps in some language,
and that's the right to an appeal in terms of any
decision that's made by one of these specialized
dockets or courts. I am suggesting that perhaps under
not unreasonably limit a defendant's or plaintiff's
ability to represent his/her case to add the
additional language "and not limit an appeal right," and that perhaps will take care of some of the other
concerns that I have heard earlier.
accept that as a favorable, a friendly amendment, as long as the makers take it as friendly.

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

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

MR. ROMBACH: Again, I think your point about constitutional rights is well taken, and I stand corrected there. Jesse and I certainly don't have any opposition. We would consider that a friendly amendment if you were to include that under the defendant's and plaintiff's ability to represent his or her case.
MR. GOBBO: In order to keep within the six-word limit, that's why I came up with that, otherwise I would have inserted the word "court" before "appeal."

CHAIRPERSON HAROUTUNIAN: Is there support for that amendment?

VOICE: Support.

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

Please go ahead.

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

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

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

CHAIRPERSON HAROUTUNIAN: Is that a friendly amendment?

MR. ROMBACH: Certainly.

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

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

All those in favor of the motion say aye.

Opposed no.

Any abstentions say yes.
The ayes have it. The proposal is passed.

(Appause.)

CHAIRPERSON HAROUTUNIAN: Well, folks we are now seven minutes past our time frame, and I am going to suggest that -- Anne, is the lunch upstairs? Right now our schedule says to come back at 12:45. Go have lunch, come back at 12:45. I think that probably sits well. It gives us a little bit less than 45 minutes, but I think we stay on schedule. And so let's do that, and so we will recess until 12:45. Thanks. And let's be back promptly at that time so we can just keep moving forward.

(Lunch break taken.)

CHAIRPERSON HAROUTUNIAN: Ladies and gentlemen, are we ready to rock and roll? Well, we are going to get started.

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

MR. QUICK: Good afternoon, everybody.

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

The first matter that the committee recommends to the Representative Assembly is adoption of MCR 2.519 governing the appointment of masters. This rule is based on Federal Rule 53 in large part. The key provision which we stress in the materials and which I stress to you is that this is a tool to be
given to the parties and to the court but only when all parties agree to it. So there is no potential of a judge delegating his or her authority to a third party and, hence, depriving the parties of their day in court against their will.

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

The gist of the rule is to provide a series of best practices so that both the parties and the court have thought through the key issues of the appointment of a master before the order is made. So they go through their duties, the compensation, the authority, and very much like a magistrate in federal court, should anybody take issue with the finding of a master on any particular issue, the circuit court then would be able to review that under sub Rule (F).

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

CHAIRPERSON HAROUTUNIAN: Dan, I take it that you are moving for the adoption of this proposal with regard to Rule 2.519?
MR. QUICK: So moved.

CHAIRPERSON HAROUTUNIAN: Is there support?

VOICE: Support.

CHAIRPERSON HAROUTUNIAN: Discussion?

MR. LARKY: Mr. Chairman, Sheldon Larky, 6th circuit. I have given our transcriber an amendment. I would like to move that -- I move that the words, quote, only with the consent of the parties and then only, end of quote, be deleted from proposed Rule MCR 2.519(A)(1).

VOICE: Support.

CHAIRPERSON HAROUTUNIAN: Is it only with the consent of the parties and only?

MR. LARKY: Then only. Since there has been support, the reason I am asking for it is this would be -- if we adopt the rule as proposed before my amendment, this would be the only rule in the entire Court Rules where the parties and only the parties themselves have the right to dictate what's going to happen. In other words, all the other Court Rules, all the other Court Rules don't require the consent of the parties as a mandatory predicate.

Secondly, I am a full-time mediator and arbitrator, and I have probably been a master or special master probably maybe a dozen times. It's a good, as you say, it's a good quiver within the judicial system to have masters, and I like the idea that we finally have a proposed rule that will set out the duties and responsibilities of the masters.

Secondly, the Federal Rules don't require the
consent of the parties. The Federal Rules, if we are mimicking the Federal Rules, the Federal Rules allow the court on its own, sua sponte, to do this. Now, I know the opposition. The opposition is special masters create additional expense. That's the major reason why there is opposition to special masters, because parties sometimes get in situations where

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

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

MR. QUICK: Just briefly. One aspect of the proposal which I failed to highlight is that we are suggesting that this be adopted on a trial basis to be administered in the manner by the Supreme Court, and the reason for that is that this is a departure in practice in the state courts and that there has been some case law on this, some of which you may be
familiar with, Borsman (sp) decision, for example, which struck down in certain context a certain

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

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

CHAIRPERSON HAROUTUNIAN: Any other discussion on the amendment?

