MEETING of the REPRESENTATIVE
ASSEMBLY of the STATE BAR OF
MICHIGAN

Proceedings had by the Representative Assembly of the
State Bar of Michigan at East Lansing Marriott, University
Ballroom, East Lansing, Michigan, on Saturday, April 26,
2003, at the hour of 10:00 a.m.

AT HEADTABLE:

THOMAS C. ROMBACH, Chairperson
DANIEL M. LEVY, Vice-Chairperson
ELIZABETH JAMIESON, Clerk
JOHN T. BERRY, Executive Director
HON. ARCHIE C. BROWN, Parliamentarian
GLENNA PETERS, Staff Member

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East Lansing, Michigan  
Saturday, April 26, 2003  
10:10 a.m.

RECORD

CHAIRPERSON ROMBACH: I would like to call the meeting to order. Thank you very much for your rapt attention. At this point we will turn to Elizabeth Jamieson to certify that we have at least 50 members in order to proceed with items of business. Ms. Jamieson.

CLERK JAMIESON: We do.

CHAIRPERSON ROMBACH: She says that we do. I will take her word on it.

At this point we will move to the adoption of the proposed calendar. I have one suggestion to make before a motion would be in order. It has been recommended by the Rules and Calendar Committee that instead of doing the agenda as it is printed, Lori Buiteweg's committee has suggested perhaps that we could eat lunch during the presentation of the ABA New Model Rules of Professional Conduct. The guests that are coming in from Chicago and Boston have concurred with our willingness to eat. They have a plane to catch as well. So I will turn to --

MR. CHIOINI: So moved.
CHAIRPERSON ROMBACH: -- to Mr. Chioini to make such a motion.

MR. CHIOINI: So moved. Carl Chioini, 16th circuit.

CHAIRPERSON ROMBACH: Carl Chioini, and you are from where?

MR. CHIOINI: Macomb County, Michigan.

CHAIRPERSON ROMBACH: 16th circuit. And your colleague, Mr. Piatt, is seconding that?

MR. CHIOINI: That's correct.

CHAIRPERSON ROMBACH: So acknowledged. Is there any discussion on this particular matter? All right. Hearing none, we will move that to a vote. All in favor of that change in the agenda please say yes.

Anybody opposed?

Hearing none, that passes unanimously.

We have had no objections received to the summary of proceedings as identified in your packets from February 22nd, 2003 and, therefore, we will say that that summary is deemed approved.

We have no vacancies to be filled at this point, but we do have a report from the Nominating Committee that will fill us in as to where that stands.
We will move to item three, those are remarks by myself. I would like to update the body on a couple of matters that we had discussed last time. First of all, the strategic plan with an unanimous Representative Assembly approval that is now in the course of being implemented. Anybody that wants to know precisely where that stands can ask one of our elected leaders. I know Ms. Diehl is here, Mr. Brinkmeyer is here, Ms. Cahill is here, and they can tell you more precisely at greater lengths, as well as our executive director, John Berry, who is very proud of that document that took over two years to draft and to pass.

Secondly, the update on the dues proposal. Right now the Michigan Supreme Court has published our dues proposal passed by the Representative Assembly for comment, and they have also published their own draft. I believe that Linda Rhodus is here from the Michigan Supreme Court. She could answer any questions as to where they are proceeding at this juncture.

The comment period closes on June 1st. In some form or another the State Bar will be present to comment at the Supreme Court's administrative hearing in Lansing on June 19th, so you need to stay posted on
that.

Just so you know, the Supreme Court in publishing their own proposal is not saying they are going to accept or reject any of the particular components, but there are some differences, and with the help of Janet Welch, our general counsel, I will just tell you a few of those items.

First of all, our proposal as passed by the Assembly envisions an age exemption of 75 years old as opposed to the current 70, and there is a grandfather clause for those people that are currently exempt would remain exempt from paying dues. The Supreme Court proposal is actually in the alternative. One provides no exemption whatsoever, the other one provides an exemption at 45 years of service as opposed to an age-based resolution of that issue.

Secondly, there is a dues amount actually in our proposal identified by a number also that's tied to the Consumer Price Index. The midwest component of that is identified in the proposal. The Supreme Court's published item has no explicit amount at this juncture. I know they are taking hearings in order to come up with that number, and it's not tied, there is no inflationary or deflationary component in their proposal.
Thirdly, there is a resignation provision with certain consequences in ours after three years. The Michigan Supreme Court has identified a withdrawal provision that is similar, but it is without pay and without the same dire consequences. Three years, there is a different type of reinstatement mechanism.

So, again, those are all in the Supreme Court website. If anybody wants to know more details you can either inquire with myself or you can inquire to Ms. Rhodus. I know that she knows far more than any other living, breathing human being about these proposals.

Thirdly, the client protection fund proposal has previously been published by the Michigan Supreme Court and is subject to the same administrative review and hearings, so that is going along with the rest of the format, and Mr. Byerley I know can answer any of your questions, our regulation counsel from the State Bar.

For your information, the Michigan Supreme Court also published for comment a disciplinary dues increase of $20 in October 2003, and that also has a $5 escalator provision for each year thereafter until October 2007. So they envisioned potentially the dues portion of our dues, the disciplinary dues provision
going up a total of $40. Again, that's subject to
comment by the Bar up to June 1st and a public hearing
on June 19th. Am I correct so far, Linda?

MS. RHODUS: Yes.

CHAIRPERSON ROMBACH: Okay. Not that I was
going to give you the podium anyway.

Then additionally I would just like to point
out that we still have several liaison positions.
Because of how the Bar has contracted their committees
from last year, that we had about a third of the
committees that were done away with because the
leadership felt they were duplicative, and, therefore,
we are still trying to put a representative from the
Representative Assembly in each of those committees.
If you are interested in anything, please come up to
see me afterwards. I had worked closely with Reggie
Turner in doing that, and I know that Dan Levy is
looking forward to working with our president-elect,
the eminent Scott Brinkmeyer from Grand Rapids.

Also, the RA is also filling liaison
positions to sections, particularly for those -- there
are already liaisons in place generally. Some of our
eminent folks, however, are graduating or term
limited, as the case may be, and we need to replace
some of those folks. So if you are interested, and we
can always have co-liaisons, in a lot of instances
that's what's occurred in the committees, please step
forward, see me after the meeting, e-mail, see Dan,
see Elizabeth, see somebody who cares.

And then the Representative Assembly
committee assignments, it's never too early to talk to
Dan, Elizabeth, or even myself. In fact, three of our
chairs I know are leaving us, so that we are going to
have a leadership vacuum, and I hope that anyone
that's interested can fill the void.

At that point, I am done with my remarks, and
I would like to move on to John T. Berry, our
executive director, for his insights. John.

MR. BERRY: Hi, Tom. Good morning, everyone.
As we speak, the flowers are blooming and the buds are
coming out on the trees and every second I speak keeps
you delayed from going out there and seeing them, so I
will try to be as concise as I can be. Applause has
already begun in the far corner of the 6th circuit.
So I will keep you updated on a couple things with the
Bar.

The first thing is the Strategic Plan is an
action in motion, not only for the fact that the
Representative Assembly has acted and we are going
forward with the court to try to get that approved,
but in the interim we continue to follow your
directions and the Board's direction on the areas that
we need to be emphasizing. And a couple areas that I
want to talk to you about.

The first thing is the ethics school that I
reported to you before, the diversion program from the
discipline system. The materials have been prepared.
We are having a day long training session on Monday,
and on May 8th we are having our first session with
over 20 people that originally had complaints filed
against them.

This is an exciting project. It's an
opportunity to help lawyers that get low, minor
complaints filed against them in which they have no
bad heart but they may have law office management
problems, communication problems, and the recidivism
rate for complaints being filed for people who go
through schools like this has been reduced from 25
percent to less than five percent.

It's an opportunity to really reach out and
be able to help our profession, help our clients.
Better yet, it's paid for by the participants, so it
doesn't come out of your Bar dues. It's a win/win for
everyone, and we are extraordinarily proud. I want to
recognize Tom Byerley, who will be up here later in
our ethics, for the tremendous work he has put in and everyone has put in to this program.

Also, we are continuing to go forward to work with our law schools. Cooley Law School has developed an entirely new professionalism effort, hiring three people to try to infuse into every aspect of the student's life, not only what needs to be up in the brain but what maybe needs to be done in the heart, and also in the practical skills to be able to serve people. Other deans have shown similar interest. We continue to be meeting with them to work more closely with them. So I think that's an improvement in our ability to deal with the things within our Strategic Plan as well.

Another area which probably got the greatest amount of interest when I reported to you one time was the issue of defining the practice of law and enforcing it, UPL. I remember when I came here and talked to you about the Strategic Plan, at one time I said how many people were interested, and most of you jumped, not only raised your hand but jumped up on top of the tables and raised your hand, to say it is important to define our profession, protect the public, and to go forward with the changes in our society. That is heating up and will continue to heat
up and is a major part of our Strategic Plan.

Right now there are issues in front of the Supreme Court, a case in front of the Supreme Court, about what bankers can do versus lawyers can do. There are issues within our own agencies within this state as what nonlawyers can do and representation before those agencies. There is issues concerning notarials. There is issues about whose jurisdiction it will be, the Court or the Legislature's. There are issues throughout, and these are important issues that you told us are important to you. The Board and the Representative Assembly leadership as well are working on these issues and will continue to report back to you on them.

In relationship to that, just to give you an idea, I have been lucky enough to work with the ABA on a task force which is engaged in making a recommendation to states as to defining the practice of law and how you go about that. I have never been involved with anything more controversial in my life. We had public hearings in which we had everyone from some folks who said don't change anything, lawyers should have not only the power they have now but tremendously more. We had consumers coming in and the FTC saying we should probably move closer to a free
market, and we had everything in between.

Obviously I don't believe in the FTC's position in reference to this, nor does our Board, nor does our Representative Assembly. However, the report that we did put out, you can see on your ABA materials, it will come in front of the House of Delegates in August, and it basically made three recommendations.

One is that every state should engage in defining the practice of law as it deems appropriate. Number two, that the basic premise of that definition should be that the practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity, and the most important part, the most important part is that each jurisdiction should determine who should provide those services and what should be included within the jurisdiction's definition of the practice of law and under what circumstances based upon the potential harm and benefit to the public.

The determination should include consideration of minimum qualifications, competence, and accountability. It should be a balance of protecting the public as well as providing services to the public.
So I think the combination of all of these items are coming together to show, again, the wisdom of Alan Kantor's committee and of our deliberations concerning the appropriate issues to spend our time in the upcoming years.

Final two comments. One is that this afternoon I will have the privilege of introducing a panel of people talking to you concerning the ABA 2000 recommendation on the Model Rules for Ethics and also our rules. This is really an important topic. The people that are here I have had the great opportunity to work with and I respect tremendously. It's going to be during the lunch hour. It's going to be later on in the process. I know what my tendency will be and maybe yours, but I really ask you to spend some time listening to them. They are incredible resources for you to help you in your deliberations at the next meeting.

And for somebody that loves this stuff, we were talking yesterday about Rule 1.6 and paragraph this, that, and the other, we are going to be talking more about the substance of what it is, and I thought last night, it reminded me that when I was thinking about updating you about UPL and defining the practice of law, these rules and their regulation are truly
what separates us from others. It's what we are about. It's not just a rule. It's who we are as lawyers, how we relate to each other, how we relate to the public, how we are held accountable, and how that accountability is enforced.

So I really look forward to the opportunity to hear from them, and with my premise to begin with that I would be as short as I could, I am now done. Thank you very much.

(Applause.)

CHAIRPERSON ROMBACH: Thank you, John. At this point we will turn to Nancy Diehl, and Nancy has always looked forward to an opportunity to address the Assembly, and we have something within her competence here and eminent prestige in order to talk to us about programs and services of the State Bar. Nancy.

MS. DIEHL: Good morning, everyone. Can anybody hear me? Can anybody hear me?

VOICE: Yes.

MS. DIEHL: Yes. Can anybody not hear me? Don't you love that question, can anybody not hear me. Expect people to raise their hands if they can't hear you.

All right. He has finally found something that I am competent on to speak about. I have only
been on the Assembly, let's see, about 12 years, so I
guess that's not so bad. Any of you -- never mind. I
was going to ask how many of you have been on longer
and haven't been invited up here.

But I am very happy to be here this morning
as chair of the Programs and Services Committee. Get
to highlight for you this morning just a few areas,
and so I am going to divide my comments into four
parts -- the good news, the not so good news, some
future good news, and then time for questions about
either the good news or not so good news. So I think
we should start with the good news, right? All right,
as everybody is nodding.

Good news, we are rolling out a new program
through the State Bar with OfficeMax. That's an
office supply store, and some of you may now, you
might like Office Depot, Staples, K-Mart, Wal-Mart.
You are going to like OfficeMax, because they have
prepared an exclusive deal with the State Bar, and it
is going to involve major discounts on supplies,
printing, and office furniture, anything you need for
work, as well as school supplies for your kids. And
the program, of course, is going to help you and your
families, and if you spend enough money it's going to
help the Bar too.
The program is going to involve a 20 percent discount to members regarding printing. Office supplies, you are going to get somewhere between 30 and 70 percent. You will be able to order online, by fax, or by phone. You will be getting soon -- you want to know how you do this. You are going to be getting notified in the very near future from the State Bar with a way to get involved.

We have had this on a pilot basis with a very few people just to work out all the kinks, and we believe it's in pretty good working order right now.

What you will do is go to the Michigan Bar website. You probably all have that memorized, right, www.michbar.org, and you go to member services, you click on there, and you will be able to get the information that you need.

It includes, again, not only your office supplies, your school supplies, but printing, and those of you who need to have copying services done, you can certainly call your local copying place and set that up. You can also call a location in another city. There are 40 OfficeMax locations around the state of Michigan, but there is also a thousand around the country. What you can do with documents that you need copied, you can e-mail them directly to
OfficeMax. They will copy them, and they can have them delivered directly to where you are going, and you don't have to carry those with you. Again, 20 percent off that. So that's the good news.

