

STATE OF MICHIGAN  
STATE BAR OF MICHIGAN

MEETING of the REPRESENTATIVE  
ASSEMBLY of the STATE BAR OF  
MICHIGAN

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Proceedings had by the Representative Assembly of  
the State Bar of Michigan at Lansing Community College  
MTEC Center, West Campus, 5708 Cornerstone, Seminar  
Rooms 1-4, Lansing Michigan, on Saturday, April 27, 2013, at  
the hour of 9:30 a.m.

AT HEADTABLE:

DANA M. WARNEZ, Chairperson  
KATHLEEN ALLEN, Vice-Chairperson  
VANESSA P. WILLIAMS, Clerk  
JANET WELCH, Executive Director  
HON. JOHN CHMURA, Parliamentarian  
ANNE SMITH, Staff Member

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Lansing, Michigan  
Saturday, April 27, 2013  
9:31 a.m.

R E C O R D

CHAIRPERSON WARNEZ: I am going to call the meeting to order. Welcome, everybody.

VOICE: Good morning.

CHAIRPERSON WARNEZ: I would like to ask from Ms. Williams, do we have a quorum here today?

CLERK WILLIAMS: Madam Chair, we have a quorum.

CHAIRPERSON WARNEZ: Thank you very much. I would also like to request that we do have a proposed calendar in front of you. I would entertain a motion to approve the calendar, Ms. Kakish.

MS. KAKISH: Yes, good morning. Kathy Kakish, 3rd circuit. In the booklet of materials that members received late in March is the proposed calendar. There are two typos that need to be corrected. The first one relates to item number 12, where it should indicate that it starts at 12 noon instead of 12:00 in the morning, and item number 13 which should reflect that it begins at 12:15 p.m. instead of a.m.

And with those two corrections in mind and on

1           behalf of the Rules and Calendar Committee, I move for  
2           the adoption of the calendar for today's Assembly  
3           meeting.

4                       VOICE:   Second.

5                       CHAIRPERSON WARNEZ:   I hear a motion and a  
6           second.  I would ask all in favor of approving the  
7           calendar please signify by saying aye.

8                       Nays?  Any abstentions?

9                       Thank you very much, Kathy Kakish.

10                      Next, in your Assembly books there is  
11           contained in it the September 20th, 2012 summary of  
12           proceedings.  I would entertain a motion to approve  
13           the summary of proceedings.

14                      VOICE:   So moved.

15                      VOICE:   Second.

16                      CHAIRPERSON WARNEZ:   First, second.  All in  
17           favor of approving the summary of proceedings, please  
18           signify by saying aye.

19                      Nays.  Any abstentions.  Motion carries.

20                      I would next like to invite Dan Quick to come  
21           forward, please.  He is our chair of the Nominating  
22           and Awards Committee.  He will present a motion  
23           regarding vacancies.

24                      MR. QUICK:   Good morning.

25                      VOICE:   Good morning.

1 MR. QUICK: Dan Quick, 6th circuit. It is my  
2 pleasure to chair your Nominating and Awards Committee  
3 this year. Let me first thank the excellent team of  
4 Jeff Nellis, Elizabeth Jolliffe, James Bartlett,  
5 Shenique Moss, Kathy Allen, with fantastic help from  
6 Dana, Vanessa, and Anne Smith with the State Bar.

7 Each of you have an updated memorandum to the  
8 RA from Dana dated April 27, 2013 with the proposed  
9 slate of candidates to fill open positions.

10 As you all know, serving on the  
11 Representative Assembly, it is a privilege and an  
12 honor here at the ultimate policy-making body of the  
13 State Bar, and I would move heartily to welcome this  
14 new group of individuals into our ranks. May I have a  
15 second, please.

16 VOICE: Second.

17 CHAIRPERSON WARNEZ: I am not used to this  
18 yet.

19 Hearing a motion and a second, I would ask  
20 all in favor of the motion, please signify by saying  
21 aye.

22 Any nays? Any abstentions? The motion  
23 carries. Thank you. I would ask the seated people to  
24 come forward to join your circuits.

25 MR. QUICK: And a round of applause.

1 (Applause.)

2 CHAIRPERSON WARNEZ: As everyone is starting  
3 to get settled and seated, I would like to begin our  
4 meeting, formal presentations of the meeting by  
5 introducing someone, our Executive Director, Janet  
6 Welch, to come forward and give some remarks on behalf  
7 of the State Bar.

8 EXECUTIVE DIRECTOR WELCH: Thank you very  
9 much. I will be very brief. I am very pleased to be  
10 here again.

11 I want to say that the Representative  
12 Assembly has done some really, really important things  
13 in the past, and they are beginning to bear fruit.

14 What I want to highlight, first of all, is  
15 the adoption by the Representative Assembly of the 11  
16 principles for an indigent criminal defense system and  
17 the fact that we are about to, I believe, in this  
18 legislative session finally achieve legislative action  
19 that will set this state where it has needed to be for  
20 decades in terms of improved indigent defense system.  
21 Your work was fundamental to making that happen.

22 When we met in September, I told you that we  
23 had hopes that we would be able to accomplish that at  
24 the end of the last legislative session, and I told  
25 you that I would introduce to you in this session

1 Elizabeth Lyon, our former governmental relations  
2 counsel's successor, Peter Cunningham, but he had a  
3 pass in September because he was the new father of  
4 days old twins.

5 Last week the president of the State Bar and  
6 Peter and I were part of a delegation in Washington,  
7 D.C. lobbying for the Legal Services Corporation, and  
8 as he was getting on the plane he discovered that one  
9 twin had respiratory virus syndrome, and while he was  
10 there the second twin got it, so he would be here  
11 today, but both he and his wife -- no, actually both I  
12 and his wife, believe that it was important for him to  
13 make up for the fact that he was in Washington for  
14 three days while he had twins who were in and out of  
15 the doctor's offices for several days. So I look  
16 forward to introducing him to you next September.

17 I think he is doing really remarkable work,  
18 and the reason that we are all optimistic that we will  
19 accomplish indigent criminal defense reform  
20 legislation in this session has a lot to do with  
21 Peter's work.

22 So what we did accomplish at the end of the  
23 last legislative session that you are also responsible  
24 for is the enactment of a Custodial Interrogation  
25 Recording Task Force, custodial interrogation

1 recording legislation based on the task force that you  
2 called into being through your resolution, so another  
3 example of making a fundamental difference for being  
4 here.

5 A third task force that you called to be  
6 created, the Eyewitness Identification Task Force, has  
7 already been responsible for creating, in coalition  
8 with the law enforcement community, protocol for  
9 eyewitness identification, and that is another piece  
10 of work that is paying real dividends that you  
11 started.

12 So those are three really fundamental and  
13 important things that you have done, but I don't think  
14 any of that compares with the fact that, in my view,  
15 by scheduling a meeting of the Representative Assembly  
16 on April 27th and agreeing to sit indoors on a  
17 Saturday you have finally called an end to this  
18 interminable winter. It is just so unnatural for us  
19 to be sitting in here, suits and dressed up, when we  
20 should all be in blue jeans and sandals and T-shirts,  
21 but that's coming, right?

22 Finally, and I said I would be short, we have  
23 been extraordinarily busy in the last couple of weeks,  
24 and I have discovered that you can be interacting with  
25 the president of the State Bar and running around and

1 doing all kinds of things and fail to coordinate with  
2 what your messages are going to be to the  
3 Representative Assembly, and I have discovered that  
4 Bruce is planning to say almost everything else that I  
5 wanted to say, so in light of that, the only proper  
6 thing for me to do is to sit down and wish you a great  
7 meeting and turn over the substance to Bruce when he  
8 speaks. So thank you very much.

9 (Applause.).

10 CHAIRPERSON WARNEZ: Thank you, Janet, very  
11 much. It was my goal to keep us moving, so in that  
12 regard I would like to reinvite Dan Quick to come  
13 forward to bring a motion for the nominations for our  
14 awards and ask for your support in approving them.