MS. LIEM: Veronique Liem for the 22nd circuit. I just have a question. Is there anything in the rule, I don't see it, that speaks of the
qualifications of a master, of a special master, and
if yes, where is it, and if not, why not?

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

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

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

is required, and, in fact, the little A speaks to
consent.
So I don't see where Mr. Larky's amendment would help this situation, but I do believe that if there could be some limit to the amount of money that a master can charge or that a court can limit it to, court knowing the situation between a party with money and a party without money can limit the amount that could be charged by a master, perhaps that would work.

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

MR. NEUMARK: No, not myself.

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

CHAIRPERSON HAROUTUNIAN: I consider that a friendly amendment. I want to ask the maker of the motion. It's considered to be a friendly amendment. Let me point out, by the way, that in the

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

MR. REISER: John Reiser, 22nd circuit.
VOICE:  Point of order.

CHAIRPERSON HAROUTUNIAN:  Yes.

VOICE:  You can't add a friendly amendment while there is an amendment discussion on the floor.

CHAIRPERSON HAROUTUNIAN:  Absolutely correct. Absolutely correct, and thank you very much for that point of order.

The pending motion on the floor is that we delete the words "only with the consent of the parties and then only" -- did I get that correct?

VOICE:  Yes.

CHAIRPERSON HAROUTUNIAN:  We are going to come back to this point, but continued discussion on this amendment.

MR. GREEN:  I am Rodrick Green from the 3rd circuit. I rise in opposition to the amendment. I know that typically a master's authority is binding as well as the expense. I think it would be a hardship upon the parties if they would be forced into a masters situation without consent, only on the judge's ruling, and principally because of the binding nature of the master's authority and the expense that would be forced upon a party, I oppose the amendment.

CHAIRPERSON HAROUTUNIAN:  Thank you. Any other discussion on the amendment?

Seeing none, all those in favor of the amendment to delete the words "only with the concept of the parties, and then only" say aye.

Those opposed say no.

Any abstentions say yes.
The noes have it. The amendment fails.

There was a proposal for a friendly amendment here with regard to adding the words "as a pilot program basis" in the question presented. Is that friendly amendment still there?

MR. LOOMIS: Yes.

CHAIRPERSON HAROUTUNIAN: It's still being accepted as a friendly amendment?

MR. QUICK: Yes.

CHAIRPERSON HAROUTUNIAN: Okay. It's there.

MR. REISER: John Reiser, 22nd circuit once again. With respect to being a pilot program, should we add a sunset clause such that -- I guess what if we don't like it? What if it doesn't work but we are stuck with it because we call it a pilot program, but the Supreme Court, who ultimately decides what the MCR's are going to be, believes it, and so I am wondering if there shouldn't be the last sentence say the following preceding provisions expire whatever it is, date you want to pick, January 1st, 2007, 2009, so we are not stuck with it if the lawyers don't think it works. That's my only point.

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

MR. REISER: So is it really a pilot then?

Let's just not call it a pilot program. Let's call it a program, unpiloted. Just kidding on that.
CHAIRPERSON HAROUTUNIAN: John, that may be the way it is anyway. Are you suggesting an amendment, by the way?

MR. REISER: Go ahead.

MR. LARKY: No, no, no.

MR. REISER: Sheldon, you know so much more than me.

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

CHAIRPERSON HAROUTUNIAN: Can you say it in six words?

MR. REISER: Oh, no.

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

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

CHAIRPERSON HAROUTUNIAN: What date would you pick?

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

MR. RADKE: Mr. Haroutunian, Victoria Radke, 42nd judicial circuit. I rise in opposition to removing the word pilot program from this proposal for the reason that it's not for us to decide. It's for the Supreme Court to decide when the pilot program ends and whether or not they are going to promulgate
that we would like to see this as a proposed rule, and we would like them to promulgate it as a pilot program, so I rise in opposition to removing the word "pilot program" from this proposal.

CHAIRPERSON HAROUTUNIAN: Thank you. Judge.

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

CHAIRPERSON HAROUTUNIAN: Thank you.