Again, what you are going to do, you can get all the information you need off the State Bar. You will call an 800 number through OfficeMax, they will give you your membership number, you will be able to use that and get your discount. Like I say, the discounts will vary depending on what you are buying, but upwards anywhere from 30 to 70 percent. Good news. All right.

So now we get to the not as good news, health insurance. You know, health insurance. Everybody is hurting with health insurance, right? People -- I mean, costs are skyrocketing everywhere. People say why? Well, we are an aging population, increased prescription costs, technology costs, health care bureaucracy, whatever.

We know there is a problem, and, of course, it's hit us right here at home. In terms of increases in Michigan, anywhere from 15 to 30 percent. And what's happened with small businesses in Michigan through Blue Cross/Blue Shield is they have seen increases anywhere between 10 and 30 percent.
And people wonder why, you know, why are these rates so high, why do we pay so much? The insurance commissioner -- this is the information I received. I don't make this up. The insurance commissioner said that, in fact, Blue Cross didn't raise their rates sufficiently. They really should have been raised higher, but didn't he just leave his job? We have a new insurance commissioner.

But anyways, that's how bad the health care costs are. They have been skyrocketing, and everybody has been seeing an increase, but people seem to think why is Michigan so much higher and why is Blue Cross, why have the rates gone up 16 percent last year, and why are you about to see an increase? You know, people say why is it so high?

And part of the problem is how Michigan regulates insurance. And there are commercial insurance carriers who are allowed to pick and choose who they insure, right? They get the young, healthy people, and they can give them the low rates. And of course someone older who has issues, they can have them pay a higher insurance rate. It makes some sense, right? Sure. You are young and healthy, you pay less; you are older, not so healthy, you pay more.

Well, Blue Cross is the insurance of last
resort. They are required to insure everyone, and what happens is everybody then gets into that group, whether you are young and healthy and older and not as healthy, and then everyone is required to pay the same amount, and it's this community group of everybody with all the health risks included, which ends up meaning the rates are higher.

Again people say, well, can't we do something better though as a group in terms of the Bar? I mean, we are such a large group, right? We are 35,000 lawyers. Why can't we do something better?

Well, we are a group of 35,000 lawyers, but only 5,000 of our members insure through the Bar Blue Cross/Blue Shield, so we really are not such a large group.

So we have tried on our own to deal with it, but what we have also done in terms of having more clout is to join with 140 other smaller businesses and associations to try to use our collective clout to do a little bit better. We are hopeful this year in 2003 that health care and rising health care costs will be a legislative priority. I think everyone recognizes that it's a problem, continues to go up, we need to do something about it.

We are doing the best we can, but we have
very limited ability to make major changes. I know when you see that increase it's very difficult. We are going to do the best we can. We will bring you updates as we get them. All I can say is the more office supplies you buy from OfficeMax, the more money you save, put that into your insurance. Okay?

You know, it's interesting. I think Blue Cross decided to tell us all they are even hurting, right, because they are, in fact, decreasing health insurance benefits for 4,000 of their salaried employees. They are reducing their benefits, and just like most businesses have had to do, right, the rates go up, we can't afford it, so we have to reduce benefits.

So everybody is hurting. Let's just hope that in the future it will get a little better.

All right. Got through the not so good news. Everybody still with me?

Now some hopefully future good news, e-filing, electronic filing. I know members are anxious for that to come about, and we certainly believe that that's a good thing, and we have had an electronic filing task force who have been working diligently, and the Supreme Court requested comments regarding electronic filing, and the task force worked
and reviewed the national standards, and what they have done and what they have submitted to the Supreme Court is, they have submitted support for the adoption of a national center for state court's electronic filing standards with a few adjustments, but basically what they are encouraging the court to do is to adopt those standards. The task force is also presently working with the Court of Appeals and other groups in Michigan to help bring this about.

Certainly we have an interest in promoting electronic filing. We also have to be concerned certainly about the confidentiality of the documents. It's important for us, the public, and the courts, so it's going to take a little time, I think, to work that all out. But it looks good, it looks like it's going to happen, and the Bar's task force is there to work with all the groups involved. Hopefully in the future we will be able to bring you more good news about electronic filing.

Okay. And the chair of the Electronic Filing Task Force is Jim Erhart from the State Bar Board of Commission, and if you have any more specific questions, he would be happy to answer them. Jim -- well, you can find him up north probably somewhere today. But he is available and would be happy to do
How am I doing there on time, Chief? Good?

All right, part four then, questions. Lisa Allen-Kost, of course, who is the Bar's Programs and Services manager, is here to answer any tough questions. Yes.

MR. GREEN: Yes, just a quick question just for informational purposes. Is there some type of booklet or pamphlet that details all the programs and services that the State Bar offers?

MS. DIEHL: I know we do have a pamphlet, but I am going to have Lisa --

CHAIRPERSON ROMBACH: Rodrick, could you come up to the microphone just so we could all hear.

MR. GREEN: I am Rod Green of the 3rd circuit. Is there a pamphlet or some type of booklet that details all the programs and services available by the State Bar?

MS. DIEHL: Wonderful question, and Lisa is going to tell you how to get that pamphlet.

MS. ALLEN-KOST: We actually have or we are in the process of working on a finalized pamphlet. We have had new services added, as Nancy alluded to, so we are going to be adding those and revising the pamphlet and getting that out this summer. Our hope
is to send that with the dues statement this summer, if that works out.

In the meantime, we do have some materials available to you, and we would be happy to send those along with the materials we send next week on OfficeMax if you would like for us to do that. Does that sound --

MR. GREEN: That's great.

MS. ALLEN-KOST: We will plan on it.

MS. DIEHL: Thanks, Lisa. Thanks, Rodrick.

All right, thank you all very much.

(Appplause.)

CHAIRPERSON ROMBACH: Since Nancy has been here 12 years and she did such a fine job with the insurance and electronic filing, we are going to ask her back for our next meeting to explain to you the idiosyncrasies of quantum physics. So thank you very much, Nancy. We'll have you back soon.

The next item we will turn to is the Representative Assembly liaison reports. The ones that we are going to do this morning are actually going to be, the first one is going to be from Mike Blau. He is going to explain to us the pro bono project for domestic violence victims, Mike being from the 30th circuit in Lansing. Michael.
MR. BLAU: Good morning. In front of you on the table you will see there is a little blue handout. If you could direct your attention to that.

This basically gives you information on Thursday, May 15th there is going to be a statewide training on issues of domestic violence, representing victims of domestic violence. And this is sponsored by the State Bar's Open Justice Commission and Michigan Coalition Against Domestic and Sexual Violence.

Basically it will be a primer on issues regarding divorce, custody, personal protection order, and it's taught by -- it's a live video presentation throughout the morning through experts in the field, and then it breaks in the afternoon at various locations for panel discussions throughout the state.

This training was done two years ago. It was very successful and really gives you an opportunity to help victims of domestic violence. It's good for new attorneys, for seasoned domestic practitioners. There are a lot of ways that you can become involved. If you are an attorney with a lot of experience in family law matters, come in and lend your services in a mentoring role.

The training is free, and I would point out
that the materials that are passed out are excellent. There is a comprehensive training manual in these areas, there is a CD ROM that is basically free and distributed if you register for the training, and we would ask that you would get involved and also pass the word along to other attorneys in your communities.

The feedback that we had a couple years ago, that it was very informative and helpful, and there is an enormous need out there. If you are looking to make a pro bono contribution, we would ask that you do it in this area of domestic violence. Legal services programs in the state are basically overrun with requests for service for representation in this area, and this would be a great help to your community. So thank you.

(Applause.)

CHAIRPERSON ROMBACH: Thanks, Michael. I appreciate your help on that matter, and I hope you all volunteer.

Next we are going to hear from -- actually Chief Judge William Whitbeck is here, and before we get to Judge Whitbeck, I just want to make a couple prefatory remarks.

This has come to our attention through the Appellate Practice Section. Tim Morris from
Port Huron is our appointed liaison to that committee. Tim is waving and having just competed in the personality contest of the local pageant, so Tim can answer any of these questions in more detail. He has given us a great deal of study.

Additionally, we have with us the chair-elect, Victor Valenti from Southfield, of the Appellate Practice Section, and he is here in lieu of Don Fulkerson, the chair from Westland, who is actually out of town. They have all expressed an interest in hearing from Judge Whitbeck so that the Assembly knows how this issue is coming forward.

Chief Judge had expressed to the Board of Commissioners, as well to the Executive Committee of that board, some severe concerns with the delay in the appellate system, and he had not only addressed us, but he had also formulated a proposal, including increased spending from the Legislature in fiscal year 2004, as well as certain changes of the Michigan Court Rules. In fact, he has taken steps already in order to implement some steps within his judiciary itself in order to kick out the opinions more quickly, and he has been able to commit to doing away with some of the delay.

At this point the State Bar President, Bruce
Neckers, had appointed a delay reduction task force. Recently they had completed their work and had submitted a report, with Professor Evelyn Tombers from Cooley Law School being the reporter of that report, and that is available for any member that would like to review it.

The Michigan Supreme Court also published Judge Whitbeck's proposal for comments, and those comments are to end, I believe, June 1st, with administrative hearing being on the same day as our dues proposal, that being June 19th.

There had been a number of concerns that had been raised by Judge Whitbeck for one and his judiciary, as well as some of our membership, and that the judge is now working with a select group of members of the State Bar that had been appointed by Reggie Turner and Scott Brinkmeyer in order to head off some of these delays, and, in fact, were trying to reach a consensus proposal. In that light, I know the Chief Judge has committed and would ask the Supreme Court to extend the comment period to, I believe, September 25th, at which point that there will be a public hearing conducted on these proposals.

At this juncture the judge, in working with this, I certainly wanted to extend the time to him,
and our State Bar is then going to defer action on
this topic certainly by the Representative Assembly
until this work group has furnished its proposal, and
then you will have that in your hands before we have
to do anything further.

So at this juncture I will let Judge Whitbeck
fill you in on the details of precisely where this
stands, and he can answer any questions that you might
have at actually a later date, because we will be
taking this up.

Judge Whitbeck, thank you very much for
coming to address our organization this morning.

JUDGE WHITBECK: Good morning. Tom has given
me 15 minutes and warned me that after five attention
tends to scatter a bit, so I am going to try to keep
this very, very brief.

The Supreme Court appointed me as Chief Judge
of the Court of Appeals back in December of 2001. And
at that time, then Chief Judge Bandstra and I were
looking carefully at the problem of delay in our
court.

We formed a working group which met
continuously, and I do mean that. We met every week
for about three months, and we looked at our situation
from every angle that we possibly could. To make a
long story fairly short, we divided the cases that we decided are according to two categories. Those of you who practice before the court will recognize these immediately.

The first category is cases we decide by order. We do all right with those cases. Our orders are two or three sentences maximum, so it's not that there is a lot of time in preparing those orders. Those orders we decide fairly promptly. We are reasonably satisfied. We could probably cut the time down somewhat, but we are in fairly good shape there.

The area in which we have a problem in is the area in which most people view the Court of Appeals, and that is cases we decide by opinion. That's about half of our caseload. Of the 7100 cases we decided in 2001, roughly half were by opinion, half by order.

We were not doing very well at all with cases that we decide by opinion. Our statistics show that it took us, on average, 556 days from the time a claim of appeal was filed until the time the opinion went out. When I was practicing, the rule of thumb was two years, and the rule of thumb was roughly correct.

We decided that that simply was not acceptable. To wait two years for a decision by opinion out of our court is simply too long.
You all are practitioners. You know the pernicious effects of delay on your clients, on the public at large. The best example I can use is situations involving dispositions of custody or terminations of parental rights where a child is involved and that child is simply waiting. He or she is waiting to get on with their life, and if we wait too long it isn't going to be much of a life. That period of time that elapses there, if that time gets too long, we are dooming these children, and there is no other way of putting it. That simply was happening.

I happen to have written over the past three weeks 20 opinions dealing with what we call TPRs, termination of parental rights, among the more depressing three months of my life, because I just went through these cases, about 20 or 30 of them, one by one, and it's not a pleasant experience. That's the crispest example I can use on this is situations involving custody and termination of parental rights.

We decided, therefore, at a meeting held at our court in March of 2002 that we would drastically reduce the time that it takes to get an opinion case out of our court.

There are a lot of moving parts to what we
are doing, and I will keep it very simple and very straightforward. We divided the process into four phases. I will start from the end. The judicial chambers; the time a case spends in research, because we have a centralized research division; the time a case spends in the warehouse, a term I will come back to; and the time that a case spends in intake where the lawyers are doing their work.

We really started at the back end at the judicial chambers. Our theory was that we could not go to the Bar, we could not go to the Legislature, we couldn't go to the public and say to them we really need to deal with this problem unless the judges demonstrated that they were willing to take the first step, as President Neckers then put it, to be the first ones in the water.

We have done a considerable amount in reducing the time in the judicial chambers. I am very proud of my judges in that regard. We have really made enormous strides in that area.

To give you an example, in 2001 the time for the judicial chambers to get an opinion out was 61 days. In the first quarter of this year, 2003, it was 28 days. We had cut the time in the judicial chambers by one half.
Backing up, the time in research division, the problem, which I will come back to, in the research division is not productivity, although any organization can run better. I am convinced, based on my look at the situation, it's not that our research lawyers aren't productive. They are. It's capacity. We simply don't have enough of them to get the work done on a first in/first out basis. The solution to that is to add capacity, more lawyers.

We are before the Legislature in the worst budget year in 50 years asking for a, I believe, modest increment in our staffing in that area, and, candidly, coupled with the fee proposal that you all have probably heard about and will probably hear a lot more about, which proposes to raise fees throughout the judicial system, including at the trial court level, I believe we have a fair chance of increasing our capacity in the research division.

Behind that is an entity called the warehouse that's a cutesy term for -- it's physically and literally accurate. When a case leaves intake, when you all have done your jobs, it migrates down the hall and physically goes on a shelf, and in 2001 it sat on that shelf for 271 days.

The reason for that was simple, we didn't
have the capacity in the research division to take the cases out of the warehouse as fast as they came in, it just wasn't there, and so they sit, they sat for 271 days.

Clearly we must eliminate that. That is our challenge, to eliminate that warehouse so that it no longer exists.