15 MR. QUICK: Good morning once again. On  
16 behalf of the Nominating and Awards Committee I will  
17 be making two motions to you today. The first is for  
18 the proposed award recipients for the Unsung Hero  
19 Award. As you know, the Unsung Hero Award is  
20 presented to a lawyer who has exhibited the highest  
21 standards of practice and commitment for the benefit  
22 of others.

23 We present to you two award winners this  
24 year, which is a wonderful testament to our Bar. The  
25 first is Jim Brenner. Jim is an attorney with

1 Clark Hill in Detroit and has an appellate practice.  
2 More to the point of this award, he has committed a  
3 significant amount of his time and professional career  
4 to pro bono service. He sits on the board of  
5 directors of the Wayne County Neighborhood Legal  
6 Services Association, but prominently has handled a  
7 number of death penalty cases across the country over  
8 the past few decades, successfully reversing death  
9 penalty awards in a number of instances. The rest of  
10 Jim's bio and materials are in your booklet.

11 Jim was nominated by Elizabeth Jolliffe,  
12 whose name I mangled earlier but is well known to all  
13 of you, and Jim is our suggestion as one of the award  
14 winners.

15 The second is Elizabeth Stafford. Elizabeth  
16 is with the U.S. Attorney's Office in Detroit. She is  
17 a long-time prosecutor of serious crimes, drug  
18 conspiracies and public corruption. She is so tough  
19 that in one trial she broke her hip in the middle of  
20 it and still showed up the next day to finish it off  
21 and get a conviction.

22 Again, that's not why we are here. Elizabeth  
23 was one of the originators of the Diversity  
24 Initiatives that was undertaken by the Federal Bar  
25 Association in the Eastern District of Michigan. As a

1 result of that initiative, in 2009 the FBA established  
2 a diversity committee, which Elizabeth chaired  
3 originally and continues to chair to this day. That  
4 diversity committee from those humble beginnings has  
5 grown to be a nexus of diversity efforts across the  
6 state. The FBA has undertaken to organize contact  
7 between the various affinity bars and bar associations  
8 committed to diversity efforts to organize their  
9 resources, to increase communication, to share best  
10 ideas, and of course the FBA's diversity committee  
11 itself has undertaken a number of very proactive and  
12 worthwhile initiatives.

13 Elizabeth was nominated by our United States  
14 Attorney for the Eastern District, Barb McQuade, and I  
15 also know that Judge Victoria Roberts, for whom  
16 Elizabeth clerked, is fully in support.

17 So at this time I would move for the  
18 Representative Assembly to award the Unsung Hero Award  
19 to Jim Brenner and Elizabeth Stafford.

20 VOICE: So moved.

21 CHAIRPERSON WARNEZ: I hear a motion. Do I  
22 hear support?

23 VOICE: Support.

24 CHAIRPERSON WARNEZ: Any further discussion?  
25 All in favor of this motion, please signify by saying

1 aye.

2 Any nays? Any abstentions? The motion  
3 carries.

4 MR. QUICK: Thank you. The second award  
5 given by the Representative Assembly is the  
6 Michael Franck Award, presented to a lawyer who has  
7 made an outstanding contribution to the improvement of  
8 the profession. Your committee suggests that the  
9 award be provided posthumously to Marty Krohner.

10 Many in this room do not need me to say  
11 anything about Marty. He was an ideal member of this  
12 body for a number of years, as well as a member of  
13 numerous other Bar associations, most notably perhaps  
14 the Criminal Issues Initiative wherein he championed  
15 the rights of the accused to a defense regardless of  
16 their ability to pay and beside the fact that he was  
17 himself a prosecutor for many years.

18 Marty exemplified the highest ideals of law  
19 in public service, and I would heartily suggest to you  
20 and move that Marty be awarded the Michael Franck  
21 Award by the Representative Assembly.

22 CHAIRPERSON WARNEZ: I hear the motion. Do I  
23 have support?

24 VOICE: Support.

25 CHAIRPERSON WARNEZ: Any further discussion?

1 All in favor of the motion, please signify by saying  
2 aye.

3 Any nays? Any abstentions? Nice work.  
4 Thank you. Motion carries.

5 MR. QUICK: Thank you.

6 CHAIRPERSON WARNEZ: I will note that we are  
7 moving steadily along, and that does not mean that the  
8 extra time we are gaining is going to be afforded to  
9 our esteemed president, Bruce Courtade, who is going  
10 to join us on the stage in a moment. But as Bruce  
11 comes up, I would just like to say it's been an honor  
12 to serve with him. My sister and Bruce served for  
13 many years together, and to have my chance to serve  
14 with Bruce has been rewarding, and I am so grateful.  
15 Come on up, Bruce. Give us an update.

16 (Applause.)

17 PRESIDENT COURTADE: Thank you, everybody,  
18 and I would like to especially thank the Assembly  
19 officers. I know, especially for the people who were  
20 just seated in this Assembly, you may not know much  
21 about your officers. They have all really spent their  
22 time in this body, they have earned their seats, and  
23 they have been doing a wonderful job in leadership.

24 I spent some time up in the U.P. with Dana.  
25 One of the first things the State Bar president does

1 is go on a swing of the U.P. It's a pretty intense  
2 three-and-a-half-day period, sitting in a car, driving  
3 for hours to go make a couple speeches, to drive  
4 several hours, to go make a couple speeches, but it's  
5 a great time to learn more about your Assembly  
6 counterpart, and I can tell you that Dana is a  
7 fantastic representative of this body. She is an  
8 outstanding spokesperson for it and advocate for it  
9 and great leader.

10 Kathleen Allen, I have known Kathleen for  
11 years now, and she is doing just as good a job as I  
12 knew she would when I nominated her to be the Assembly  
13 clerk. She is a legal aid attorney from Grand Rapids  
14 and in that role does a wonderful job representing the  
15 indigent civil litigants, but I can tell you that on  
16 the Board of Commissioners she has a voice that is  
17 well respected regarding not only civil litigants but  
18 also she has been a great advocate for indigent  
19 criminal defense.

20 Vanessa is the only disappointing member of  
21 the leadership, and she is disappointing in two  
22 regards. The first is the Rep Assembly elections were  
23 not held until the day after I had to appoint my  
24 executive committee. Had they been a day earlier, I  
25 would have loved to have had the opportunity to

1           appoint her to the executive committee, because she  
2           really is outstanding. I am also disappointed that I  
3           only get to work with her for one year.

4                        She was an outstanding leader coming up  
5           through the ranks. I had heard of her but hadn't  
6           really met her until this year, and I have had the  
7           opportunity to spend some time with her, and she is  
8           just doing a great job, as recognized by Crain's  
9           Detroit Magazine which selected her as the recipient  
10          as its General and In-House Counsel Award for work  
11          that she does with R.L. Polk.

12                      So that's the state of your leadership. Now  
13          I want to give you a little bit about the state of the  
14          Bar.

15                      I am happy to report the Bar is in  
16          outstanding shape, fiscally and in every other way  
17          imaginable. We are doing more, offering more programs  
18          to more attorneys. In fact, we just found out  
19          yesterday, according to the latest statistics, we now  
20          have 42,600 attorneys in the state of Michigan, an  
21          increase of 650 roughly this fiscal year. We are  
22          doing that with less dues to our members. I don't  
23          know if you noticed, but last fall you got a \$10 dues  
24          decrease. And not only that, when you compare our  
25          dues across the board around the state, it's amazing

1 the bargain. I know it seems difficult to believe  
2 when you are writing that check every year, but it  
3 really is a great benefit and a great bargain compared  
4 to what our counterparts around the state are paying.

5 Much of the responsibility for that, I would  
6 like to take it, but I can't. It's with Janet and her  
7 staff. They do an amazing job, and until you get into  
8 the presidency and you are more involved in the  
9 day-to-day activities, you don't have a full  
10 appreciation for what they do. I can tell you that I  
11 already had, I held Janet in high regard going back to  
12 our days at U of M Law School, but the respect has  
13 grown immensely in the seven months that I have been  
14 president.