MR. LARKY: Mr. Chair, Sheldon Larky, 6th circuit. I am going to vote against these additional words. The reason I am going to vote against it is because we have had masters in this state. We have
had masters for years in this state. All we are doing is asking the court to adopt a proposal that finally solidifies, solidifies what masters should be and how they should be and the terms and conditions of the masters. And we are asking the court to accept a federal rule, which makes sense, and for us to say that we should use this as a pilot program, those of us who practice long enough have seen the masters being used in the court system, and so we accept it as a reality. Let's just make sure that we put it in specific terms so that there is guidelines to establish it. So I am going to vote no as to the addition of these four words.

CHAIRPERSON HAROUTUNIAN: Any other discussion?

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

MR. GOBBO: Are we on the amendment still?

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

MR. GOBBO: Stephen Gobbo from the 30th circuit. For most of my professional life prior to
incarcerated. I worked for the prison system in New York, New York, Michigan, and Federal Bureau of Prisons, and I have had the experience of operating under a special master appointed by the Federal Courts, and the major concern that I would like to just pass along if this were to be adopted in its present form is that the special master kind of takes on a life of its own and the durational aspect of a special master, I think, would have to be included in this proposal for me to vote in favor of it, and it's a different durational issue than the one that my colleague, John Reiser, raised initially about earlier.

It's the length of time that the special master would be delegated to operate under the court in order to resolve whatever the issue is, because in the situations that I have seen the Federal Courts have appointed people that have served as their law clerks with no qualifications in the specific area, particularly in the specialized area such as prisons, have just allowed the special master to run for years and years with no resolution of the issues that if they had come before the court in the firsthand situation probably could have been resolved. And I don't know if that's from lack of wanting to deal with the issue, high level of docket cases or what, but the fact is that's the experience that I have seen, and I will vote against this unless it has some type of qualifications enabled into this for appointment of the master.
The one issue that I would like to address with that is that this, as written, it basically says that the parties can consent to the appointment of a master, but it doesn't necessarily say who that master is going to be. So I think that's one area that would have to be changed, and then some type of time limitation on how long the master can deal with a particular subject before maybe giving somebody an appellate right to kind of eliminate the process and basically get out of that process.

CHAIRPERSON HAROUTUNIAN: Thank you.

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

Contempt, of course, is inherently within the court's power. I think it's really unusual, based upon the masters I have seen in my practice, for a judge who appoints a master not to take a recommendation as almost a mandate. I would prefer the word was "request" or "seek" a contempt citation as oppose to "recommend," recommendation being more of a binding.

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

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

CHAIRPERSON HAROUTUNIAN: The maker does not look at that as a friendly amendment, so if you would
like to amend that.

    MR. ELKINS: Make it an amendment.

    CHAIRPERSON HAROUTUNIAN: Is their support?

    VOICE: Support.

    CHAIRPERSON HAROUTUNIAN: Any discussion with regard to the amendment, which is delete the word "recommend" and insert the word "seek" in (C)(2).

        All those in favor of the amendment say aye.

        Opposed no.

        Got to have a division. I am sorry, I need a raising of hands for those who are in favor of the amendment.

        (Hands raised and being counted.)

        CHAIRPERSON HAROUTUNIAN: Please put your hands down. Those opposed please raise your hands.

        (Hands raised and being counted.)

        CHAIRPERSON HAROUTUNIAN: Thank you. Please lower your hands. The amendment fails 33 to 58.

        We are back on the main motion. Any further discussion?

        VOICE: Call the question.

        MR. HERMANN: Fred Hermann, 3rd circuit.

        Couple comments and a question. First of all, I favor this, having been through this situation in the past with commercial parties who desperately desire to have a special master appointed but because of the status of the case law feared that ultimately the findings of the special master would be questioned on appeal and, therefore, in some cases elected not to have a special master appointed and in the cases where we did go
ahead and have one appointed were nervous throughout the entire course of the litigation as to what would happen on appeal with the findings of the special master.

The fact that the parties need to consent to this I think is a very important part of this, because I appreciate that in other cases the cost burden may be significant for parties and, therefore, it should not be something the court can do without the consent of the parties. There are many cases where parties desperately desire to have a special master because it does increase the efficiency of the litigation. I am in favor of it for those reasons.

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

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

The second question I have, and this raises a concern and a possible inconsistency between the language of sections (A) and (C) with respect to the purpose for which the master is appointed and then the master's authority under (C). Specifically my concern would be in (A)(1). Under scope, (a) says, Perform duties consented to by the parties, which in my view would encompass virtually anything that the parties consented the special master to be allowed to do, and then under (C)(1)(a), it says, Unless the master is
appointed otherwise, the master may regulate all proceedings.