In front of that, however, is the phase that you are most concerned with, and that is the intake phase in which the transcripts are being obtained from the lower court, the lower court record is being obtained, the appellant is filing his or her brief, the appellee is filing a response. The appellant may file a reply brief. In 2001 that took 260 days in intake. That's a long time.

The best way to understand our proposal and to deal with the question that I always get asked, the question is if we cut down our time in intake, as your proposed rules would do, won't a case just simply go from intake and sit in the warehouse? The answer is yes, if that's all we do, but if we drain the warehouse, if we get that added capacity in our research division, then the answer is no. It will go to the research division, then to the judicial chambers.
Is that possible? I think so. It's possible for the following reason. I went through this yesterday. You have to kind of back into it.

Right at the moment our capacity in our research division is such that we are at what I would call equilibrium. We actually clear more cases than we get in. Our clearance rate, the number of cases submitted divided by the number of cases disposed of, has been for the last three years over 100 percent.

So at whatever level we achieve we can stay there without additional resources. The trick is to get to that level, and at a long-term where me must be in order to decide all of our cases, opinion and order cases within 18 months, or 95 percent of them within 18 months, which is the old ABA standard, and it is the standard that the Legislature set for us in the mid 90s in boilerplate to their appropriations bill, in order to get there we have to decide all of our opinion cases, we have to decide our opinion cases, pardon me, on average of 300 days.

Once we get there, once we drain the warehouse, we can stay there. In fact, we will be able to tell the Legislature we won't need, in the following year, the additional seven to ten research attorneys we have asked for, because with our current
capacity we could stay there. The trick is to get there.

The only way I think we can get there if everybody does their part, the judges, the Legislature, our research division, is if we cut down the time in intake. We can't get there without doing that.

Now, fortunately, for reasons I candidly will say I cannot explain, the time in intake has reduced itself from 2001 to 2002 by about 20 days. For whatever reason, we have picked up 20 days at intake. It wasn't as a result of our efforts, because our efforts hadn't kicked in yet. It just happened. I wish I could explain why, but I can't. That gives us some flexibility.

What we need now is to clip about 66 days out of our intake phase. The proposals that we have submitted to the Supreme Court would clip 101 days, so we have some wiggle room, for lack of a better term, which is why Scott Brinkmeyer, Janet Welch, and I, and my staff met yesterday. We have set up a process by which hopefully both sides of the table, for lack of a better term, although I don't like that analogy, can look at this situation rationally and perhaps come up with a consensus proposal.
In that regard, I have sent a letter, copies of which -- copies of three things are available on the back table, not enough of them unfortunately. One of them is our progress report number four, which shows our progress to date in the last quarter. The second is a very brief synopsis of the rule proposals at the time we spoke, and we are back again, and the third is a letter that I sent yesterday to the Supreme Court asking them to extend the comment period that currently runs out June 1 to September 25th, to extend or perhaps hold a second hearing, if they decide to hold the first hearing as it's currently scheduled on June 19th, to hold another on September 25th, and to extend the effective date for the proposed rule changes to January 1.

That, I think, gives this body a chance to think this over and gives the committee that we are working on a chance to work our way through it, but it does set some outside limits. If we don't reach agreement, then the Supreme Court will have to make its decision.

I believe we can reach agreement, because I think that, although there are a lot of moving parts in this situation and it is complicated both for me to explain and for people that don't deal with it every
day to understand, nonetheless, if you bring it down
to its essence, we need to get 66 days out of the
intake phase in our court. We need to cut the time
from its current level down by 66 days.

I believe that is doable, and I believe it's
doable without placing overly enormous pressure on the
appellate practitioners who appear before us.

One way that we can look at this is by
dividing cases into categories, differentiating case
management is a cliche that deals with that one. We
have it to some extent already, but one way of looking
at our data, and we do look at it this way, is civil
versus criminal. Should we have different tracks,
different rules for civil cases versus criminal cases?
Our proposals don't contemplate that, but they
certainly could.

So that's my seven minutes on my watch. We
will be meeting with this committee. I want to push
this process forward. I believe it's possible to
reach consensus on this, and I hope that the Bar will
work with us on it.

(Applause.)

CHAIRPERSON ROMBACH: It's remarkable he
explained such a complex topic. I have been at other
presentations where he had a whole slide show and
Power Point presentation with a lot more detail. So if somebody wanted to know more, again, they can turn to -- I know Victor is here. Victor, you don't want to say anything more than the Chief Judge, right?

MR. VALENTI: Not at this time.

CHAIRPERSON ROMBACH: You are reserving your rebuttal for some future point.

MR. VALENTI: Hopefully we won't need it at that point.

CHAIRPERSON ROMBACH: Well, I can assure the Assembly that as we work through these issues that we will keep you posted, and this very well may result in yet another presentation to our calendar in September in order to be able to have some meaningful input to the Supreme Court before their administrative hearing.

Next we are going to hear from our Assembly committee reports, and we will start that with William Knight from the Assembly Review Committee. Bill.

MR. KNIGHT: Thanks, Tom. I am the chair of the Representative Assembly Review Committee, and we have a really cool Power Point presentation for you today to keep you awake on this.

The Representative Review Committee has been really active the past several years now, and I want
to go through today to give you kind of a past, present, future overview of what the Assembly Review Committee has been up to and where we intend to be going.

Last year we were meeting almost monthly in trying to get our arms around what the Representative Assembly was doing and what it should be doing and where it should be going, and almost a year ago to the day we had a similar presentation by the Review Committee chair, Elizabeth Jamieson, and we had stated then that we were going to be moving forward and were trying to get everybody's input into, especially from the Assembly, what it was we were trying to do as the Representative Assembly.

And at that time there was a lot of talk about whether the Assembly was even relevant with the planning for the Bar overall, and I think a lot of us looked to ourselves as to what were we doing here on these Saturdays and what were we accomplishing.

So we did kind of a self-assessment. We went to many sources for information and their ideas on this. We also did a survey both within the organization and without, within the Assembly and without, and several issues were identified. And the objectives of the Assembly were stated fairly clearly
in these surveys as to what they thought we should be
doing as our role, what we were achieving, and what we
should be achieving, and then also that we needed to
enhance the communication, both internally and
externally, within the Assembly and within the Bar and
within the legal community as a whole.

Last September we spoke about what we were
attempting to do and what we thought the Assembly
should be doing to meet those issues that were
identified. We talked about communications with the
Assembly members with the list serve, a website,
having our meetings more effective. We attempted
several things that some of you may recall. We
presented the survey results as to what the membership
were thinking about the Assembly and what they were
expecting from us, and we prepared a final report of
all of our work, what we had found in our surveys, and
we came up with four recommendations and proposed
resolutions.

And, if you recall, those resolutions were
presented to the Assembly, and each one was adopted by
the Assembly, and we have been moving forward now from
that base of those four resolutions.

From those four resolutions we can kind of
narrow it down as to three issues that we were
addressing -- Assembly liaisons, improved communications, again both amongst the Assembly members and within the Bar and within the legal community as a whole, and then also notice of Board actions and policy issues, timely notice of those actions that the Bar is facing and which the Board has been addressing.

As I said, the Assembly adopted those four resolutions last September. The first one, Assembly liaisons for State Bar sections, and almost every section now has an Assembly liaison. These liaisons we have had for a period of time for several of the sections. Some of you may have been a liaison to a section and didn't even know that that was your purpose in being on that section.

I think we, with our leadership, we have gotten liaisons for most of the sections, if not all of them now, and the liaisons know why they are there, and they have a strong and effective function that they are performing.

We have incorporated into our Assembly meetings now permanent space on our agenda for reports from these section liaisons. Today we have the Appellate Section and then the Prisons and Corrections Section reporting. This is something that had not
been done in the past.

The second resolution involved liaisons for
the State Bar committees, and, again, almost every
committee now has an Assembly liaison attending those
meetings. Those liaisons, again, have a better
understanding of their roles, and they are much more
effective in what they are doing in their
communications back and forth between the Assembly and
these committees.

At our last meeting we had a liaison report
from the Ethics Committee, Judicial Qualifications
Committee, and then an informational report from the
Civil Procedure and Courts Committee.

Today the presentation is more -- less
informational and more direct as to the actions that
are going on, and we had a report from the U.S.
courts.

The third resolution involved the interaction
between the Assembly, the sections, and the
committees, and, again, we have the permanent space on
our agenda for these reports. We had reports at our
last meeting on the Section Summit report from Kim
Cahill, and also the annual meeting report from Scott.

These are the kind of things that are
bringing back to the Assembly an explanation as to how
we are all working together -- the sections, the committees, the Assembly, the Board -- how it's all working together now as a team and we are not out there sitting by ourselves. Today we'll have Programs and Services report from Nancy Diehl that she presented. These kind of things are not only informational to us, but it's something we take back to the membership that we are supposed to be representing.

And the improved communication regarding relevant issues, the sections and committees have been welcoming these liaisons into their meetings, and it has helped us a lot with becoming more relevant to the whole Bar, because these sections and these committees, they have been working very, very hard year in and year out, the members in those sections and committees are very committed to what they are doing and their missions, and they are pleased with the increased access that they now have to the general membership through the Assembly, that they have the support of the Assembly in the work that they are doing, and that they actually have some means of getting their work out to the public and getting it not only recognized but supported so that their work is being more effective in what they are trying to
accomplish.

The fourth resolution was the notice of Board actions and policy issues. Again, we have put permanent space on the Assembly agenda for updates from the Bar leadership, and these updates regard both pending Board activities and their future activities. These can be found on the website for the Bar if you want to find out ahead of time what's going on with the Board of Commissioners and also with the handouts.

Today we provided to you the minutes from the Board's meeting back in January, and then they met again yesterday, so we provided the agenda. We obviously don't have the minutes for that meeting yet. They haven't been approved. But you can see what work they have done and what work they are facing now, what's on their agenda.

We have been fast tracking some of these issues through the Assembly, some of these policy issues that is our job to be working with, and the most obvious and I think the best example of this was the adoption or support of the Strategic Plan and the dues proposal at our last meeting. That was something that clearly is a policy issue that the Representative Assembly members should be addressing and should be weighing in on, and that's something that actually was
happening fairly quickly.

Once these things start to roll, they move pretty fast and action has to be taken, and we are not necessarily the one setting up the time frame on it, so we have to be able to react to that. We did very well. Most of our committees, I think, were involved in preparing for that so that it was presented to the Assembly properly and fully at our last meeting. We were able to address it as an Assembly where we felt we were well informed, where we could take serious action on it. That was not only appreciated by the rest of the Bar, but I think they felt that we took it seriously and addressed it in an appropriate manner, and it has, I think, increased our standing in the Bar community.

And then the Assembly leadership included in periodic meetings with the Supreme Court. Our chair and our chair-elect have been invited to meet with the Supreme Court when they have their meetings. It's a great way for the Assembly to stay on top of what issues are going to be coming down the road, what policy issues the Supreme Court has been contemplating, what things we can expect to come to us, and so we get a little bit of a heads up there with having our leadership involved in the early
stages of what's happening at the highest level of these policy decisions.

The Assembly has really good representation on the Board now. We have four former Assembly chairs -- Brinkmeyer, Schnelz, Cahill and Ulrich. They are on the Board at this time. We have other Board members who have been deeply involved in Assembly work in the past, and the Board now has a membership composition that I think thinks of the Assembly when they are making their decisions. The Board is considering how they can use the Assembly and how the Assembly can use the Board to work together and serve our membership so much better now.

The successes that we have had, I have talked about the most recent one with the Strategic Plan and the dues proposal. We have been implementing our resolutions that we passed last September. I think that has paid off. I think it has been a benefit to both the Assembly members here but also to the membership that we are representing, and we have found that with this type of action where the Assembly is getting together, it's getting the reports from the committees, the committees are being called upon by the Assembly leadership to support what's going on prior to the Assembly meeting so that things are being
presented. This is something that I think we can
relate back to what the Assembly Review Committee has
been trying to implement over the past several years,
and it's been paying off.

The Assembly leadership is actively seeking
substantive policy issues for the Assembly. I talked
about our leadership being in these meetings with the
Supreme Court identifying some of these policies. The
liaisons that we have to the sections and committees,
those are the places these policy issues are first
developed. The sections and committees are hearing
this long before I am going to hear something if it's
not in my area of practice.

For the future some of the things that we are
doing now have been driven by the Representative
Assembly and the Representative Assembly leadership,
and what we are hoping to do is we are hoping to
institutionalize some of these things.

The leadership is working to place these
items on the agenda. It's a standard act that we are
doing now, but it's our leadership driving that, and
we wish to make sure that that's institutionalized so
that these things will always be part of our agenda,
we will always have liaisons on these sections and
committees, all of these actions that we have found to
be successful actually become institutionalized within the Bar.

What we are hoping to do next as a Representative Review Committee is to define policy. We have as our charge as the Representative Assembly to be the final policy-making body for the State Bar, and we need to be proactive rather than reactive to these policy issues as they come down the road. We need to identify them early and take action on them as the Assembly deems appropriate.

The Michigan Court Rules state that we are the policy group who is to work on dues issues. We did that, but it was something that as an Assembly we saw coming down the road and we reacted to it quickly and we were flexible enough that we could get our committees together, have hearings on the matter and then present it to the full Assembly so that when we made our decision on that it was a well-informed decision.

The Keller permitted issues, those are the types of things that we have addressed in the past, that we are the proper forum to be addressing those types of issues, and we have listed here some of the things that we went back and reviewed what we have done in recent history as a Representative Assembly.
Some of the issues, policy issues that we have
discussed here, some of these you will recall. We
have had some very informed presentations, we have had
some fairly dynamic speakers, both from the Assembly
and from the podium on these things, and I think we
have had some discussions that were at a higher plane
than we have had at least in the distant past at the
Representative Assembly. We have moved up quite a bit
in the types of things that we are handling.

What we are hoping to do is to somehow come
up with a definition of what these policies are. If
you read these, these are kind of all over the board,
but they are certainly the types of issues that our
membership are discussing and need to have a consensus
form somehow so that it can be stated to the public on
some of these things, and this is the place to be
doing that.