15 A couple of the programs that I would like to  
16 talk to you about. We are approaching the one-year  
17 anniversary of the soft launch of the Solutions on  
18 Self-Help website. These statistics are somewhat  
19 dated. They were valid as of a month ago.

20 Since the soft launch of that website in  
21 August, which it hasn't been really publicized, there  
22 hasn't been a lot of hoopla about it, we have had  
23 400,000 page views since that public launch. There  
24 have been approximately 70,000 unique users to go and  
25 use that website. This is a website, for those who

1 may not realize it, that it has basic SCAO-approved  
2 forms for people seeking legal assistance who may not  
3 be able to afford it otherwise.

4 Al Butzbaugh, former State Bar President and  
5 recently retired Berrien County Circuit Court Judge,  
6 reported that of the people coming before his court  
7 seeking divorce, 70 percent of the cases involved at  
8 least one, 70 percent of the cases involved at least  
9 one in pro per party, and more than 50 percent of  
10 those involved two in pro per. And he said he could  
11 tell that people were coming in. He had one person  
12 present a perfectly drafted divorce form using State  
13 of Hawaii forms.

14 So this is an effort for us to reach the  
15 unmet population that Legal Aid can't serve. There  
16 just are not enough Legal Aid attorneys. There aren't  
17 enough pro bono attorneys, and I know that when we  
18 rolled out this program or when the program was rolled  
19 out we heard a lot of concerns about this is going to  
20 be taking work away from lawyers. I am happy to  
21 report that the highest click rate on that site is for  
22 people looking for family law advice. The second  
23 highest click rate is help me find an attorney.

24 So it's doing what we had hoped it would,  
25 which is for the very basic, simple forms, people are

1 able to access them, but it's driving them to go talk  
2 to attorneys, to get legal advice. So I think that's  
3 great.

4 I want to encourage you. Coming up, you are  
5 going to be getting an Economics of Law Practice  
6 survey. Please fill it out and return it. That  
7 information is critical to us, especially now that the  
8 Supreme Court has basically referred to that as the  
9 bible for all fee disputes. It's only as good as the  
10 information that we get back, so it's important we get  
11 information back from as many people in as many areas,  
12 as many practice areas, geographic regions, firm  
13 sizes, government practice, everything. Please take  
14 the time. It doesn't take that long to fill out.

15 There have been a few issues that have taken  
16 my time in the last seven months. One was that little  
17 quiz that some law students took last July. I don't  
18 know if you heard about it. For those who were not  
19 aware of the circumstances of the Bar exam, we had a  
20 62 percent overall pass rate for first-time takers in  
21 July. My phone was ringing off the hook, not only  
22 from the law schools who were upset about it, because  
23 it made them look bad, the law students who had taken  
24 the exam who felt that the rules had changed, and  
25 lawyers around the state, but the funny thing about

1 the lawyers around the state, there were two distinct  
2 camps. One was the camp saying, This is terrible, how  
3 can we do this to these kids who spent \$120,000 on  
4 their education and now the rules have changed? And  
5 the other camp was saying, It's about time somebody  
6 pulled up the ladder. There aren't enough jobs.

7 So I will tell you that we have been  
8 monitoring this. We have been attending meetings. We  
9 have scheduled meetings. I believe that there will be  
10 some tweaks, but, as State Bar President, my position  
11 has been it's not our job. We don't administer the  
12 Bar exam, we don't draw up the questions, we don't  
13 determine what the standards are, but the main thing  
14 that we have to insist on for our members and for our  
15 future members is transparency. So that's what we  
16 have been insisting on and I believe we are going to  
17 get.

18 Second issue that I would like to talk a  
19 little bit about is indigent criminal defense. Janet  
20 mentioned it. You know, we just observed the 50th  
21 anniversary of Gideon versus Wainwright, which  
22 established the right of all indigents to have  
23 criminal defense counsel that are facing jail time. I  
24 wish that I could tell you as we sit here today that  
25 Michigan has met that promise, but I think you all

1 realize that we haven't.

2 A little bit of a history lesson was that we  
3 were, the State Bar was concerned about it for years.  
4 The Rep Assembly lead the way adopting the 11  
5 principles that we then lobbied for. We ended up, in  
6 conjunction with the Michigan Legislature and the  
7 National Legal Aid Defender Association, doing a  
8 year-long study of ten different courts, ten different  
9 areas around the state of Michigan trying to see who  
10 was doing things right and how we can improve. The  
11 results of that -- well, a report was issued in June  
12 2008 that was appropriately named, A Race to the  
13 Bottom -- Speed and Savings Over Due Process: A  
14 Constitutional Crisis. None of the ten counties came  
15 close to meeting the minimum standards required under  
16 Gideon.

17 Among other things, the report found that  
18 indigent criminal defense attorneys were not given  
19 adequate time to meet with their clients, that there  
20 were shortcuts being taken by the courts that clearly  
21 violated constitutional rights. People were routinely  
22 denied their right to counsel in Michigan in certain  
23 jurisdictions, and that Michigan ranked 44th out of 50  
24 states in funding for indigent criminal defense.  
25 Michigan was held up as a role model of how to do

1 things incorrectly.

2 But I am very pleased to say that,  
3 particularly after the last gubernatorial election,  
4 there was a lot of traction with legislation. The  
5 State Bar was integral in drafting legislation and  
6 getting it submitted. It passed overwhelmingly in the  
7 House and was referred to the Senate basically during  
8 the lame duck session where, when the gavel came down  
9 at 4:30 in the morning on December 14th, no action had  
10 been taken. So the legislation died temporarily.

11 But we have already been back at the table  
12 with key legislators from both houses, both sides of  
13 the aisle. It will be back. It's been introduced in  
14 both houses, and I am optimistic that if not by the  
15 time that I am out of office in September that during  
16 Brian Einhorn's presidency that legislation will pass,  
17 and I think Michigan will then be seen as a role model  
18 in a good light.

19 One other thing that I want to explain, and a  
20 couple of you have heard this before, is why is it so  
21 important to people who don't practice criminal law?  
22 Why is it so important to people who don't break  
23 criminal laws? The best example I can give you is one  
24 that I witnessed firsthand.

25 I don't do a lot of criminal defense anymore,

1 but I still do some, and about a month and a half ago  
2 I was in a West Michigan court for an arraignment,  
3 representing a 19-year-old-woman who had an alcohol  
4 offense. And it was the proverbial cattle call with a  
5 full courtroom with one after another after another  
6 defendant being called up, read their rights, and  
7 asked their plea. And I saw so many people under the  
8 age of 21, so many people for whom it was pretty  
9 obvious that English was a second language, going up  
10 and pleading guilty without any idea what the  
11 ramifications were, without ever understanding that,  
12 okay, it's only an MIP, but you get picked up for  
13 another MIP and you are losing your license for 30  
14 days. You get picked up for a third MIP, you are  
15 losing your license for a year. You go to apply for a  
16 job, and they are going to see an alcohol arrest, and  
17 they are going to pick the person that doesn't have an  
18 alcohol arrest. None of those things explained to  
19 them. In the meantime, here is my 19-year-old girl.  
20 I get her in a juvenile diversion program. She  
21 doesn't have a record.

22 Imagine two years from when one of those  
23 other defendants goes in or tries to get a job or  
24 tries to apply to school competing against my client,  
25 can anybody here really say they both received equal

1 access to justice?

2 That's why it's important. That's why every  
3 lawyer here, whether you do criminal defense or not,  
4 whether you are a prosecutor or a criminal defense  
5 attorney, you should be supporting this and  
6 encouraging your legislators to support it.

7 The one final thing I want to talk about, and  
8 for those of you who were here in September, you know  
9 I have been preaching about civic education all year.  
10 It's something that is vital to us. I have been  
11 called the Johnny Appleseed of the Constitution  
12 because at every stop that I make around the state I  
13 bring and I leave copies of the U.S. Constitution for  
14 people.