And my concern is, I assume we are not trying to give special masters the authority to conduct, for example, jury trials, but you could read this language as allowing the parties to consent to that, and I wonder if we should clarify between (a) and (c) specifically what the limitations of the special master would be versus what the parties will be allowed to consent to have the special master perform.

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

CHAIRPERSON HAROUTUNIAN: Let me just add something. I will just add something in terms of looking at it, and that is in (A)(1)(a), it says, Perform the duties consented to by the parties. In (C)(1)(a) it says, Unless the appointing order directs otherwise, a master may regulate all proceedings. To me what that says is if you are going to put an order together, you have to be extremely
specific with regard to what one does or what one does
not do. Now, that's to me, as I read it, just in
terms of looking at the words. Mr. Larky.

MR. LARKY: Mr. Chairman, Sheldon Larky, 6th
circuit. I move that we delete the words "as a pilot
program" from this proposed rule.

VOICE: Support.

CHAIRPERSON HAROUTUNIAN: Is there support?

VOICE: Support.

CHAIRPERSON HAROUTUNIAN: Any discussion?

All those in favor of deleting the words "as a pilot
program" from the rule say aye.

Those opposed say no.

Any abstentions say yes.

The noes have it. The amendment fails.

Back to the main motion. Any further
discussion?

All those in favor of the motion say aye.

Those opposed say no.

Any abstentions.

Congratulations, Mr. Quick. The proposition
passes.

(Applause.)

Moving right along to the last item on our
agenda, proposed amendments to Michigan Court Rules
2.301, 2.302, 2.313, 2.401, and 2.506 electronic discovery rules, and let me ask Mr. Dan Quick to address that.

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

(Applause.).

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

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

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

I think generally the gist of the rules fall into two main categories. One is to try to handle some of the substantive issues that come up with electronic discovery, and I will walk through very briefly some of the highlights of these rules, but issues about preservation, issues about inadvertent
Disclosure, issues about burdens on third parties who are subject to a subpoena are some of the substantive issues that are sought to be addressed here and that have issues unique to some degree when dealing with electronic information.

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

We obviously do not have those sorts of analogous early mandatory conferences under the Michigan Court Rules, but these rules do suggest that those considerations be taken into account when a scheduling order is put together and I think by their very presence within the Court Rules will assist parties, counsel and the court in identifying earlier, rather than later, the presence of potentially thorny issues and handle them early before they become more of a problem.

Walking very quickly through some of the highlights of the rules, on the very first page, 2.302(B)(5) addresses the preservation obligation for electronically stored information, and essentially what this says, and this is an analog to the Federal
Rules, it says if you have a reason to believe that information may be relevant you cannot let it be deleted off of your computer, you cannot go out there and shred electronic evidence. It isn't very different from the Enron or the Arthur Andersen sort of situation.

In terms of limitations on discovery of electronic materials, the next subsection addresses this and permits a party, obviously, to raise issues about burden and how reasonable it would be to have to produce the sort of electronic information being sought, and the rule sets up the procedure by which the court can weigh both considerations and as part of that, under the prevailing Federal case law, they would also consider things like cost, who is going to pay for what may be a very expensive process of digging stuff out of backup tapes, et cetera.

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

This was a grave concern as electronic discovery developed in the Federal Courts, so this proposal was adopted in the Federal Courts to deal
with that situation and creates a burden, once the
other side who has received information, once they
have been notified, you know, Bates number 6,000,023
was actually a work product memo, it governs what they
have to do with that and how it cannot be used on
going forward in the litigation.

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

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

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

In summarizing these rules, I repeat that
this is not really a change in practice in the
committee's estimation. It would simply add greater
certainty and clarity than the vacuum created by the
current Court Rules which do not address these situations, and I think that there is some great merit in permitting the state lawyers and judges to take direct guidance from the much faster developing case law in the Federal Courts on these issues, and that

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

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

VOICE: Support.

CHAIRPERSON HAROUTUNIAN: Any discussion?

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

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

But there are major issues that can relate to the production of data in this form or that form and the ability to specify that it must be in this form or that form. Objections can be raised in (3), somewhat the situation when I asked my father about our corn picker wearing out, and he said, Well, don't worry about the corn picker wearing out, worry about the old farmer wearing out who knows how to run the corn
picker and fix it. And this concern relates to data which has an astonishingly long potential life span.

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

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

CHAIRPERSON HAROUTUNIAN: Thank you.