We are hoping to establish guidelines to
ensure Assembly involvement within the Bar activities,
to seek and identify policy issues, who will be
seeking these issues and how will they be identified.
We need to be able to move quickly on these things.
Again, our most recent example is our Strategic Plan
and Bar dues when we moved on that in our last
meeting.
To redefine Assembly committee responsibilities. We have a lot of committees that are fairly active. Some have been fairly inactive, but when we have called on them they have pulled together and have worked really well with all the other committees.

We need to ensure Assembly committee coordination. Again, that was done by our leadership most recently. That's something that we would hope to be able to more institutionalize as to how it will be done for the future leaders that may be coming down the road years from now, and then to ensure the financial stability of the Assembly. The Assembly is an expensive component of our Bar, and the committees that we have are also expensive. The more we use them, the more expensive they become. We need to ensure that there is adequate financial support for the work that the Assembly is choosing to be doing now.

And then continue the Assembly Review efforts to ensure an effective and efficient Assembly. If I can, I would ask all of you to consider volunteering for the Representative Review -- Representative Assembly Review Committee for our work in the future. It's a really active committee. We have been very
involved. Last year we were meeting almost monthly. We have met twice so far this year. We are going to be scheduling a meeting right after our meeting today. We are going to compare calendars to make sure we have enough participation on that important question of defining policy at our next meeting.

So if I can, I will give you a little, use this a little as a commercial and ask you to try to get involved in that committee. We will take your input at any time, and if you wish to join the committee, we don't turn anyone away.

I would like to thank the members of the committee who are listed up there. Like I said, we have been very active. It takes a lot of time. Robert Feldman, Timothy Fusco, Claire Groen, Elizabeth Moehle Johnson, Lynn Moon, myself, Judy Lincoln, Robert Spada, Tom Rombach, Dan Levy, and Elizabeth Jamieson who are keeping the committee moving forward from their participation last year. Thank you very much.

(Appause.)

CHAIRPERSON ROMBACH: We actually have one other report. Unfortunately we had envisioned Chris Ninomiya being here from Iron Mountain. He has been delayed in a trial. I guess as elected prosecutor in
the great north you actually have to try some cases,
and he is in the process of doing that, so between his
transit here and back he thought it best that he stay
close to file on this one. So in lieu of Chris being
here I am going to give that report because it is
fairly important.

I would like to note that right now this
committee, the Nominating Committee, is focused on
filling the vacancies in the Representative Assembly,
both now and then recruiting lawyers to run for open
seats in the elections that are being conducted from
June 1st to June 15th.

To that end, if anybody wants to pick up a
nominating petition and you currently sit in the
Assembly and haven't done so, the deadline for that is
actually coming up on April 30th. The petitions need
to be postmarked, so if you are from a big circuit,
say for instance Wayne County, you can probably get
the necessary five signatures even at the Assembly
over lunch and turn those in. So for those of you
that have seats that are expiring.

For those of you that don't quite know what's
going on, you can turn to the March Bar Journal that
includes some details as to who is up and who isn't.
Also included in there is a nominating petition as
well, so if you would like to submit the names of your friends, relatives, anyone you have a score to settle, you know, to be nominated, that would be a good idea.

I would note that our goal by September is to have every one of these seats filled by our next meeting, and also 39 of the judicial circuits are going to actually be voting on 61 of the spots, so considering the Assembly is 151 people, it's pretty historic that we have 61 availabilities, both the people that are sitting here and possible vacancies.

Secondly I want to point out that the Michael Franck award is, as usual, our highest award from the Assembly, and that's going to be awarded in September. We are seeking nominations at this juncture. The deadline is July 25th. We prefer those to be in writing so the committee would have a better rendition of the background of the individuals that merit this consideration. We have received two nominations already of eminently qualified people, but we can always use some more thoughts from the Assembly or however we amended the ones we already have in front of us.

And, thirdly, that we are also researching for Representative Assembly clerk, for those of you may be so inclined to sit up here and get the
attention of everyone else here, that would be a great idea. I encourage you to do so. It's been a very rewarding career that I have had so far.

And I would acknowledge right now that we have a meeting upcoming of the members on the committee, Bob Gardella, Amy Gierhart, Mike Piatt, Mark Teicher, David Lady, and Francisco Villarruel, and hopefully we will get those details to you shortly, as soon as Chris comes with that information, but that will be this week so I will give you the heads up.

I appreciate your attention. That's the final report, and now we will get to the blood and gore of considering some of these proposals. Also, I want to make sure that our Assembly parliamentarian, our Chief Judge from Washtenaw County, Archie Brown, has something to do and some guidance to provide me with at this juncture.

I am going to call up Richard Bisio. He is the chair of the Civil Procedure and Courts Committee. He previously had a proposal in front of the Assembly that we had actually tabled, and his committee went back with the transcript of our comments for that matter and had reconsidered their proposal. The results therein are actually included in your packets.
Essentially I think this is going to be near the same submission, and he will give you some insight as to why his committee feels very strongly that the Assembly should act favorably on this legislation.

Richard.

MR. BISIO: Thank you, Tom. The purpose of this proposal is to encourage prompt resolution of threshold issues in cases and discourage holding back dispositive arguments until late in a case, and it was prompted by a number of recent decisions, mainly in the medical malpractice area, strictly construing the statutes about notice of intent to sue and affidavits of merit and affidavits of meritorious defense.

Part of the proposal applies only to medical malpractice cases, part of it applies to all cases, and I will just review the highlights of the proposal which is in your material.

First, the amendment to Rule 2.112 would set a deadline for parties to raise challenges to a notice of intent to sue or an affidavit of merit or affidavit of meritorious defense in a medical malpractice case. So that those should be raised early in the case when perhaps it is possible to correct any defects and when perhaps the statute of limitations has not yet run, but in any case so that those things are focused on at
the beginning of the case rather than at the end of the case, and hopefully that would encourage decision of cases on the merits rather than on a technicality of a defect in some of those documents.

Secondly, and along with that, the amendment to 2.118 would provide that an amendment of an affidavit of merit or affidavit of meritorious defense would relate back to the original filing date of the affidavit. That, again, parallels the provision for amendments of complaints and other pleadings, and we believe it's consistent with case law.

The other part of this proposal applies to all cases. It's not limited just to medical malpractice cases, and it is to also encourage early addressing of dispositive issues. The amendment to 2.401 provides that the court can include in a scheduling order a deadline for filing summary disposition motions and a deadline for challenging the qualifications of expert witnesses.

There is a corollary change to 2.116 that also simply clarifies that rule. The rule as it presently stands can be read to prohibit a court from setting a motion cut-off date because it says certain summary disposition motions can be raised at any time. The amendment that we are proposing says unless the
court orders otherwise those grounds can be raised at any time.

So those are the proposals. I want to address some of the questions that came up at the last Assembly meeting. There were suggestions at that meeting that, first, there should be no deadline at all for making summary disposition motions because issues come up late and sometimes it's appropriate to raise a motion even on the eve of trial if that would avoid the expense and the time of going to trial.

There was another proposal that all summary disposition motions should be made before case evaluation so that people are not faced with an argument at case evaluation that a party is going to be filing a motion for summary disposition, the case is going to be thrown out so the case evaluator should take that into account.

The committee considered those proposals when you sent it back to us, and we think that the rule should not be limited in either way. The proposal we are making simply acknowledges what many judges already do, which is setting a motion cut-off.

If in a particular case it's important to have a motion heard early in the case or if it's important to have a motion heard after a motion
cut-off that's already been set or later on in the case, that's a matter we believe for the court's discretion in a particular case, and the practices vary from court to court and judge to judge as to when judges set motion cut-off dates. Sometimes they are before case evaluation, sometimes they are after, sometimes they are before discovery is completed and sometimes after, so we don't believe that it's appropriate to set a strict rule in the rules but rather to leave that for the discretion of the judges in a particular case. And our proposal is simply to acknowledge the court's authority to set a cut-off date for summary disposition motions.

That's pretty much what the proposal is, and if you have any questions I would be glad to respond to them.

CHAIRPERSON ROMBACH: At this point, before we make the motion, I would want to allow any section or committee that has comments to come forward at this moment and lend your two cents to the discussion. Seeing none present at this point and at that point then I will recognize Gary Peterson from Portage to make appropriate motion. Gary.

MR. PETERSON: Thank you. Gary Peterson from the 9th circuit. I am also a member of the Civil
Procedure and Courts Committee with Richard, and I would move that the Assembly approve the proposed changes to the Court Rules that have been recommended.

CHAIRPERSON ROMBACH: So it's been moved. Is there a second present to that motion?

MR. BRECK: Support.

CHAIRPERSON ROMBACH: Kevin Breck from the 6th circuit, and Gary has noted he is our liaison to the committee, so any question you might have could be directed as well to Gary.

Is there any discussion from any members of the Assembly? Again, just state your name and number for the record. Mr. Andree I am sure can do that. He has been up here before.

MR. ANDREE: Gerard Andree, 6th circuit. Since I believe in truth in advertising, I will also tell you that I speak as a person who for the past 27 years has been defending doctors and hospitals in medical malpractice litigation, and since I believe in truth in advertising I bring that up because obviously for those of you who do not do medical malpractice perhaps you don't appreciate the flavor of what's being proposed, but this is straight out of the MTLA without them having the courtesy to come and tell you it is. I think if this is going to be a plaintiff's
Bar motion, they at least in fairness ought to identify it as such.

I have a number of different objections to this proposal. First of all, on a technical matter, it talks about challenges to an affidavit or the challenges -- yes, the affidavit of merit being done within 63 days, and the comment is made in the proposal that this would, and I will quote, this would -- in most cases this should give the opposing party sufficient time to determine the qualifications of the person signing the affidavit.

Well, that's a very nice statement, but I would like to know how, especially since affidavits must be filed with the complaint. You have 91 days from the time the summons is issued, many times summons are not even served within 63 days, so if you are going to say that you have 63 days from the time that the affidavit is filed, the affidavit is filed with the complaint, at what point are you going to have 28 days even to answer the complaint much less initiate any discovery to find out the qualifications?

I would think that 63 days after the filing of an answer would even be oppressive, but this is from the time of the filing of the affidavit.

Another section of this proposal indicates
that, puts in these magic words, and I quote, unless the court orders otherwise. I mean, why don't we just accept this for what this is. Any time you have a court rule that sticks in this phrase unless the court orders otherwise, you have no court rule.

I am old enough to remember what I refer to as the bad old days when you couldn't tell from one circuit to the next how a judge was going to enforce a court rule or much less, for those of you who don't practice in a larger circuit like Oakland or Wayne, you didn't know from one floor to the next how a judge was going to enforce the court rule or sometimes how even one judge was going to enforce the court rule from one case to the next.

The reason that we have court rules is so that there is uniformity, and any time you have a phrase that says unless the court orders otherwise, you are inviting no court rule.

This one aspect of the case that talks about that you have to bring up and tell the other side that they don't have a good enough expert. I mean, let's not forget the fact that this is an adversarial relationship. I am representing a doctor. Somebody is suing my client. I see that this person has no basis whatsoever for his opinions. I then have to go
to the other side and say, hey, listen, you don't have a good enough expert against my doctor. You ought to go and get a better expert. I mean, does the conflict of interest, does that strike anybody as something that's raised here? I have the duty to go tell the other side that they have to go get a better expert against my doctor or my hospital?

Actually what this is -- I mean, the statute is very clear. The statute is clear as to what the requirements are for experts. The statute is clear the requirement of what you have to do. In effect what you are saying here, ladies and gentlemen, is that when one side's malpractice, when one side commits malpractice, I have a duty to tell them you are committing malpractice here by not having a good enough expert, so I have to tell you that so it won't get in your way of your claiming malpractice against my client. I think that's ridiculous.

I don't see any duty that I have on the part of my client to go tell another side they have to go get a better expert against my own client.

Last point -- I think I may have exhausted my five minutes. I think this is a seriously flawed and very biased attempt to get around the Court Rules and it should be defeated.
CHAIRPERSON ROMBACH: Thank you very much, Gerard. At this point, because there were some
contents raised, I am going to refer back to
Mr. Bisio. Perhaps he can address a couple of these
issues, and if anybody else wants to comment, then
please make your way to the microphone during this
response.

MR. BISIO: To the question of whether this
is an MTLA proposal or a plaintiff's Bar proposal, our
committee is composed of both plaintiffs and
defendants attorneys, attorneys representing both
plaintiffs and defendants from large firms and small
firms, and we have a federal judge and a couple of
state judges on the committee. We have a wide
diversity of experience and viewpoints on the
committee, and this is something that we agreed to,
including people who represent defendants. So I don't
think it's fair to say that this is a plaintiff's
proposal.

On the question for the deadline of
challenging an affidavit, the rule did not make that
an inflexible deadline. It allows a showing of good
cause to make a challenge after the times that are
presumptively set in the rules. I think it probably
is a good point that the time should start running
from the time of service rather than filing of the affidavit, because it is a good point that it's filed but perhaps not immediately served. So that may be an appropriate modification.

On the question of challenges to expert qualifications, the proposal is aimed mainly at the qualifications that are set out in the medical malpractice area which sets out some very specific requirements for the types of certifications that expert witnesses must have, matching those certifications to the certifications of the defendant.

Those types of challenges, I think, are things that can be raised as a threshold issue early on in the case rather than save it to the end of the case, and the proposal is aimed simply at resolving those questions early on in the case so that, if it's possible during the scheduling of the case, those problems can be cured and the case can be decided on the merits rather than on the question of the technical qualifications of the expert witness.

CHAIRPERSON ROMBACH: Thank you. Typically I am not going to have everyone respond in that nature, but, again, because some question had been raised about the committee, I thought it was important.

Mr. Rotenberg.
MR. ROTENBERG: Steven Rotenberg, 6th circuit. My comments are mostly with regards to the modification, the proposed modification to 2.116, and I really don't see the point in it. There is an automatic -- the way the scheduling rule is set up, there is an automatic cut-off about three weeks before trial for filing, because you need to give three weeks notice to the other side. And I can forsee situations where right up to the day, up to very close to the day of trial one can have situations where you might want to invoke summary disposition because they haven't failed to, filed a claim or a defense and the case hasn't developed itself sufficiently for one side or the other to determine that it's prudent to file a motion at that time.