15 I am not a constitutional scholar, although I  
16 did get into a heated debate with a representative, a  
17 congressman's aide in Washington, D.C., about whether  
18 preambulatory language really is enforceable. I don't  
19 have a position whether you are a strict  
20 constructionist or whether you are supposed to be an  
21 activist who sees the Constitution as something that  
22 can be molded to fit scenarios. The reason I carry a  
23 Constitution is to remind me of why we do what we do  
24 and to remind me that every time I step in court,  
25 although I am advocating for my client, more

1           importantly I am advocating for our justice system and  
2           for the rule of law.

3                       Two thirds of the people in the United States  
4           cannot name their congressman. Two thirds of the  
5           people in the United States can't name a single  
6           Supreme Court Justice. Eighty percent of high school  
7           juniors are not proficient in social studies in the  
8           state of Michigan. If these people cannot understand  
9           the basic tenets of our government, how can they ever  
10          understand that it's important to support the justice  
11          system, the third branch of the government. How can  
12          they ever understand that it's important to support it  
13          financially as well as just emotionally. How can they  
14          ever understand that sometimes a judge has to make a  
15          decision which is unpopular, not because it's the  
16          right, not because it's -- let me back up.

17                      How can they ever understand that sometimes a  
18          judge has to make a decision that's unpopular because  
19          it's the right thing to do, because constitutionally  
20          by making that decision that judge is protecting every  
21          one of our rights. It's not a technicality that this  
22          criminal defendant gets off. It's a constitutional  
23          right that is being saved, that is being protected by  
24          that judge. If these people can't understand that,  
25          our whole justice system is at risk.

1           So that's why I do it. That's why I  
2 encourage you to do it. I encourage you to talk to  
3 any group that you can. The State Bar has a great  
4 resource on its website with the civic and legal  
5 related education website. It's got a full page of  
6 links to articles, to curricula, to anything that you  
7 would need if you wanted to go speak to a group from  
8 second grade to senior citizen.

9           Go there, read that material, go meet with  
10 groups. It's only by spreading the word that we can  
11 fulfill our mission as the guardians of justice. I  
12 know that sounds dramatic, but that's really -- if we  
13 are not going to do it, who will? Nobody is in a  
14 better position than lawyers are to protect our  
15 constitutional rights.

16           So I think I have already gone over my time,  
17 but if anybody has any questions I would be happy to  
18 take them. No questions. I like that.

19           Thank you for having me, and I look forward  
20 to seeing you again in September.

21           (Applause.)

22           PRESIDENT COURTADE: Janet, you do not have  
23 any idea how much trouble Janet saves the State Bar  
24 from. One thing she just wanted me to clarify is that  
25 the Solutions on Self-Help website, the State Bar

1 supports it, but it is not a State Bar website. It's  
2 a separate website. It came as a result of the  
3 Solutions on Self-Help Task Force that Justice Marilyn  
4 Kelly created and solicited volunteers for. So even  
5 though we are fully supportive, it's not a State Bar  
6 website. Any questions? Thank you, everybody.

7 CHAIRPERSON WARNEZ: Thank you so much,  
8 Bruce.

9 Here is my opportunity to address everyone  
10 today, and I just want to tell you thank you so much  
11 for spending time here, for giving up time with your  
12 home and your family on the weekends when you should  
13 be expecting downtime and so forth, but this is one of  
14 the most important and energizing and exciting things  
15 really in the long run you may be doing, not just for  
16 yourself, but for all the lawyers in Michigan and even  
17 more so the litigants who come into our courts who  
18 have no idea what lawyers are, what our system is.

19 It's been said, and I think about it a lot,  
20 don't ever underestimate what one person can do, what  
21 a difference that one person can do in their  
22 activities, and in that regard I encourage you and  
23 charge you and challenge you today to put in effort,  
24 time. I know you already have, but in the debates  
25 that I expect to be coming from the proposals that are

1 on our calendar, I invite everybody to truly, please  
2 actively participate, engage, and make a difference,  
3 speak your mind.

4 I have thought so much also and been affected  
5 by the bombings in Boston, and I think about that  
6 every day, really. I put my shoes back on again. I  
7 took a long break from running, and that singular  
8 event made me put my shoes on and say I am grateful to  
9 have the legs I was born with and I have the energy  
10 and ability to run two miles around my neighborhood,  
11 and in that regard that's the same energy and spirit I  
12 think I am trying to pull from us as we tackle our  
13 business here today.

14 You know, I think Boston also highlights some  
15 things that we also may need to take into heart, which  
16 is life is fragile and our health is fragile, and I  
17 know that that, if we think about that and we think  
18 about some of the proposals what we are trying to do,  
19 it's not about us always, but it's others, and health  
20 is fragile.

21 With the inventory rule, I think about in  
22 that regard, you just never know what's going to  
23 happen. So the intentions of that proposal, I think,  
24 is meant to acknowledge that and not be about how hard  
25 it is on us but how it might be helpful to those we

1 love and to our clients that we have duties and  
2 obligations to. I am not advocating, but I do like to  
3 look at that proposal in those terms more so than  
4 others.

5 I want to thank, and when I have this  
6 opportunity as well, when I said one person can make a  
7 difference, there are singular people out in the  
8 audience who are making a difference, and this would  
9 be a good time for me briefly just to ask to  
10 acknowledge. I want to acknowledge all of your chairs  
11 who are serving, and perhaps have them rise. If you  
12 ever have a question, not for just this meeting but  
13 future meetings, for September, specifically you will  
14 know who to go to or speak to.

15 So in that regard, if I could acknowledge  
16 Carl Chioini, who is our Assembly Review chair, stand  
17 and say hello.

18 (Applause.)

19 CHAIRPERSON WARNEZ: Fred Herrmann, he is our  
20 chair of Drafting.

21 (Applause.)

22 CHAIRPERSON WARNEZ: Is Eilisia Schwarz here?  
23 There she is.

24 (Applause.)

25 CHAIRPERSON WARNEZ: Eilisia is chair of our

1 Hearings Committee, which is not always as active as  
2 others, but so important.

3 Dan, obviously you got to meet Dan earlier  
4 today with the earlier motions, but acknowledge Dan as  
5 our chair of Nominating and Awards.

6 (Applause.)

7 CHAIRPERSON WARNEZ: Kathy Kakish, the chair  
8 of our Rules and Calendar Committee.

9 (Applause.)

10 CHAIRPERSON WARNEZ: John Clark. There is  
11 John. Stand up.

12 (Applause.)

13 CHAIRPERSON WARNEZ: John is chair of Special  
14 Issues, and so we thank him for -- he has been  
15 especially energetic and enthusiastic in wanting to  
16 get involved.

17 For anybody that is new, these committees are  
18 the ones you need to start getting active in,  
19 volunteer for. This is how you get to know the  
20 Assembly even better than attending the two meetings a  
21 year that we have. I encourage you, if you are  
22 interested, make yourself known to Kathleen Allen.  
23 She is going to be very interested to know what your  
24 interests are as she tackles her appointments in the  
25 upcoming year, and she is starting that effort

1 already, right now.

2 I also don't want to forget in that regard,  
3 there is a deadline that everyone should be aware of  
4 relative to September's meeting, and that is that  
5 July 25th is the deadline. If anyone is interested in  
6 running for clerk of the Assembly, you must submit a  
7 letter of interest and perhaps a resume to Anne Smith  
8 by July 25th, or I should say Vanessa Williams as  
9 well, as our clerk would be happy to receive that, but  
10 attention to Vanessa and Anne for that purpose.

11 Does anyone have any questions? In that  
12 regard, I have noticed that we are in the company of a  
13 distinguished guest, who I am so privileged and  
14 pleased to have with us. I have some remarks I would  
15 like to make regarding our next agenda item, which is  
16 to be addressed by former Justice Marilyn Kelly.

17 Justice Kelly, I have admired you for a long  
18 time. I have sat in this Assembly, as you have, and I  
19 would like to just let our Assembly know a little bit  
20 more about you.