MR. QUICK: And I appreciate that you are framing that as a comment. Let me share with you some
of the issues I am familiar with that took place, and, obviously, when the Federal Rules were changed this was subject to great debate. Stony Conference put together a very thick set of comprehensive materials to go to law professors and practitioners from around the country on this.

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

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

If you allow the respondent the ultimate fallback position of simply providing it on a piece of paper, then you protect from potential abuses that
could expound litigation that would go on for years about deck ten tapes with this tape and that tape and things I have stored in my barn for my grandchildren to sell some day.

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

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

MS. MURPHY: Susan Murphy, 4th circuit. Having been under a deadline to create a record retention policy dealing with electronic technology, e-mails, et cetera, by the December 1st deadline, something that struck me when I read this was I recall during my training and preparing that that there is a Federal, under the Federal Rule there is a rather strong sanction by way of a jury instruction for inappropriate destruction, so I would like you to discuss what, if anything, was discussed as to that issue. And under 2.313 you only indicate that they may not impose sanctions under the section, but there is no discussion as to what sanctions could be imposed.

MR. QUICK: Well, let me respond this way: I think under 313 that the court is going to retain general discretion to impose any sanction that it deems sufficient to address the impropriety, which can
take the form of a jury instruction or a whole host of other things.

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

CHAIRPERSON HAROUTUNIAN: Any further discussion?

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

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

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

CHAIRPERSON HAROUTUNIAN: Is there support?

VOICE: Support.

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

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

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

MR. BUCHANAN: Rob Buchanan from 17th circuit. I would move in opposition to the amendment. Obviously proving that the person knew that it would lead to discoverable evidence I think shouldn't be the standard. It should be what the current law is, which
is should they have known. Now you have to prove that
they did know, so I would be in opposition to it.

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

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Those opposed say no.
Anyone abstaining say yes.
The noes have it. The amendment fails. We
are back on the main motion.

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

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

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

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

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

CHAIRPERSON HAROUTUNIAN: You know that and I
know that. The court reporter doesn't know that.
So the words are, A party may elect.

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

CHAIRPERSON HAROUTUNIAN: Respondent may
Is there support for that amendment?

VOICE: Support.

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

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

CHAIRPERSON HAROUTUNIAN: Thank you.

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

It would seem to me that a printout, other than perhaps in your objections, would be a form
that's reasonably usable and, therefore, it's already
an option to produce it in printout form.

CHAIRPERSON HAROUTUNIAN: Thank you.

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

CHAIRPERSON HAROUTUNIAN: Thank you.

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

Can't we solve the problem by adding to the[end of the first sentence "subject to objection"? A
subpoena may specify the form or forms in which
electronically stored information is to be produced
subject to objection. Doesn't that resolve the issue?
motion for amendment be defeated, then I would move that as a substitute.

CHAIRPERSON HAROUTUNIAN: Understood.

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

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

MR. POULSON: By removing mine.

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

All those in favor of the amendment say aye.  
Opposed no.  
Abstentions say yes.

The amendment passes. We are on the main motion. Any other discussion?

All those in favor of the motion say aye.  
Those opposed say no.  
Those abstaining say yes.

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The proposition passes. Thank you, Mr. Quick.

(Applause.)

CHAIRPERSON HAROUTUNIAN: Now before we adjourn, a couple of things. Number one, attendance slips, they are being passed out now. Please sign them and turn them in to either Anne Smith at this corner or Kathy Kakish at this corner.
There are also mileage vouchers in your package, and you can fill those out. You don't have to do it right this minute. You can, but you can send them to Anne Smith. The address is there.

VOICE: What's the rate per mile?

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

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

Finally, I want to thank all of you for going through this process. You have really done a heck of a job. We are about 12 minutes over, but you are all to be congratulated with regard to the thought process, the effort, the attempt to put together something that when we send to the Supreme Court for the court's evaluation that we'll have a good work product.

Any other business to come before the group? If not, I would entertain a motion to adjourn.

VOICE: Motion.

CHAIRPERSON HAROUTUNIAN: Is there support?

VOICE: Support.

CHAIRPERSON HAROUTUNIAN: All those in favor say aye.

Opposed no.

Those abstaining say yes.

The ayes have it. We are adjourned.

(Proceedings concluded at 1:43 p.m.)
REPRESENTATIVE ASSEMBLY              4-21-07

STATE OF MICHIGAN  }
COUNTY OF CLINTON   )

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

May 7, 2007          ___________________________________
                       Connie S. Coon, CSR-2709
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                       Lansing, Michigan        48906