So I just don't see the reason for doing it at all. If a circuit or district wants to put in their local rules they are going to put it in there, there are provisions in the Court Rules for them to do that. I have seen scheduling orders that do, you know, cut off motions at a certain date. I just don't see why we need to standardize it and make it that rigid.

The other thing too is unless the court orders otherwise, I can see that being potentially
ripe for abuse. You know, no judge wants to have their docket cluttered up on motion call day. Unless the court orders otherwise, they could, you know, you could have somebody do something extreme such as saying, okay, fine, you have to file it with your first responsive pleading. And I agree with the previous speaker that the way it's written that you will create a situation where there is no rule, so I just don't see the reason for adding that language there.

CHAIRPERSON ROMBACH: So are you speaking then against that portion --

MR. ROTENBERG: I am speaking against that portion because it makes it unclear, and I just don't see a justification for doing it

CHAIRPERSON ROMBACH: So you can either ask to amend that portion if you are in favor of the resolution in the rest of its entirety, or you could sit down and ask somebody else to do that, or you can sit down anyway.

MR. ROTENBERG: I think I am going to sit down. I am just saying I don't think it's a good idea.

CHAIRPERSON ROMBACH: You are speaking against it at this juncture generally.
MR. ROTENBERG: Correct.

CHAIRPERSON ROMBACH: Thank you, Steve. Does anybody else have any comments or any questions of anyone that has spoken? His eminence, Mr. Brinkmeyer.

MR. BRINKMEYER: Scott Brinkmeyer from the 17th circuit. Did I hear the proponent suggest that he would accept in Rule 2.112(L)(2)(b) as a friendly amendment the exchange of the word "filing" for the word "service."

CHAIRPERSON ROMBACH: Actually we need to address, rather than the proponent, we would need to address the maker of the motion, which is Mr. Peterson. If you are suggesting a friendly amendment, if Mr. Peterson adopts that and the second would concur, then we could proceed without an adversarial proceeding on that topic.

MR. PETERSON: I would accept that as a friendly amendment to change 2.112(L)(2)(b) so that the remainder of that sentence after the comma would read, Must be made within 63 days of the service of the affidavit on the opposing party.

CHAIRPERSON ROMBACH: I believe that Nancy Brown, in charge of communications of the State Bar, is incredibly efficient, and I believe that change is being made as we speak. So from what I understand --
and who, again, was the second on this? It was Mr. Breck. Is that okay with you, Scott?

MR. BRECK: Yes.

CHAIRPERSON ROMBACH: So, Gary, you have accepted as a friendly amendment as proposed by Mr. Brinkmeyer?

MR. PETERSON: Yes.

MR. BRINKMEYER: Next, although I do not practice in the medical area, I do practice extensively in civil litigation, and I am persuaded by the first speaker that the proposed change to 2.116(D)(4) is inappropriate. If there is one thing that at least I like to see and most of the attorneys that I practice with or against like to see, it is consistency in rules, court rules, and I think in large part by adding what you have to 2.401(B)(2)(a)(vi), you pretty much take care of that anyway. Because if you are going to get the judges now to have to order deadlines for summary disposition, then you can argue at that point whether or not a shorter or longer time for filing would be appropriate under (C)(8), (9) or (10), so I would move to amend by striking the proposed change in 2.116(D)(4) and ask for a second.

VOICE: Second.
CHAIRPERSON ROMBACH: Actually, again, you are going to have to ask Mr. Peterson, because he is the maker of the motion.

MR. BRINKMEYER: I am proposing --

CHAIRPERSON ROMBACH: You are proposing now a new amendment?

MR. BRINKMEYER: Correct.

CHAIRPERSON ROMBACH: You are not asking him whether he likes it or not?

MR. BRINKMEYER: If he will accept it --

CHAIRPERSON ROMBACH: I am just trying to be efficient here.

MR. BRINKMEYER: If he will accept it as a friendly amendment, I am happy to do that. We won't even have to vote.

MR. ROMBACH: Gary, again, it's up to you. We are going to propose it as a friendly amendment. If you are not in concurrence, then Mr. Brinkmeyer is in a position to move that through the amendment process in voting. What do you think of his proposed change to 2.40 -- where am I at?

MR. PETERSON: I would not accept it as a friendly amendment.

CHAIRPERSON ROMBACH: I didn't suspect so, but, again, I want to be as consistent as we can.
At this point the maker of the motion, not having accepted it, Mr. Brinkmeyer.

MR. BRINKMEYER: Let me make clear what this would mean. If we were to strike the proposed 2.116(D)(4), you would then retain and it would remain unchanged what is currently in 2.116(D)(3) on the first page of the proposal.

CHAIRPERSON ROMBACH: And you are applying this then across the board to both matters in tort and matters generally in civil as well, because that aspect, from what I understand, doesn't have any particular ramifications just in medical malpractice, that is across the board.

MR. BRINKMEYER: That's correct, and that's my point, and hopefully my second would agree with that, whoever that was.

CHAIRPERSON ROMBACH: So Mr. Brinkmeyer is in search of a second to his resolution.

MR. ROTENBERG: Second.

CHAIRPERSON ROMBACH: Mr. Rotenberg will second that, and, again, we will proceed with debate. Considering that this is actually a new aspect of this, everyone's previously used five minutes is wiped clean and anyone can discuss the proposed amendment. Is there any mind to discuss this? Okay.
Hearing no discussion from anybody on the floor, we will move this to a vote, and what we will do is we will say all in favor please signify by saying yes.

All those opposed say no.
I believe that the yeses carried. That amendment is adopted, and Nancy Brown has made or soon will make the appropriate change striking item 4 from 2.116, summary disposition.

Are there any other further comments?

Mr. Brinkmeyer.

MR. BRINKMEYER: You also have to leave 3 unchanged, so we have to remove the strikes from 8, 9 and 10.

CHAIRPERSON ROMBACH: Thank you very much for that clarification. And, again, now we are speaking to the primary motion as Mr. Brown points out, anything people want to discuss, and if so, please go ahead, get up to the microphone and state your name and circuit for the record.

MS. LIEM: Veronique Liem, 22nd circuit. I have actually a couple questions, one on the first amendment concerning modifying the filing language to service of the opposing party language. I have two questions. One, what if you have several opposing
parties, what if not all opposing parties are served, and shouldn't that be addressed as part of the amendment, because when does the clock start ticking essentially is my first question.

The other question I have is I am not sure I understand why we need a relation back amendment on the amended affidavit of merit if we have a very short time frame for objections, and I am asking questions on that as well.

CHAIRPERSON ROMBACH: Why don't we address those in order. Basically the amendment that we had passed with regards to service on a party, you are asking for clarification as to how that would come about. I could either address that I guess to Mr. Peterson, it's your motion.

MR. PETERSON: Obviously a party who is served would have the option if they choose to challenge it, they can file a challenge. Any party can file a challenge. So if there are multiple defendants, each and every defendant could file their own challenge. One defendant may choose not to challenge it, another may, and it's up to the individual party within that time frame of service. If they choose to challenge it, then they have to abide by that time deadline in order to file their
challenge.

CHAIRPERSON ROMBACH: Does that clarification meet with your needs for that?

MS. LIEM: Yes.

CHAIRPERSON ROMBACH: How about the second matter now. Would you like to address that question to Mr. Bisio? Would that be best? Richard.

MR. BISIO: The relation back provision was intended to resolve statute of limitations problems. It's, as you point out, less important if there is a short deadline for challenging the affidavits, but it still may be an issue in some cases where the case is filed at the very end of the statute of limitations.

MS. LIEM: May I comment?

MR. ROMBACH: Yes, go ahead. It's your question. You still have the floor. You need to go up to the microphone, though, (a), for our hearing impaired like myself, and secondly for the record to be kept. Go ahead.

MS. LIEM: Veronique Liem, 22nd circuit. I have problems with that provision because I believe there is a certain obligation on the part of the plaintiff to provide a reasonable affidavit of merit, and that would give too much latitude to provide a sloppy one or an insufficient one early on, so
personally I would move to strike this portion of the proposal.

CHAIRPERSON ROMBACH: So you are moving that we amend that by striking that portion of the proposal?

MS. LIEM: The relation back amendment, yes.

CHAIRPERSON ROMBACH: Is there a second for that initiative?

MR. ANDREE: Second.

CHAIRPERSON ROMBACH: Whose got the second?

Gerard Andree of the 6th circuit.

Basically we are talking about 2.118(D), is that where you want the correction made?

MS. LIEM: Yes.

CHAIRPERSON ROMBACH: Nancy, do you have that -- and make sure, ma'am, that we will have that done to your satisfaction and Mr. Andree's satisfaction in the rule as displayed on the overhead so that we get this right. If you would just read off perhaps --

MS. LIEM: I would strike to amend in a medical malpractice action, amendment of an affidavit of merit or affidavit of meritorious defense relates back to the date of original filing of the affidavit. I am moving to strike that language.
CHAIRPERSON Rombach: So basically that is as corrected on the screen is the way you want it?

MS. Liem: Yes.

CHAIRPERSON Rombach: Mr. Andree, does that meet with your approval?

MR. ANDREE: Yes.

CHAIRPERSON Rombach: Tremendous. That is as a proposed amendment and seconded, now open for debate. Anybody, again, can speak to this because all the five minutes are erased.

Hearing none, what we will do is we will move that for a vote.

All those in favor of striking the language as proposed signify by saying yes.

All those opposed to striking the language signify by saying no.

The Chair has to make a ruling. Actually the Chair is going to ask, because the Chair is uncertain and because, again, I have hearing defects, I am going to ask that we do this by standing, and I would have Dan and Elizabeth help count on this and typically Rules and Calendar. Lori could you help them out too. Lori Buiteweg our chair up here in this endeavor.

So if Lori you can take a third, Dan, you take a third and, Elizabeth, take the other flank here.
All those in favor of the striking the language, please stand at this moment.

(Vote being counted.)

CHAIRPERSON ROMBACH: Madam clerk, 28?

Twenty-eight is the magic number to beat. All those against this proposal please rise now.

(Vote being counted.)

CHAIRPERSON ROMBACH: Thirty-eight. That motion fails by ten. We are back now to the case in chief, the main motion. Is there any further comment on that?

We have one successful amendment which will be considered in the main motion. At this point we will vote up or down as proposed, and as proponent it would be most proper to allow Mr. Peterson carrying the burden of proof here to have final comment if he chooses.

MR. PETERSON: I don't have any further comment.

CHAIRPERSON ROMBACH: Mr. Bisio.

MR. BISIO: I don't have anything.

CHAIRPERSON ROMBACH: Hearing none, we will move to a vote. All in favor of passing this resolution as proposed and amended, please signify by saying yes.
All those opposed signify by saying no.

In the opinion of the chair the ayes, the yeses have it. The resolution passes.

At this point we are going to turn to our next item on the agenda. Thank you very much, Mr. Bisio, for your committee's hard work on this topic and your coming back to us for our concurrence in the proposal.

Next item on the agenda will be from the Prisons and Corrections System, the proponent being Stephen Gobbo, the chair of that section. Steve is here with us today. He is going to come up and address us with their proposal that I know has certain interests in the Governor's office. Steve.

MR. GOBBO: Good morning. I am somewhat moved by being here following a Court of Appeals Judge, Mr. Whitbeck, and just following up on some comments that he made. I am going to just talk about the reason why this proposal has been put forth before this Representative Assembly.

I could state it probably in some words that will kind of be flowery or in some way straight to the point, and I guess, as attorneys, coming and dealing with different ideas and issues is probably one of the things of our profession that makes us great.
I couldn't help but notice coming into this room that there was a note by the assignment of rooms, and I don't know if it pertained to this room or to one of the other events taking place, but it was basically a quotation from Tom Watson, who I believe was the chair of IBM. The great accomplishments of man have resulted from the transmission of ideas and enthusiasm. So I am hoping that this body does have some enthusiasm for this resolution.

To get to the point with Judge Whitbeck, he talked about capacity and a problem in terms of production. Obviously the prisons and corrections aspect of the criminal justice system is one that is always dealing with capacity. There are other implications beyond capacity, the concept of justice, the concept of cost, and this proposal goes to the heart of those concepts, and what I would like to do is for the representative body to, I guess, address the resolution that's before you in an open way, and I will be glad to address any other questions that will come up in terms of the resolution. So, having said that, I am not going to say much more.

CHAIRPERSON ROMBACH: What I would like to note is that there is a change to the resolution from what you have in front of you. Mr. Gobbo has been
working on this, as has our vice-chair, Mr. Levy.

Just so you know that you need to follow the language as proposed on the overhead. That's going to be, I believe, introduced as a substitute.

One of the reasons is that certain Keller concerns had been raised as far as this being ideological or political in nature, and some of those concerns had resulted in this motion being refigured for the Assembly's consideration.

Again, the section had initially proposed it not particularly with an eye to anything other than the initiative that they would like to see the State Bar take, and then when our corporation counsel and other forces looked at it, they thought it was more appropriately configured in the manner before you. So thank you very much, Steve.

MR. GOBBO: And I thank the Chair for clarifying that.

CHAIRPERSON ROMBACH: At this point a motion would be in order from a member of the Assembly. Who are you and why do you come here?

VICE CHAIRPERSON LEVY: Daniel Levy, 3rd circuit. I come here because I am a former member and, in fact, chair of the Prisons and Corrections Section and currently I guess I am serving
as the Assembly liaison to the section.

I wanted to point out that the amended language makes it clear that the intent of this resolution is not to adopt any of the particular proposals in whole but to suggest that these are the questions that should be being asked, not suggesting the answers.

I look at this resolution and this process a little bit post-sentencing justice in this state, like a lot of places, has been a little like that notorious balloon effect. We have the habit of squeezing in one place and watching it pop up in another without ever looking at the whole balloon, and the essence of this proposal is that somebody needs to stop and take a look at the whole balloon rather than just squeezing one little part, and for that reason I would move its adoption.

MR. GARDELLA: Second.

CHAIRPERSON ROMBACH: Mr. Levy has made the motion. We have a second from where? Mr. Gardella, right? What circuit are you from, 45?

MR GARDELLA: Robert Gardella from the 44th circuit, I second.

CHAIRPERSON ROMBACH: My readability from here may not be the best, so we are at the 44th
circuit.