21 I understand that you grew up in the city of  
22 Detroit. You are the youngest of three children from  
23 your family. You graduated from MacKenzie High  
24 School. Education has been a primary part of your  
25 efforts throughout your career. I acknowledge that

1 you received a Bachelor of Arts from Eastern Michigan  
2 University and studied in Paris at -- forgive me. I  
3 won't even try. My pronunciation of French would be  
4 impossible, but I know you have been far and wide  
5 studying. You have a Master's from Middlebury  
6 College, obtained a law degree from Wayne State, from  
7 which you were acknowledged as a distinguished alumni,  
8 and have been reintegrated into teaching, I believe,  
9 and on, I assume, the Board there as well.

10 I know that you have a distinguished service  
11 career in education, serving as a teacher in  
12 Grosse Pointe Public Schools, as well as the Michigan  
13 State Board of Education. You practiced law for 17  
14 years prior to becoming a part of the bench; that you  
15 were elected to the Court of Appeals in 1988 and  
16 reelected in '94, and in 1996 you were elected to the  
17 Supreme Court of Michigan and reelected again in 2004,  
18 serving as its chair from 2009 to 2011. Also, only  
19 the fifth woman ever to do that, so happy for that.

20 I acknowledge your career service with the  
21 Women Lawyers Association, and all of the special  
22 organizations and efforts you spearheaded, including  
23 the Self-Help Task Force. We are so pleased and  
24 privileged to have you here. We welcome you  
25 wholeheartedly, and I ask you to join us up at the

1 podium to address the Assembly.

2 (Applause.)

3 JUSTICE KELLY: Thank you all. It's always a  
4 thrill for me to have this opportunity to address you,  
5 and I am pleased to be able to talk to you a little  
6 today about one of my pet projects, and I'll be happy  
7 to hear comments from you. I have been asked to  
8 discuss the Judicial Selection Task Force, and that  
9 report, the report of that task force, is located at  
10 tab seven of your material. It's a short read,  
11 believe me, and one that is worth your while when you  
12 have a few minutes.

13 The recommendations of the task force include  
14 removing the age 70 limitation on lawyers to run for  
15 judgeships in Michigan, which is one of your proposals  
16 for consideration today at tab 11.

17 Let me step back a minute and go back over  
18 some of the background about the task force and its  
19 report, some information that maybe some of you are  
20 unfamiliar with.

21 Judge James Ryan, formerly Justice Ryan of  
22 the Michigan Supreme Court and Judge Ryan of the  
23 6th Court of Appeals, and United States Supreme Court  
24 Justice, retired, Sandra Day O'Connor and I set up  
25 this commission in 2010 to study proposed needed

1 changes to Michigan's method of selecting  
2 Supreme Court justices. Although we focused only on  
3 Supreme Court justices, the implications for the other  
4 700-some judges in our state are obvious.

5 The task force had 25 members. Each member  
6 was selected because he or she was well known and  
7 respected. The political leanings of these  
8 individuals to the extent their leanings were known  
9 were divided or divided them 50/50 right down the  
10 middle, conservative, republican.

11 In terms of their professions, four were  
12 judges, 11 lawyers. Two were businessmen, two were  
13 former legislators. There was a League of Woman  
14 Voters leader, a U of M regent, an educator, an  
15 accountant, a bank president, and a large corporation  
16 vice-president. They came from all over the state.  
17 Among these lawyers were three former presidents of  
18 the State Bar of Michigan -- Tony Jenkins, Wallace  
19 Riley and Charles Toy -- along with Executive Director  
20 of the State Bar of Michigan, Janet Welch. More about  
21 the members appears at pages 15 through 18 of that  
22 report.

23 The work of the task force was funded  
24 entirely by its members, all of whom are volunteers,  
25 by the C. S. Mott Foundation, by the League of Women

1 Voters and principally by the State Bar of Michigan  
2 Foundation. Wayne State University Law School  
3 furnished the meeting facilities, and one of the  
4 professors, Justin Long, attended voluntarily all of  
5 the meetings and served as reporter, writing the  
6 report.

7 The task force began its work in January of  
8 2011 and it continued until August of 2011 with  
9 educational presentations, not discussions on what  
10 should be the proposals, but merely on educating  
11 itself about the state of law in Michigan and in other  
12 states.

13 If you would like to learn more about what  
14 the members read and the people they heard from, the  
15 lecturers they heard, you can consult pages 13 and 14  
16 of the report.

17 Then from August to December the members  
18 developed their recommendations, which were published  
19 in April of 2012.

20 I can say that the deliberations of this  
21 group were an outstanding example of earnest debate  
22 and respectful consideration of other people's views,  
23 which is remarkable considering the diversity of the  
24 group and the strongly felt and divergent views of its  
25 members.

1                   Ultimately there were six recommendations  
2                   that came out. There were no dissents. All of the  
3                   recommendations were the consensus of the members. In  
4                   a nutshell, here is what they were. Number one, the  
5                   Legislature should amend the Michigan Campaign Finance  
6                   Act to require full disclosure of the source of all  
7                   funding of judicial campaign ads, and this includes  
8                   issue ads.

9                   As you know, money has been pouring into  
10                  Michigan judicial elections in amounts unheard of as  
11                  recently as 15 years ago. For example, total spending  
12                  on the Michigan Supreme Court races last November,  
13                  according to the Michigan Campaign Finance Network,  
14                  was \$18.4 million. Not only is that far in excess of  
15                  the spending before the year 2000, much of it is  
16                  anonymous. We don't know who spent it.

17                  Consider that of the \$18.4 million spent,  
18                  \$13.85 million went into unreported TV ads, so-called  
19                  issue ads. So 75 percent of the money spent on the  
20                  last Michigan Supreme Court race came from interests  
21                  and individuals who are unidentified to the public.  
22                  We have campaign finance laws in Michigan, but they  
23                  regulated only \$1 of every \$4 spent on this race.

24                  And this undisclosed judicial election  
25                  spending is not occurring just at the Supreme Court

1 level these days. It's spilling into the lower  
2 courts. So that in November, in the November election  
3 in 2012, in Oakland Circuit Court, unreported TV  
4 advertising was \$2.1 million that's unreported.  
5 Again, the disclosure rate was a mere 25 percent. We  
6 don't have any record of who spent the other 75  
7 percent. We didn't know it before the election, and  
8 we don't know it today, and we will probably never  
9 know it.

10 The task force concluded that existing  
11 reporting requirements should apply to all  
12 advertising, including issue ads, that the people are  
13 entitled to know who contributed and how much they  
14 contributed. Task force members believe that many of  
15 the nasty ads will go away if the people who pay for  
16 them, if their names are known to the public,  
17 especially before election day.

18 Studies show, in fact, that 90 percent of  
19 voters, both republican and democrat, favor these  
20 changes in our election law. And I am happy to say I  
21 know that the Representative Assembly has already  
22 taken action on this problem, that three years ago you  
23 approved a resolution requiring disclosure prior to  
24 judicial elections of the source of all funding for  
25 all expenditures for campaign advertising, so my hats

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1 off to you on that. You have helped show the way.

2 The second recommendation of the task force  
3 is that the Legislature should remove the statutory  
4 requirement that candidates for the Michigan  
5 Supreme Court be nominated by political parties. It  
6 should require, instead, that these candidates be  
7 nominated in nonpartisan primaries, the same way all  
8 the other state judges are nominated.

9 No other state nominates its Supreme Court  
10 justices at a partisan political convention and then  
11 turns around and immediately elects them at a  
12 nonpartisan general election. This procedure has  
13 subjected Michigan to ridicule nationwide. The task  
14 force members believe that getting rid of political  
15 nominations of Supreme Court candidates won't remove  
16 politics from these elections, but it will reduce the  
17 effect of political parties. It will greatly lessen  
18 the public stigma the public has come to associate  
19 with Supreme Court justices. So the appearance is  
20 part of the problem here.

21 The public, you know, we know, we all  
22 believe, should be confident that justices decide  
23 cases without worrying whether their ruling conforms  
24 with party ideology or otherwise puts their party's  
25 support at risk.

1           The third task force recommendation is that  
2           an independent, nonpartisan citizens campaign  
3           oversight committee should be formed to monitor  
4           judicial campaign advertisements, check them for  
5           factual accuracy, and report to the electors on their  
6           findings before election day. The task force  
7           encourages nonpartisan civic groups to form such a  
8           campaign oversight committee. Members of the media  
9           have assured us that they would welcome such an effort  
10          and would assist in publicizing an independent  
11          committee's findings.

12           The fourth recommendation of the task force  
13          is that the Michigan Secretary of State should create  
14          a voter guide and disseminate it to all Michigan  
15          electors informing them of the qualifications of the  
16          candidates for judicial office.

17           Voter ignorance about judicial elections is a  
18          major problem with our election system. If it's going  
19          to survive and work, the voters have to know more  
20          about candidates and care more about voting for them.  
21          As much as a third that go to the poles to vote don't  
22          vote the nonpartisan ballot, don't vote for the judges  
23          at all. If the Secretary of State were to distribute  
24          information by way of the website, the cost of  
25          implementing this recommendation would be pretty low.

1           The fifth recommendation is the Governor  
2           should promulgate an executive order creating an  
3           advisory commission to screen candidates for  
4           Supreme Court vacancies. It should recommend new  
5           justices to the Governor based on merit. Again,  
6           Michigan's current law stands out among all the  
7           states. The Governor here is allowed to fill  
8           vacancies on the Supreme Court with utterly no checks  
9           and balances on his or her decision.

10           The task force concluded that Michigan should  
11           adopt a practice that's worked well in other states.  
12           It should have a nonpartisan, diverse commission made  
13           up of lawyers and nonlawyers that scrutinizes the  
14           candidates that want to fill Supreme Court vacancies,  
15           and then the commission should recommend to the  
16           governor whom to appoint based on merit alone, devoid  
17           of political considerations or of the influence of  
18           special interest. And the governor should agree to  
19           pick from among those nominees in order to fill the  
20           vacancy. The commission should function in public,  
21           and it should be subject to public scrutiny.

22           Now, last spring some of us sat down with  
23           Governor Snyder, some of us from the commission, task  
24           force. We put this before him. He listened and asked  
25           questions, but he didn't take any action at all. And,

1 as you know, he has now chosen a new Supreme Court  
2 justice to fill a vacancy and, again, did it without  
3 any change in the method used before, no check and  
4 balance whatsoever on his decision except such as he  
5 wished to make.

6 The last recommendation we made is that the  
7 Legislature should put before the people a  
8 constitutional amendment removing the prohibition on  
9 persons over 70 years of age from running for judicial  
10 office. No other elected officials in Michigan are  
11 subject to such an age qualification. The task force  
12 believes that this limitation is not only arbitrary,  
13 but it serves no legitimate -- no public interest.  
14 Based on the sole criterion of age, it artificially  
15 ends the judicial careers of existing judges and  
16 justices who reach the age limitation, and it  
17 unnecessarily constricts the pool of otherwise  
18 qualified persons who might be candidates. It smacks  
19 of age discrimination.

20 The age 70 years limitation was drawn before  
21 we were using words, I think, like age discrimination.  
22 Back in the 1908 constitution it was created at a time  
23 when there was no Judicial Tenure Commission to review  
24 judges who didn't function well in office and  
25 recommend their removal. So it was created more than

1 a hundred years ago when it was more difficult to  
2 remove dysfunctional judges from office and when fewer  
3 people had a effective working life into their 70s.

4 Those are the recommendations of the task  
5 force in a nutshell, and you will notice in the report  
6 a large part of the pages in the report are actually  
7 part of an appendage which suggests legislation, an  
8 executive order, constitutional amendment that would  
9 implement, that the legislature and others in  
10 government could use to implement these  
11 recommendations. Some of these have been adopted from  
12 other states and where they have worked very well.

13 Since this report was issued in April of  
14 2012, the task force has taken these recommendations  
15 personally to key legislators, to the Governor, as I  
16 said, to the Secretary of State, meeting with them  
17 personally, asking them to take action.

18 With respect to the Legislature, we have  
19 sought bipartisan support of the legislation. So far  
20 the only action that's been taken is on that age 70  
21 recommendation. The Governor and the Secretary of  
22 State haven't taken any action at all on any of the  
23 recommendations.

24 The bottom line is that the climate to date  
25 does not appear to be favorable to enacting most of

1 these recommendations, even though the polls show that  
2 the public is solidly behind a number of them. But,  
3 of course, we all know that important change is  
4 usually slow in coming. An influential body like this  
5 Representative Assembly can help turn the tide in my  
6 opinion by speaking out. So I leave it to you, and I  
7 would be happy to answer questions. Yes.

8 CHAIRPERSON WARNEZ: Please come forward at  
9 the mike.

10 MR. FLESSLAND: Dennis Flessland from 6th  
11 circuit. Justice, was there any discussion about  
12 raising the age to 75 maybe for mandatory retirement  
13 instead of keeping -- instead of abolishing it  
14 entirely?

15 JUSTICE KELLY: Yes, there was.

16 MR. FLESSLAND: What were the pros and cons,  
17 because it seems to me that it's kind of nice to have  
18 a cut-off age. I mean, seventy might be low, but we  
19 have all been before judges who are kind of slowly  
20 losing their edge, and it's hard for the lawyers and  
21 the Judicial Tenure Commission to kind of act in those  
22 ambiguous situations, because there is a dynamic on  
23 the bench and a dynamic in the Bar where nobody wants  
24 to do harsh things against an old friends of theirs.  
25 This kind of made it easy, but 70 might be too low.

1 Did you talk about that?

2 JUSTICE KELLY: We talked about it, because  
3 it's certainly a viable suggestion, and I think in the  
4 end we ended up with the recommendation to simply  
5 abolish it, partly because there is no particular age  
6 that can be identified as being the right age to force  
7 somebody out and that people aren't forced out in  
8 other public office because of age and that there is,  
9 as I said earlier, a mechanism now to get rid of  
10 people who shouldn't be in that didn't exist before.

11 It's certainly a debatable issue, but, again,  
12 there seems to be no good age to set a limit at if we  
13 were going to set a limit.

14 CHAIRPERSON WARNEZ: Come forward.

15 MR. BARRON: Justice Kelly, I wonder if you  
16 could speak to the discussion that the task force may  
17 have had about, given Michigan's electoral system, the  
18 strong power of incumbencies, that if a person is  
19 elected to the bench that, even if there is  
20 competition in the election, they tend not to -- they  
21 tend to retain their office, which is good in the case  
22 of a fine judge but not good in the other case and  
23 whether the impact of adopting this constitutional  
24 amendment would tend to keep people in and not allow  
25 new lawyers or judges to take judicial positions

1 because there would be few vacancies.

2 JUSTICE KELLY: Yes, you are right, it  
3 probably would keep people in if they chose to stay  
4 beyond the age 70 and run again, and there was a lot  
5 of discussion. In fact, I argued the part that there  
6 is a lot of new, young blood that the judiciary ought  
7 to benefit from. The counteracting argument is, of  
8 course, that this is a position where people learn as  
9 they go and often get better and wiser the longer they  
10 are on the bench and that the public effectively gets  
11 the benefit of its expenditures on them the longer  
12 they are in office. It's a debatable issue obviously

13 MR. PHILO: John Philo from the 3rd circuit.  
14 I just wanted to follow up on the age requirement,  
15 because I do think there is some discomfort having  
16 this arbitrary age limitation. It just doesn't, you  
17 know, just doesn't sit right, but on the other hand I  
18 do think there is a very real problem with the sense  
19 of entitlement to an office. I know that it isn't in  
20 other political offices. Many of us think maybe it  
21 should be, because it just becomes an entrenched, and  
22 nobody wants to speak against that, someone who has  
23 had a life, their entire life. The Judicial Tenure  
24 Commission does not seem to be set up to address that  
25 at this point.

1                   Was there some consideration of more  
2                   objective criteria that might be added to the Tenure  
3                   Commission or anything of that nature?