At this point it’s been moved and seconded. I next need to turn to any sections or other committees that had been invited to comment if the chair of those august groups are here. Seeing none, then we will turn to Assembly debate. Lisa, go ahead.

MS. KIRSCH-SATAWA: Lisa Kirsch-Satawa, 6th circuit. First of all, I urge you all to adopt this resolution as proposed for many reasons, and those of you who don't practice in criminal law, keep in mind that just because you support something that has to do with crime, it does not mean you are soft on crime.

These proposals will not only help the state budget, but they will help the community as a whole. The reason that they would help the community is that -- and I have never done this before, so my heart is about to bust out of my chest.

Basically research shows that incarceration alone does not do anything to prevent recidivism or to reduce repeat offenders. What prison needs and what the community needs is for them to be educated and to receive services.

Right now, because of the backlog in our prisons and the lack of services available, a convicted sex offender who might only be sentenced to
a period of one year to 15 years will serve probably at least three or four because they cannot get into the necessary one-year program that they are required in order to meet their eligibility requirements for parole.

If we could address some of the mental health issues, the sex offender issues, substance abuse issues, and mental health issues in the pre-trial stages as well as through alternative programs in communities, then the backlog of prisons, the lack of capacity, the need for future prisons and then hopefully a decrease in recidivism would all follow. It makes complete sense for the benefit of everyone that these issues and this blueprint be adopted to be explored as a whole.

The most critical age of prisoners, and this is described in the commentary in the materials, is that we have teenagers to mid-teen prisoners are the ones who really need to be targetted for programs. As our laws become tougher on younger defendants, we see more youngsters, children going into the prison system with all of those mentors to teach them how to be career criminals around them and no intervention that's appropriate at this time.

The community as a whole needs intervention
and needs education for these people. We can't stop
the violence unless we have it. So I urge you to
remember alternatives to incarceration, putting
services in place earlier, and looking at all of these
issues does not mean that we are soft on crime, and I
would be their request for the one who is enthusiastic
about this.

CHAIRPERSON ROMBACH: Thank you, Lisa. Do we
have any other comments going to this proposal?
Hearing none, we will move this to a vote.

All in favor -- and I guess I will ask either
the proponent, do you have anything else to say,
Steve? Go ahead.

MR. GOBBO: If I can make a brief summary and
just give you a brief history of how the ABA proposal
was kind of put together.

The ABA has, under the auspices of the
Criminal Justice Section, has a sentencing and
corrections committee. That committee is made up of
professionals like you, law professors, consider those
professionals in some ways, and people that work
within the criminal justice system in various areas of
the criminal justice system.

Some of the people that are on this committee
have served in very high positions. One of the people
was Mike Quinlan, former director of the Bureau of Prisons under President Reagan, Don Santarelli, former head of the LEAA, which is the Law Enforcement Assistance Agency, which has now basically gone away. However, he served under Nixon.

So when we talk about this proposal, it was really put together by the Sentencing and Corrections Committee of the Criminal Justice Section of the ABA in order to provide some guidelines to the states and territories and the federal government for reviewing things that are out there in the criminal justice system to make it more cost effective, not to mitigate or militate against public safety. It's basically a call with some outline to take a look at things that might just improve the system.

Very similar to Judge Whitbeck's comments this morning about capacity and the issue that with more research people you can move things along and reduce the backlog. With this proposal, at least it gives the attorneys in this state, who I think would have an interest in looking at the justice system, the impetus to move forward. Thank you.

CHAIRPERSON ROMBACH: At this juncture Mr. Levy will waive any final comment and move to the jury's decision.
All those in favor of the proposal as has been amended in front of you today on the overhead, please signify by saying yes.

All those opposed, signify by saying no.

In the opinion of the Chair the yeses do have that one. So thank you very much for your passion, your time, your consideration to Mr. Gobbo and his committee, as well as Mr. Levy.

MR. GOBBO: Thank you.

CHAIRPERSON ROMBACH: We will now move to item 10 on the agenda. That's consideration of the proposed resolution in support of increasing the federal judicial compensation as recommended by the National Commission on the Public Service, the Volcker Commission. Speaking on behalf of Sheldon Light, who was not able to make it as the chair of the U.S. Courts Committee, we have Charles Chamberlain, Jr. from Grand Rapids. He is known as Chip to his friends. I simply refer to him as Mr. Chamberlain.

MR. CHAMBERLAIN: Thank you, Tom. I will try to be quite brief.

As we all know, Article III of the Constitution provides that our judiciary shall serve for life, during which time their compensation shall not be diminished. The realities are that our
founders did not take into account the insidious effects of inflation or the politics of compensation of our federal executives.

District judges, which I will use simply as an example, are compensated at the rate of $150,000 a year. By any comparison, that is far below what you find in the private sectors of similarly qualified people. To compare them to law school deans, they are compensated at a rate of 50 percent. Compared to the average pay of a full professor, they make $50,000 less.

We as a committee believe that we should take a stand. We believe our judiciary is uniquely unqualified to advocate on its own behalf for a pay raise.

There are two aspects to our proposal. One is that we urge that there be -- and I should mention that the proposal is tied to the Volcker Commission report, which is in its entirety in your materials. But there are two recommendations, nine and ten, and the 9th recommendation is the that congress should grant an immediate and significant increase in judicial, executive, and legislative salaries to ensure a reasonable relationship to other professional opportunities. Our resolution just pertains to
judicial compensation.

And recommendation ten is that congress should break the statutory link between the salaries of members of congress and those of judges and senior political appointees.

So there are two aspects to the proposal, one that congress immediately compensate judges adequately, and secondly that they sever the statutory link.

We believe that there may not be a crisis today, but we as a committee believe we want the bench to continue to remain diverse and representative of our community. If something is not done about judicial compensation, over the long-term people will not be attracted to those positions. If they are not attracted to those positions, our judiciary will not be representative of the people whom they serve.

Thank you.

CHAIRPERSON ROMBACH: Since Robert Neaton, our liaison to this committee, is not available at this juncture, I am going turn to Barbara McQuade, I believe, with a motion and order.

MS. MCQUADE: Thank you, Mr. Chairman.

Barbara McQuade from the 3rd circuit. I do move to adopt the resolution in support of increasing federal
judicial compensation as recommended by the National Commission on the Public Service.

CHAIRPERSON ROMBACH: Thank you very much, Ms. McQuade. Does your colleague, Mr. Riordan, second that?

MR. RIORDAN: I second it and I support Ms. McQuade.

CHAIRPERSON ROMBACH: Since you both work in the same office as Mr. Light, that this is kind of a job requirement of sorts.

MR. RIORDAN: I should disclose he is my immediate supervisor.

CHAIRPERSON ROMBACH: I figured I would give you that opportunity, particularly I know federal judges are probably in favor of this too.

MR. RIORDAN: I am sure they are. I haven't discussed it with them.

CHAIRPERSON ROMBACH: At this point does any other member of the Assembly have a comment to make on this proposal? Mr. Piatt.

MR. PIATT: Paul Piatt from the 16th judicial circuit. I just have a comment. I have been practicing law for 34 years, and I have never seen a short line for an appointment for a federal judgeship yet.
(Applause.)

CHAIRPERSON ROMBACH: Are you speaking on behalf in favor or against the motion?

MR. PIATT: Just a comment.

CHAIRPERSON ROMBACH: Thank you very much.

You have added to the confusion of the debate.

Does anybody else have any insights to share with us?

MR. ANDREE: Gerard Andree from the 6th circuit. I think it's important that we pass this resolution for this reason. I think as attorneys and members of the Bar and members of the legal profession we should be proud of the people that serve as our judges, and it has always rankled me that, truth be told, by the time a person gets to the point where they could be a darn good judge, they simply can't afford to be one because of the realities of what we have today. I mean, it's nice to come home to your wife and say, Hey, listen, the president wants to appoint me as a judge. You wouldn't mind my taking a pay cut? And even though there may not be a short line for it, maybe if we paid people the bread and put the best and the brightest on our benches, then that long line would be a long line of better qualified people.
CHAIRPERSON ROMBACH: Thank you very much, Gerard. Does anybody else have a comment on this resolution? You need to go to the microphone, reintroduce yourself to the Assembly.

MS. LIEM: Veronique Liem, 22nd circuit. I just have a brief comment. I want to remind everyone that we are facing significant budget deficits at the federal level which we are looking like we are passing on to the next generation, so that's my comment in opposition to the proposal.

CHAIRPERSON ROMBACH: In opposition. I detected that. Mr. Abel.

MR. ABEL: Matthew Abel from the 3rd circuit. I am not sure whether I support this or not. Clearly I do support adequate compensation for everyone, but I don't think that the federal judges are the people in the system who are the least adequately compensated. There are lots of other areas of the system that need to be better compensated.

Furthermore, I don't know that increasing the pay will attract the best and the brightest. The best and the brightest perhaps already will have made their fortune before they get to the federal bench and won't need the money for that.

And, in addition, if you can't live on over a
hundred thousand dollars a year, perhaps you should
reassess your standard of living. Thank you.

CHAIRPERSON ROMBACH: Are you sure you are
not in favor of that, Matthew?

MR. ABEL: After I have been appointed to the
federal bench I may change my opinion.

CHAIRPERSON ROMBACH: Thank you. Mr. Miller.

MR. MILLER: Randall Miller on behalf of the
6th circuit. Not on behalf, from the 6th circuit.

It wasn't that many years ago that I actually
ran for a circuit court position, and in the middle of
my campaign somebody asked me how much I was going to
be making, and I really had no idea. I wasn't running
for the money. I was running for the principle. I
was running because I felt that that was what I needed
to do. It had nothing to do with the money. That's
number one.

Number two is there are too many judges on
the benches right now that are there because of the
money. They weren't qualified as attorneys in the
first place. It was an easier way to make a living,
so it was just a simple way for them to make more
money than they ever would have made in private
practice, and that's all I have to say on this.

CHAIRPERSON ROMBACH: Again, are you in
favor or opposed?

MR. MILLER: I think it's clear I am against.

CHAIRPERSON ROMBACH: Does anybody else have any insights to share with the Assembly at this juncture? Hearing none, we will move this to a vote.

Actually I need to hear from either Mr. Chamberlain, if you want to say some other words of encouragement or -- you want to say anything?

MR. CHAMBERLAIN: No.

CHAIRPERSON ROMBACH: Ms. McQuade, I know you are dying to say something in rebuttal.

MS. MCQUADE: I agree, I don't think people become judges because of how much it pays, but I think people who are federal judges deserve to be paid more than the first year associates appearing before them. I think they deserve at least as much as run-of-the-mill law professors. And so the fact that they -- I am not saying all law professors are run of the mill. I am saying --

MR. ROMBACH: There are several that are guests here today.

MS. MCQUADE: -- the ones who are run-of-the-mill are making more than our federal judges, and it just seems inappropriate to me. And I think the real problem is it's linked to the
congressional pay increase for cost of living, and for political reasons they are often in a position of not being able to raise the pay, and judges are kind of just swept along with that. So for that reason part two of the proposal is very essential.

So for all those reasons I would ask that this body adopt the resolution.

CHAIRPERSON ROMBACH: Fortunately the professors we have visiting with us are very distinguished and they do not --

MS. MCQUADE: None of them are run of the mill.

CHAIRPERSON ROMBACH: Thank you. So that present company is excluded from those comments. Thank you for forgiving us.

At this point we will move this for a vote. All those in favor of the proposal as before you signify by saying yes.

All those against the proposal signify by saying no.

Okay. Again, I believe that the chair is uncertain, and I am going to call for the division. All those in favor of this proposal please rise to show your concurrence. And I will have the same folks, if they are available. I believe that we will
need to deputize somebody else.

(Vote being counted.)

CHAIRPERSON ROMBACH: Twenty-three. Okay.

All those opposed to this signify by standing at this juncture.

In the opinion of the Chair the noes have it.
I am not going to go to a count. Thank you very much for your indulgence. I guess I will wish Mr. Chamberlain better luck with his next resolution.

As proposed initially -- we are catching up. We are currently at the lunch break. What I suggest is that we take probably ten minutes on the watch and then come back and listen to our eminently qualified, not possibly compensated enough professor from Boston, as well as our ABA expert from Chicago and Elaine Fieldman and Tom Byerley and Mr. Berry. If you can take ten minutes, be back, and we will discuss this final item during lunch.

(Break was taken at 12:22 p.m.)

CHAIRPERSON ROMBACH: Thank you for coming back here so expeditiously while you enjoy lunch, to which we spared no expense, as usual.

At this point I would like to introduce John Berry, our executive director, who is probably most appropriately in a position to introduce all his
friends here who, with his national clout and esteem, was able to land these nationally renowned speakers, as well as a member of his own staff, Mr. Byerley, and our co-chair of our Ethics Committee, Ms. Fieldman.

Additionally, I would like to remind you at the conclusion of this I would be happy to entertain a motion to adjourn. Technically, as well as in order to get credit for being at today's meeting, so I don't have to invoke owners absence policy, please fill out one of the slips that will be available after this presentation on the way out.

Mr. Berry.

MR. BERRY: Thank you. It is really a privilege to introduce the folks at this table. We are, first of all, very lucky within this state to have a tremendous amount of expertise in the area of ethics and professional responsibility, and Elaine Fieldman to my right is co-chair of our Ethics Committee, and I have had the privilege the last two years to see not only her very hard work and the work of that committee, but also to see the technical expertise joined together with the real world approach to looking on how this is going to affect lawyers, and I am very privileged to have the opportunity to work with you and to learn from you.
Tom Byerley from the far left heads up the Professional Standards Division of the State Bar, and as part of that responsibility works with the Ethics Committee. Just as a small plug, I will let you know that he gets engaged in the ethics hotline process, and the numbers to that have risen dramatically over the last several years, and one of the areas of your Strategic Plan is to try to help provide even more services to our lawyers in that regard.

The two guests to my left that I would like to introduce with a little bit more background, the first to my direct left is Nancy Moore. I looked over at her during the last debate, and I was -- I don't know whether you know this, but the executive director does have floor privileges, and I was going to seat my floor privileges to her, but I don't think that's necessary with Nancy Moore.