4                   JUSTICE KELLY: That is a good idea. I think  
5                   the Tenure Commission could set up criteria to agree,  
6                   specifically to look at people who are not functioning  
7                   well enough, more than they do now. I agree that  
8                   that's a good idea.

9                   MR. MORGAN: Ken Morgan, 6th circuit. I  
10                  started my career at the Tenure Commission on staff,  
11                  so this issue is something I have paid close attention  
12                  to for a while.

13                  I am curious in the materials that we  
14                  received there is a comment that a significant number  
15                  of the members of the task force believe that the  
16                  election of judges compromises judicial independence  
17                  even with appropriate reforms, yet the final report  
18                  doesn't suggest a change to that aspect of the  
19                  constitution. Could you speak to what was the  
20                  decision, how was it arrived at, and then related to  
21                  that, why shouldn't the effort be to address that  
22                  issue across the other benches.

23                  JUSTICE KELLY: The issue of age?

24                  MR. MORGAN: No, no, the election issue.

25                  JUSTICE KELLY: Well, that's an excellent

1 question. It's really a question that's lurking sort  
2 of behind the scenes on this whole report.

3 In a word, what happened is that ultimately  
4 probably the majority, the slight, a slight majority  
5 of the members concluded we ought to go to an  
6 appointed system for all the judges in the state but,  
7 I believe, did not agree to make that a strong  
8 recommendation, a big recommendation of the commission  
9 because it was so divided on it and there seems to be  
10 no immediate likelihood that that will happen in this  
11 state. The forces that it would take, the kind of  
12 money it would take to change it, because it would  
13 require a constitutional amendment, just aren't there  
14 right now. So I believe that a good number of the  
15 task force members resolved to simply try to find ways  
16 to improve the present system.

17 At one point I recommended to them that they  
18 tell the public if these changes can't be made we  
19 ought to go to an elective system. They weren't -- I  
20 mean to an appointed system. They weren't quite ready  
21 to do that either.

22 But that's lurking behind all of this, and  
23 it's my strong opinion that if we can't make changes  
24 to reform the system we have got right now, we are  
25 going to have to seriously talk about just going,

1 leaving them, but it certainly is worthwhile to try to  
2 improve the system we have, and it has worked in the  
3 past quite well. It's been mostly recently, in my  
4 opinion, with this influx of unidentified money and  
5 the increased voterization of the court that we have  
6 had so much difficulty and so much public opinion that  
7 questions the impartiality and independence of our  
8 judges.

9 MR. SMITH: Joshua Smith, 30th circuit. A  
10 couple of points. Although judges, as far as I know,  
11 are the only elected officials that have an age  
12 limitation, they are also among the few elected  
13 officials that aren't subject to term limits. So the  
14 fact is that in my lifetime, living in the 30th  
15 circuit -- I have lived in the 30th circuit my whole  
16 life -- there has been one circuit, sitting circuit  
17 judge who has lost a race. There have been, I think,  
18 two, maybe three sitting Supreme Court justices who  
19 have lost a race, and I think there has been a total  
20 of zero Court of Appeals judges who have lost a race.

21 The fact is, unless you have that age  
22 limitation or have term limits, you have effectively  
23 zero turnover in judge positions unless and until a  
24 judge decides to retire. I think that's problematic  
25 for several reasons.

1 I will give an example, the U.S.  
2 Supreme Court. I don't know what the median age of  
3 the U.S. Supreme Court is. It's old. It's very old.  
4 And not that I am exactly young anymore.

5 JUSTICE KELLY: It's even old by my  
6 standards.

7 MR. SMITH: It's up there. Let's put it this  
8 way, they are old enough to be my grandparents, and  
9 there is nothing wrong with that, but when you look,  
10 for example, at the social mores of some of the people  
11 on the Supreme Court, simply not representative of  
12 people who are sometimes 40, 50 or even 60 years  
13 younger.

14 Some of the statements I heard during the gay  
15 marriage debates from the court I think were  
16 absolutely cringe worthy. I am sure that a lot of  
17 people in their 80s might feel that way, but a lot of  
18 people in their 20s don't. Gay rights would be an  
19 issue on which there is wide divergence and it's  
20 largely generational, but those are two separate  
21 issues. One, the fact is, an elected position without  
22 an age limit, you do have, it's at the higher end of  
23 the age pool for various reasons, but at the same  
24 time, if you have elected judges, for good or ill,  
25 they just don't lose their races. Very rarely.

1 JUSTICE KELLY: You make good points. I will  
2 say this to you. We have as many or more people  
3 appointed to the bench in Michigan at all levels than  
4 we have elected, and that is because there is a lot of  
5 turnover. A lot of judges do quit right in the middle  
6 of their terms or die. So that, in fact, we do have  
7 an influx of new people that we wouldn't have if that  
8 wasn't the case.

9 If you just look at the Supreme Court, I  
10 haven't checked recently, but the Court of Appeals,  
11 for example, large, large number of those 28 people  
12 were appointed, when they first took office by  
13 appointment, not by election. In many ways what we  
14 have in Michigan is an appointed system with elections  
15 tagged down to them.

16 I tend to believe that the age of the  
17 judiciary is always going to be a little older than  
18 the average age of the population and even of the  
19 attorneys, and maybe that's a good idea. I mean,  
20 theoretically with age comes wisdom. I don't want to  
21 overstate it, but that is the countervailing.

22 PRESIDENT COURTADE: Bruce Courtade from the  
23 17th circuit. I am going to take the time to correct  
24 an oversight from my earlier presentation and then ask  
25 a question based on that. The oversight was I forgot

1 to report to this body that with the appointment of  
2 Justice Viviano the State Bar Judicial Qualifications  
3 Committee received glowing reviews from everybody  
4 involved. That body is appointed by the State Bar  
5 presidents, historically has been geographically  
6 diverse, politically diverse, age diverse, and seems  
7 to provide, as I look at the proposal, a lot of the  
8 things that would be provided by the Advisory  
9 Screening Commission.

10 Was there discussion about the JQC and its  
11 role and would you see a continuing role for the JQC  
12 or would that be excluded by the screening commission,  
13 as I knock over the microphone.

14 JUSTICE KELLY: I don't know if it would be  
15 excluded, but there was definitely talk about this.  
16 Let me say I think and I believe the members of the  
17 task force felt that that commission has done a very  
18 good job over the years. There have been several  
19 criticisms. One is that it's only lawyers, and in the  
20 general public's view this is not a group that's  
21 representative of them. It represents to them a  
22 professional interest, a special interest, and so that  
23 decreases its value in the eyes of the public.

24 Secondly, as things stand right now, the  
25 Governor isn't required to go to you at all at any

1 time, and so it's totally at the Governor's discretion  
2 how much to listen to you, if at all. But certainly  
3 the Governor has no obligation to act on your  
4 recommendations favorably, and that also would change  
5 with this commission.

6 If there are no further questions, I thank  
7 you for your attention and I appreciate your interest  
8 in this.

9 (Applause.)

10 CHAIRPERSON WARNEZ: It's 10:40. We are a  
11 little bit ahead of schedule. I might suggest, unless  
12 there is objection, that we take our break now, but  
13 still move up the schedule to return to our seats in  
14 ten minutes. Any objections to that suggestion? All  
15 right, let's take a break. I will see you back in  
16 your seats at ten minutes to 11.

17 (Break was taken.)

18 CHAIRPERSON WARNEZ: If everyone could get in  
19 their seats, please.

20 At this point in the calendar what we are  
21 ready for and excited to hear is the Assembly Review  
22 report from our chair of Assembly Review Committee. I  
23 would ask Carl to come forward.

24 MR. CHIOINI: Good morning. I too am going  
25 to be brief, try to be brief, but I do want to give

1 you a little bit of background as to what the Assembly  
2 Review Committee has been doing for the last seven or  
3 eight months.