I have come to know Nancy most recently in the last couple of years during the Ethics 2000 process of the American Bar Association. She is a member of the faculty of Boston University School of Law where she teaches professional responsibility. She has been teaching and writing in the professional responsibility field for over 20 years. She has a long list of writing accomplishments. She is also
chair of the Multi-State Professional Responsibility Examination Text Drafting Committee, and has been engaged in all kinds of activity concerning professionalism and teaching.

From my personal experience, however, I have had the chance to watch her be the reporter to Ethics 2000, and for those of you who haven't had the chance to go to some commissions or committees of the ABA and others, the reporter position is really, in my mind, the key to the whole workings of a committee or a commission. They bring great expertise. They have to work with the voting members of the committee or commission to help them be able to make the decisions.

I have never seen anyone better at what she did, and I also have had a great opportunity to learn from her as well.

Becky Stretch, next to Nancy. Becky and I go back a ways, since 1989 when she came to the American Bar Association. Becky has been the staff liaison to almost every major American Bar Association effort in the area of ethics and professionalism. She worked with the McKay Commission, which worked on the issues concerning the discipline side of how we regulate our profession, and most recently has been working and worked with as the person attached to the Ethics 2000
Becky brings to the experience of this entire process, both a working experience of the technical rules, but also the real world implications of what this means, and I think I will conclude with one remark. The process of looking at the ethics rules, which you will have the opportunity to vote on in September, has been a process which has brought together the sort of technical aspect of rules and how to make sure they are drafted appropriately, but more importantly I think the Ethics 2000 work spent a lot of time working with outside entities to make sure that this really related to the real world and what we should be about as an attorney. So I, with you, look forward to their presentation. Thank you very much.

And I think I will turn it over to, first of all, Elaine Fieldman, who will describe the process that we have been going through in Michigan and how that's related back to the ABA, and after that I will turn it over to Nancy and Becky. Thank you.

MS. FIELDMAN: Thank you, John. First of all, it's been my privilege to serve as a co-chair for the Ethics Committee for the State Bar. We have a terrific committee, very active, very dedicated committee.
And we started with a wonderful product from the ABA, the proposed rules from the Ethics 2000, and what we have done is, first of all, we assigned every rule to a member of the committee. Every proposed rule, they did an analysis on the rule, how it was via change or not a change to the current Michigan rule. We then formed a subcommittee which met three times over the summer and fall to review every single rule, discuss it, analyze it, debate it, and make a recommendation to our full committee.

The full Ethics Committee then considered every rule, thoroughly discussed it, debated it, analyzed it, made a few more changes, and for the most part our task of reviewing the rules has been completed, and the rules, as I understand it, as we recommend are posted on the website for all of you if you want to review them before September. You will get them anyway before September, but they are available now.

The last thing that we have left to do is in a couple of weeks we are meeting to discuss the comments to the rules and to wrap up some loose ends to the rules that we have reviewed.

We looked at the rules with a view to adopt as close as possible the ABA recommendations, and I
suggested to you that we have, and I state to you that we have thoroughly analyzed, discussed, debated from all ends, and I really ask that when you look at these rules in September you keep that in mind. Thank you very much.

MS. MOORE: Thank you very much for having me here. I am delighted to be in Michigan, and I am delighted to be back in touch with John Berry. It's been a pleasure to work with him. He was one of the many liaisons to different organizations that we worked very closely with. He was the liaison from the National Organization of Bar Counsel.

What I want to do, as Elaine mentioned, our understanding is that Michigan, the Michigan Ethics Committee is going to be proposing to you in September proposed changes to the Michigan Rules of Professional Conduct that are very largely, not exclusively, but very largely based on the changes that were originally recommended by the ABA Ethics 2000 Commission.

So what I am here to do today is to tell you a little bit about the Ethics Commission at the ABA level, what motivated the process that led to these changes, and to give you just a quick highlight of some of the rules that we recommended, most of which are being recommended in Michigan, but not all of
them.

The ABA Ethics 2000 Commission was appointed in 1997 and charged with the task of undertaking a comprehensive evaluation of the Model Rules of Professional Conduct. There were several reasons that the ABA decided that this was an appropriate time to undertake such an evaluation.

First of all, by that time the Model Rules had then been adopted in approximately 44 jurisdictions, but with a number of significant variations at the state level. This was both good news and bad news.

The good news is that it gave us an opportunity to learn from state experimentation, and a number of the changes that we proposed were changes that we picked up from the states, and one of the Michigan contributions there is that the Michigan approach on confidentiality and disclosure is one that we thought was a significant improvement on the current or at least the then current ABA Model Rule.

So that was the good news, that states had really made a number of significant improvements and had experimented with a number of different ideas.

The bad news, of course, is that with the increase in multi-jurisdictional practice, having so
much variation among the states makes it extremely difficult for lawyers who practice in different jurisdictions. So that one of our goals was the need for at least some greater uniformity in light of the increase in cross border practice.

Second development was that the American Law Institute had recently completed a ten-year project that culminated in the publication of an entirely new restatement of the law governing lawyers. As many of you know, the restatement did not focus on disciplinary rules but rather identified and elaborated the broader legal framework in which lawyers work. We thought that it was a good time to review the disciplinary rules in light of what we have learned about this broader legal framework.

And, third, obviously there have been dramatic changes in the organization and structure of modern law practice. This includes not only the growth in the size of many law firms but also the increasing variety of forms in which lawyers practice and, of course, changes in technologies available both to lawyers and to their clients.

Now, when the commission first began meeting, it decided very quickly that the rules were not in need of any radical overhaul of the type that had
occurred in 1969 when the ABA moved from the Model Code of Professional Responsibility to the Model Rules. Rather, we thought that the rules were working quite fine, and the Commission then defined its goals, a more limited goal of updating the rule in light of the developments that occurred since their initial adoption in 1983.

Moreover, after some initial tinkering with the first rules that we looked at, the Commission increasingly adopted what we continually refer to as a minimalist approach. As we went along, more and more often the mantra would be repeated, if it ain't broke, don't fix it. What's wrong with the rule? Not is this the best possible rule we could have but rather is the rule working, if it's not working, why isn't it working, let's fix it.

I want to mention just a word about what we thought was the extraordinary openness of the Commission's process in recommending these changes. We met approximately four to five times a year. I think we had something like 50 days of meetings. All of our meetings were open. They were, in fact, regularly attended by a number of lawyers, including our liaisons, such as NOBC liaison, John Berry. We had representatives from the United States
Department of Justice representing prosecutors who
were, I believe, present at all of our meetings. We
had representatives from ALAS, which is the large law
firms self-insurance group, and a number of Bar
organizations and just individual lawyers who were
interested in the process.

They attended the meetings. They were
invited to speak at the meetings. They gave us their
comments. We often reached out to them to ask
questions about how these rules were working in
practice.

We posted drafts all along during the
five-year process. We posted drafts on the commission
website, virtually all of the drafts that we
considered. We received a very large number of
comments, and we revised our drafts continuously
throughout this period.

We submitted our final report to the ABA
House of Delegates in August of 2001. The House of
Delegates began its review at that time, and that
review was completed the following February 2002, and
there were a couple of additional rules that were
considered the following summer, August 2002,
recommendations from the ABA Commission on
Multi-Jurisdictional Practice. Those resulted in
changes to Rules 5.5 and 8.5 that I will mention in a moment.

During the time that the House considered the Ethics 2000 proposals, they adopted virtually all of the recommendations we made, although with a couple of important exceptions.

So what kinds of changes were adopted as a result of the Ethics 2000 process? What I want to do now is just talk about, just to highlight a couple of the more significant changes. There is no way I could possibly report to you even all of the major changes in the time that I have allotted, but just to hit some of the highlights and to sort of group them according to different categories, different types of changes that we made.

You probably know that the number one complaint about lawyers is that they don't adequately communicate with their clients. Among the most important changes that we think we made are those that were designed to clarify and to strengthen the lawyer's duty of communication.

For example, throughout the Rules we replaced the phrase "consent after consultation" to "informed consent" because we thought that would more clearly communicate the nature of the communication that's
required between a lawyer and client.

Secondly, we required that -- we added a number of writing requirements throughout the Rules. For example, we required that conflict waivers be confirmed in writing; that is, recognizing that it's often difficult to get the client's signed consent, nevertheless we thought it was important that there be a writing. We took the proposal from a couple of the states. I think Washington state had a specific requirement that the client's consent be confirmed in writing, so it would be sufficient, for example, to send a confirming letter.

Along these lines, the Ethics 2000 Commission had recommended that fee agreements be confirmed in writing as well. That was one of the recommendations that was not adopted by the ABA. And my understanding is that the first two changes that I mentioned, changing consent after consultation to informed consent and requiring that conflict waivers be confirmed in writing, are being recommended by the Michigan committee and that the Michigan committee, like the ABA, has declined to recommend that fee agreements be put in writing.

In our second category of changes we clarified and strengthened the lawyer's duty to
clients in specific problem areas. For example, we added a prohibition on most client/lawyer sexual relationships, a change that I understand is not being currently recommended by Michigan. I hope there will be a little more discussion on that.

In addition, and a change that is being recommended by Michigan, modifications were made in Rule 1.14, the rule that applies to representing clients with diminished capacities, and the point of those changes was to give additional guidance to lawyers as to what specific types of protective measures lawyers can take, that is, short of requesting a guardianship.

Third category of changes, we responded to the changing organization and structure of law practice, first of all, by recognizing the extent to which lawyers are now serving as arbitrators, mediators, and third party neutrals. We have recommended an entirely new Rule 2.4 that specifically addresses the lawyer who serves in that third party neutral role, and in addition we have modified Rule 1.12 to address conflicts of interest of lawyers who have previously served as the arbitrator, mediator, or third party neutral in a particular matter, what can that lawyer or that lawyer's law firm
subsequently do by way of representing clients in the
same or substantially related matters?

We made important change -- we began the
process of recommending changes to Rules 5.5 and 8.5
that were then picked up by the Commission on
Multi-Jurisdictional Practice, and these are the
changes to Rule 5.5 and 8.5 having to do with -- 5.5
creates a number of so-called safe harbors; that is,
situations in which we make it clear that lawyers who
are engaged in cross border practice will not be
considered to be engaged in the unauthorized practice
of law, and Rule 8.5 deals with the disciplinary
authority of a state to discipline lawyers who engage
in unauthorized practice in their state or even while
engaged in authorized cross border practice,
nonetheless will be held to be subject to the
disciplinary authority of the host state.

It also addresses a choice of law provision
as to if you are going to be disciplined by a state
that is not your licensing jurisdiction which of the
rules, again keeping in mind that there inevitably
will continue to be a lack of complete uniformity,
it's important to know how do you know which state
rules to comply with when your practice involves more
than one jurisdiction.
With respect to the imputation of conflicts of interest and the question of screening, the Ethics 2000 Commission had recommended to the ABA that lawyers be permitted to or law firms be permitted to avoid imputation by enacting screens in some situations involving lateral moves by lawyers. The ABA rejected that recommendation. It's my understanding that Michigan has a proposal that is somewhat of a compromised position which reflects the practice that has already existed in Michigan, if not specifically in the rules themselves, at least in an ethics committee opinion.

By and large, let me say that I am absolutely thrilled. I think the Michigan committee did a terrific job. I am particularly impressed with the recommendation on screening. I wish we had had that proposal before us. I think it's a proposal that we might have been able to sell to the ABA.

Fourth, we responded to questions raised about the new technology. For example, throughout the advertising and solicitation rules we have talked about what happens when lawyers have their own website. We have talked about electronic communications. We have defined, by the way, throughout the rules whenever there is a requirement
of a writing, writing is defined to include electronic communication. So if you want to confirm a conflicts waiver through e-mail, that would be an acceptable form of writing.

Fifth category, we tried to clarify any ambiguities in existing rules and the comments to provide better guidance and explanation to lawyers. For example, we took the terminology section and we elevated it to a black letter rule, an entirely new Rule 1.0. We added some newly defined terms, and then we added commentary to the definitions, again with the view towards doing as much as we can to educate and give lawyers guidance as to how they can comply with the rules.

Throughout the rules we revised and expanded the comments in order to give better explanations and examples, once again with a view towards making it easier for lawyers to comply with the rules.

We completely reorganized Rule 1.7, the basic conflicts of interest rule, not with a view toward making substantive changes but simply to try to better articulate what the conflict rule is and how it works.

Sixth category of changes, we clarified and strengthened the lawyer's obligations to the tribunal and to the justice system itself. For example, in
Rule 1.6, the confidentiality rule, we added a provision that permits lawyers to disclose in order to obtain legal advice for themselves about their own compliance with the rules.

And we revised Rule 3.3 to strengthen the lawyer's obligation of candor to the tribunal with respect to testimony and actions taken by clients and other witnesses, for example to clarify that the duty of candor to the tribunal applies to depositions as well as to trial testimony.

Seventh and finally, we recommended the need for changes in the delivery of legal services to low and middle income persons. For example, we added a new Rule 6.5 which relaxes the conflict of interest and imputation rules in situations in which lawyers acting under the auspices of programs sponsored by nonprofit associations, such as the Bar association or by the court, provide short-term limited legal services, for example manning one of these lawyer association hotlines, to encourage lawyers to do this without worrying excessively that a failure to perform a conflicts check may ultimately conflict their law firm out of a representation.

That just gives you, I think, just a smattering of some of the changes we recommended and
the reasons why we recommended, and I hope if you have questions we would be happy to answer them. At this point I am going to turn the program over to Becky Stretch who is going to tell you a little bit about what the ABA has been doing since the adoption of the rules to assist states like Michigan in reviewing these proposed changes.

MS. STRETCH: Thank you. I first want to thank the State Bar of Michigan for its long history of contribution to the field of ethics and professionalism nationally. There have been several members on our Standing Committee on Ethics and Professional Responsibility from Michigan, and of course you have had two wonderful executive directors who have made tremendous contributions to increasing professionalism and ethics in the profession.

Mike Franck, of course, was involved in these rules when they were first adopted in 1983, and he was a moving force and had a lot of influence on how the rules first started. And, of course, as Nancy has already told you, John was there with us, too, these five years as we have been looking at them again. So we at the ABA Center for Professional Responsibility are very appreciative, and we believe that the profession has been greatly strengthened by those
contributions.

As Nancy said, we are here on behalf of the Joint Committee on Lawyer Regulation. That is the entity that we are working with to help states review the rules. And in terms of reviewing the rules, this includes the amendments made by the ABA House of Delegates not only based on the recommendations of the Ethics 2000 Commission but also the Multi-Jurisdictional Practice Commission, so E2K and MJP. And I see that Michigan has proposed amendments that do coincide with what the ABA has recommended on multi-jurisdictional practice. We will say a little bit more about that in a second.

Of course each state has to decide whether to accept, modify, or reject the many amendments made by the rules. We understand that there are important policy differences between the states and the ABA, and we, of course, are not trying to persuade everyone that they need to adopt the Model Rules exactly as we have adopted them by the ABA, and, of course, Ethics 2000 doesn't totally agree with a couple of things that the ABA did. But, nevertheless, we are certainly encouraging states, urging states to seriously consider the advantages of at least substantial uniformity of the state rules.
Nancy mentioned there is a great deal of cross border practice going on in America today. Lawyers are increasingly engaged in multi-jurisdictional practice. As they cross state borders, they need to comply with the ethical rules of what you might call the host jurisdiction, the jurisdiction where they are not licensed, even if they are licensed in more than one jurisdiction. If the rules in those jurisdictions are substantially the same, it is, of course, much easier for the lawyer to comply with the ethics rules. And it is also easier for the state disciplinary systems to administer reciprocal discipline or just any kind of discipline. Uniformity also helps to preserve the position of the state courts as the primary regulators of lawyer conduct. There have been, of course, a number of recent efforts to transfer some of that authority to the federal government, evidence the Sarbanes-Oxley legislation and SEC regulations, and also on a slightly similar note, the efforts of federal prosecutors to have federal courts adopt rules governing the conduct of federal prosecutors in federal court or even in state courts, particularly with respect to Rule 4.2, the rule prohibiting contact with represented persons. If state rules differ too
widely, we believe that gives ammunition to those who
would argue for more national regulation.

With those thoughts in mind and for other
more pragmatic reasons, many state committees have
taken the view that they will take a strong look at
the ABA proposals and try to agree with them where
necessary but, of course, to adopt their own rules where
there are significant policy differences.

Of course in keeping with the high standards
that Michigan already has, your committee has done a
thorough job, as Elaine and Nancy have already pointed
out. It agreed with the bulk of the ABA
recommendations, but, of course, maintained differences
that are important in Michigan, most notably is, of
course, the confidentiality rule where Michigan decided
to not agree with what the ABA did in keeping a very
limited discretionary rule on disclosure. Michigan
continues to have a leadership role in this area, and
I believe that because of states like Michigan and
others the ABA will, of course, be looking at this
again.

There is currently a task force on corporate
responsibility that will bring back recommendations to
the ABA, again, to consider changes in Rule 16 on
confidentiality and Rule 113 on organizational
clients. This is partly in response to Sarbanes-Oxley and other federal legislation, but it's also just because the states are trying to let the ABA know that it needs to get with it in these areas. So we appreciate your leadership in that area.

One thing I would also like to point out that your committee is recommending is that, and I believe that will bring forward to you that Michigan consider adopting the comments to the ABA Model Rules or the -- the Michigan rules. I should say there are comments to the ABA Model Rules that in the past Michigan has not included, and Michigan has looked at those rules, changed them where appropriate for Michigan, amended them and come up with, I think, a really terrific recommendation.

I do think one of the most important things that the Ethics 2000 Commission did was the excellent work that it did on the comments. They now provide what we call sort of book end examples of this would be a really good example of what not to do and here is a good example of what to do, but you can't really draw a fine line as to what's ethical and unethical, but here is consideration, and I think the comments are really terrific.

The Joint Committee is keeping track of the
progress in all of the various states. We can provide your committee and/or any of you who are interested with information about what's going on nationally. We do have a website that soon will have comparisons between every state's proposed rules and the Model Rules and also will have by rule what all the different states have so it's easier to say what all the differences are nationally, if any.

I would like to point out that I think most of the states that have looked at it are, indeed, going along with the rule on sex with clients, and I do think that is mostly because they don't want to talk about it, in spite of the fact that Nancy says she hopes that you will look at it again.

About 12 states have completed the review, like your state, but only one has actually voted by the court already, and that is North Carolina, and their rules have taken effect already.

This, of course, is a process where we all learn from one another, and we look forward to continuing to do so and learning from your experience as well.

Do you want to add anything?

MR. BYERLEY: I just wanted to add a couple of things. As the staff person with the Ethics
Committee, I am hoping all of you understand the amount and depth of the work that both the ABA Commission on Ethics 2000 undertook and our Michigan Ethics Committee. Just all of you that do not know, our committee is comprised of like 40 individuals of judges and lawyers throughout the state and some of which are on the Representative Assembly as well. But they have done a tremendous amount of work, starting with analyzing each rule, doing a report on each rule, our subcommittee hearings and meetings, and then our full Ethics Committee.

There has just been hundreds and hundreds of hours of work that have been undertaken to these rules, and procedurally, just so that you know, what will happen is the Ethics Committee meets next on May 9th, which is less than two weeks away. It's our hope at that meeting that our work will be done as a committee. We will then put the final recommendations out to you, and we will get them out to you as soon as we can so that you will have plenty of time to look at them and discuss them with individuals that you know before your meeting in September.

So it's our goal when you come to the meeting in September not that we have a lot of amendments from the floor necessarily, because we want to give you
plenty of time to do that in advance so we can try to work that out. But, again, I hope you all appreciate the great depth of work that's been done by the volunteer committee of the State Bar of Michigan working in conjunction with the ABA to get a new set of ethics rules which I think will take us for many years ahead. Thanks.

MR. BERRY: I would like to add one other thing about the information that will be available to you prior to your deliberations in September.

We got together yesterday, and we sort of joked about being groupies in this area. When you work at it long enough, you start throwing around the numbers and everything else concerned. I asked Nancy, I said, What are you doing in reference to all this? She said, After five years, I would like to go on with my life. And, of course, here she is now doing the same thing, which is talking about this.

But, depending on the level of information that you want, I ask you probably to filter it through me first or Tom first. We can get you to more information than you possibly want, but one recommendation I have is there is a tremendous amount of ABA information that relates to reporter's notes concerning the sort of explanation of why certain
things were done and were considered. That information, I think, would be very helpful and useful to you for back-up information if you are interested in a particular rule. I can't imagine between now and September you would spend your whole lives reading through every page of that information. But I think as it goes forward we try to bring your attention to those areas that might perk your interest the most, whether or not it's a particular rule or whatever else, or through Tom or through the Ethics Committee, we will do all we can in the state to help you and then the resources available and the studies will be available for you as well.

Yes, Elaine.

MS. FIELDMAN: Two comments actually. First of all, we did thoroughly discuss the sex with client rule, and our Supreme Court recently considered that rule also and right before we undertook this task.

Secondly, when you do look at these rules, one thing we always had to keep reminding ourselves is that these are discipline rules, they are not aspirations. So when you read something and you think this would be a good idea, also think this is something that a lawyer could be disciplined for not doing or for doing, and that's very important to keep
in mind when you are looking at this. It's not only
what's a good idea.

MS. DIEHL: You mean we are not recommending
sex with clients?

MR. BERRY: But that is subject, Nancy, that is
subject to debate in September, however, depending on
how you want to go about that issue.

Are there any questions for the folks that
are here? This is a great opportunity to pick their
brains, or if you are ready to go home, well, we can
work that out. Tom is over here as well. So any
questions. Yes, there is one over here.

MS. RADKE: Victoria Radke from the 47th
circuit. Is this information available online at
aba.org?

MS. STRETCH: Yes. All the information I
referred to is -- we have a new web page for the Joint
Committee on Lawyer Regulation. I am sure Tom can
give you the address, but if you have a pencil, it's
abanet.org. If you go to the Center for Professional
Responsibility home page, which is CPR, and you click
on implementation initiatives. That's where we -- and
we have all the different state reports. We have an
ongoing status report of what all the states are doing
on the various different recommendations, and it
clicks on, like if you want to see what North Carolina did, you just click on the North Carolina report, and it will take you right there. Pretty soon I will also have the comparisons I have done of all the different states' reports on the Model Rules, as well as the various rules, so yes.

MS. RADKE: Thank you. And are we doing the same on our website?

MR. BYERLEY: Yes.

MR. GREEN: Just a quick question. Has there been any consideration as to importance of documenting the termination of the client-attorney relationship?

MS. MOORE: I believe there was a proposal. As I said, throughout the Ethics 2000 process there was concern about documentation and the importance of doing as much documentation as possible. However, there was also the understanding that, again, remembering that this is a disciplinary rule, that it is substantially burdensome on lawyers to make all these writing requirements, and so we ended up that we debated both where in the rules -- we definitely wanted to add more writing requirements, and then the question is picking and choosing which are the points that are most important to require the documentation.

It was the belief of the ABA that it was the
conflicts waivers, that that was such a source of
difficulty for both clients and lawyers that this is
something that ought to be required.

I would think in terms of terminating in both
engagement letters and termination of representation
the ABA would have considered that at the level of
best practices where we would absolutely urge lawyers
for your own benefit as well as the benefit of your
clients this is the best thing to do, but we did not
require it in terms of a disciplinary rule.

MR. BERRY: What I might add for just a
second is one of the beauties of our new ethics school
is that the ethics school, and hopefully this will be
expanded, will be talking about that issue of both
termination and declination, not taking a client, and
how you can use that determination as a marketing tool
as well as a protection tool for yourself. And so we
will be educating lawyers more and more in those
particular efforts even though there is not a specific
discipline rule to deal with it.

MS. FIELDMAN: There is a new rule proposed
dealing with prospective clients and how
confidentiality comes in and how you are conflicted
out in situations in these so-called beauty contests,
so there is a rule on a related matter that addresses
MR. HARON: Dave Haron from the 6th circuit. This is really directed at Tom, Liz, and our staff. When we discuss this in September, will the proposal be presented in bulk or will we have opportunities to deal with specific areas? I haven't read them, you know, the proposal yet, but when we are talking about something like multidisciplinary practice, we have had debates on that in the past, and I am concerned that if, whatever the rule is recommended, that if it changes our practice, that when we get it in front of us it will be part of, you know, 20 or 30 or 40 changes, and we won't have an opportunity to really address those because of the nature of debate at the Assembly. We tend to sometimes either go over something very quickly or don't debate it because it's too much. So I wonder how it will be presented to us.

CHAIRPERSON ROMBACH: Thank you very much, David. Tom Rombach. I am from the 16th circuit, as last I remember, and what we will be doing is we will be getting a book of this nature. Again, I am not sure that it's finalized, but this is a draft version. It does include a red line version of the current Rules of Professional Conduct here in Michigan and then a draft of the proposed Rules of Professional Conduct.
Conduct that Barry Powers and Kevin Breck and Sharon Noll Smith all serve as liaison to that group, and I am sure they can go into detail, but you are right, there are several positions that the Representative Assembly has taken that are going to be in controversy there, not only the multidisciplinary, but I believe there may be some facets of multi-jurisdictional in there as well, as well as the attorney-client no sexual relations provision at least addresses an issue in that draft as well, and the Assembly has stated positions on a lot of those matters, so we are going to try to keep our institutional history and if you can be vigilant during that discussion.

But the reason we are doing this here today is to identify these issues and contentions so the Assembly can be thinking about it so when this draft is completed along with the comments that we can consider it, and all of this is on the website right now, so if you go to the State Bar website you can break down this book as it stands, but that's subject to further change in May as they come up with some of the comment editing that they feel is very important to show us the differences.

So, again, I am going to take up the whole
thing. It's the annual meeting. We meet both in the morning and the afternoon. I fought very hard to keep that meeting intact. So all these issues are on the table, so I appreciate everyone staying here today and trying to flesh out some of these items, but you are right, and if somebody wants to reinvent the wheel and say we are going to revisit past Assembly actions, we could do just that because, even though the Assembly has taken a policy position, this is a proposal, and we can change course at any time. So I appreciate you keeping that in mind. Thanks, David.

MR. BERRY: Tom, if I could add one more note in reference to helping you out. You are used to getting small packages and big packages, and the big packages, as you point out, have all kinds of different rules in it. Having worked with this group for five years and done this before, I cannot tell you how often -- out of those 50 meetings there were hours of discussion, and probably, we were joking about it yesterday, doing the 180-degree turns based upon new information that was provided, useful information that was provided.

The more time you can devote to this prior to the meeting, and we as a staff and I am sure the committee would give you as much time as you need, if
you see these things ahead of time and something perks up and you say, you know, I just don't like this, whatever, give us the opportunity to talk to you, and also if somebody finds something that is a problem, to the last second we will get to the committee and we might be able to figure out that we do need to make a change prior to that time.

But this is something that really takes a lot of study, and we will be glad to help you in any way that we possibly can between now and during the meeting.

CHAIRPERSON ROMBACH: As Chair, I guess are there any further comments or questions to the illustrious panel? As I said, we are going to be taking up the issue, as in any issues of great magnitude, importance, and complexity. That's why we are doing this here today. I know these folks would be willing to answer any questions you might have privately, although I have to assure the two people from out of town that they are aboard a plane in fairly short order, so I really appreciate them coming in. If we could have a round of applause for our guests.

(Appplause.)

CHAIRPERSON ROMBACH: Thanks, everyone, for
your rapt attention. Glenna Peters and Ms. Lott and
Ms. Allen-Kost are handing out the permission slips to
leave, if you can fill those out. Additionally, if
you can have us retrieve the name badges.

I would also just want to remind the people
that are interim Assembly appointees to make sure that
they have their nominating petitions. That's an
interim appointment and you have to rerun for the
balance of the term.

If there is no other further business before
the Assembly at this juncture, I would entertain a
motion to adjourn.

VOICE: So moved.

CHAIRPERSON ROMBACH: It's been moved and
seconded. All those in favor indicate by saying yes.

Any opposed say no.

Hearing none, it passes unanimously. Thank
you very much for your time.

(Proceedings concluded at 1:16 p.m.)