4 When I first was appointed by Dana, her and I  
5 met, and we wanted to discuss what some of Dana's  
6 goals were for the Assembly, to try to make these  
7 meetings meaningful, to try to get people to attend,  
8 to have a really decent agenda and to get the word out  
9 there. And we had help of a very good committee.  
10 Past Chair Richard Barron, who is here this morning,  
11 Kim Breitmeyer, who has been our recording secretary,  
12 John Blakeslee, and Michael Blau. All of us met a  
13 number of times, and we tried to work on what went on  
14 last year with the committee and last year under  
15 Mr. Barron. What we did is we prioritized some issues  
16 and concerns that the committee could address, and  
17 then we decided how we could do this. And we had  
18 great help from the State Bar. I can't tell you how  
19 valuable the State Bar has been to us. Anne Smith,  
20 Candace Crowley, Anne Vrooman. Everybody has just  
21 been terrific to us.

22 We decided initially to look possibly into a  
23 survey to find out what the members would be  
24 interested in and what we could do to make these  
25 meetings more interesting and more meaningful. And we

1 met with Anne Vrooman, and Anne sat down and talked to  
2 us, and ultimately we came up with the conclusion that  
3 maybe we were only going to get a 20 percent response  
4 and this wasn't the group of people that would help  
5 us.

6 We then later looked at another approach. We  
7 looked at an approach that would maybe get someone who  
8 has been close to the State Bar, that has a close  
9 affiliation to the State Bar and try to develop a  
10 means of using that as a way of generating interest,  
11 publicizing the Assembly and getting people interested  
12 in the Assembly process. And we looked at that for a  
13 little bit. And we had used Candace Crowley. Candace  
14 came in and helped us to identify some areas there.

15 And prior to this meeting you can see many of  
16 the fruits, at least I hope you have seen some of the  
17 fruits of the Assembly. Did you all get an e-blast  
18 from your commissioner telling you about the meeting  
19 and telling you what was on the agenda? Hopefully  
20 some of you got that. How many of you got that? We  
21 are trying to get the word out there. That was one  
22 way.

23 We were also successful with Anne.  
24 Anne Smith got us the publication in Lawyers Weekly  
25 where we got a blurb in Lawyers Weekly that told

1 everybody about what the agenda is and some of the  
2 topics of the agenda we would be discussing this  
3 afternoon. If you saw that, that's also another  
4 methodology.

5 We are trying to spread the word out and to  
6 get people interested in the Assembly so that we have  
7 people that want to be on the Assembly and want to  
8 participate. It's an ongoing process. We aren't  
9 done. We are still intending to continue, because we  
10 have to explore the other areas. So if you see any  
11 one of us after the meeting, please feel free to talk  
12 to us and give us your ideas, because we still have  
13 more to finish, more to conclude.

14 Any questions on the part of anyone? Thank  
15 you.

16 (Applause.)

17 CHAIRPERSON WARNEZ: We are now prepared to  
18 start to consider the inventory rules, and with those  
19 efforts I am pleased to acknowledge and introduce,  
20 first of all, Ed Pugh. Ed, he is a former chair of  
21 our Master Lawyers Section, chair of the committee  
22 that drafted the rule in front of you, and the lawyer  
23 who has been in private practice with Pugh & Moak, who  
24 has been practicing and assisting lawyers in their  
25 succession planning, has a lot of experience about the

1 subject of what's in front of us.

2 We also are privileged to have with us  
3 Charles Rutherford. Mr. Rutherford is the chairperson  
4 of the fellows program, which is the supporting group  
5 in the Michigan State Bar Foundation for Access to  
6 Justice. He is a former president and trustee of the  
7 Macomb State Bar Foundation. He is the former chair  
8 of the Senior Lawyers Section, which is now the Master  
9 Lawyers Section, he is retired in 2010 from Dykema  
10 Gossett where he specialized in intellectual property  
11 law. I would like to welcome both gentlemen with a  
12 hardy round of applause.

13 (Applause.)

14 MR. PUGH: Good morning. Both Charlie and I  
15 are past Master Lawyers chairmen, so we are a little  
16 bit beyond the age of most of you, but this is  
17 something that we have been working on for a number of  
18 years, probably more like seven or eight.

19 In 2007 the American Bar Association began  
20 its recommendation that the states adopt an inventory  
21 attorney rule. At last count, at least 20 states had  
22 adopted a rule for the succession of attorneys  
23 practice. Some call it an inventory rule, others call  
24 it names such as successor attorney, assisting  
25 attorney, attorney surrogate or receiver attorney. So

1 if you try and Google inventory attorney, you are  
2 going to find only a third of the states that have  
3 this type of a rule.

4 At present in Michigan when a lawyer dies,  
5 disappears, or is disabled in a way that prevents the  
6 lawyer from discharging responsibilities to his  
7 clients and if he leaves no one, he or her, leaves no  
8 one to step in with authority to take over their  
9 practice, there is a significant lapse of time while  
10 those left to sort things out figure out what to do.  
11 Especially for solo practitioners, without support  
12 staff or family or friends plugged in, there may be no  
13 one who is even aware of the need to do that sorting  
14 out, only clients who may or may not realize something  
15 has happened and don't know what to do about it.

16 Although there is a rule that permits the  
17 filing of a custodianship by the Attorney Grievance  
18 Commission, in most situations it's buried deep in the  
19 Michigan disciplinary procedural rules and is probably  
20 unknown to most lawyers.

21 An early project of the Master Lawyers and  
22 even a project of the old Senior Lawyers Section was  
23 to develop a way to address the need for succession  
24 planning by lawyers.

25 MR. RUTHERFORD: Thank you. We need to

1 protect our clients so that if something unforeseen  
2 happens their interests will be protected. We need to  
3 protect nonlawyer family members so that they will not  
4 be left with the situation that has to be sorted out  
5 unassisted.

6 MR. PUGH: How did we come up with the  
7 language that we are proposing to you? After studying  
8 many states' rules, some of which are quite detailed,  
9 our committee decided that something simple was really  
10 the best way to go.

11 Wyoming has a short one-page rule that they  
12 call the designation of attorney surrogate. Florida's  
13 rule which dates back to 2005 and was revised in 2010  
14 is now a one-page rule. Indiana's is four pages long  
15 in small print. Washington state has a half page rule  
16 with just a planning ahead handbook, but all of the  
17 states that we have looked at are considering  
18 something along these lines. Because lawyers have  
19 many different kinds of practices and practice in  
20 quite a variety of circumstances, constructing a  
21 one-size-fits-all way for an attorney, an inventory  
22 attorney to act, made little sense. So the rule is  
23 written in a way that permits the attorneys to  
24 determine the scope of what the inventory attorney is  
25 agreeing to do.

1 MR. RUTHERFORD: We made a deliberate choice  
2 to require lawyers who have clients to designate a  
3 lawyer who has agreed to serve as inventory attorney,  
4 because the protection of clients' interests are that  
5 important, but we also made a deliberate choice not to  
6 make this an ethical rule requirement or a requirement  
7 that could subject a lawyer to administrative  
8 suspension for noncompliance, as is the case with one  
9 who does not pay his or her dues.

10 MR. PUGH: In response to comments that  
11 Charlie and I and others received when we first  
12 approached you about this about six months ago, we  
13 made several changes in the proposed rule as it's  
14 drafted, and so it now will pertain only to lawyers  
15 who have a client other than that lawyer's employer.  
16 In other words, in-house counsel are now excluded from  
17 reporting.

18 MR. RUTHERFORD: We have not chosen to exempt  
19 anyone in a firm with other lawyers, because all  
20 lawyers who have clients should have a plan in place,  
21 not just sole practitioners. It may simply be easier  
22 for lawyers in firms to designate someone such as a  
23 managing partner to be the inventory attorney than for  
24 a solo practitioner, but all lawyers with clients  
25 should give thought to developing a plan.

1 I, in 2005, lost my son in a boating accident  
2 up in Lake St. Clair. Still hard to talk about it,  
3 but at least my son, who was a sole practitioner, had  
4 a dad who knew something about it and what to do, so I  
5 petitioned the Grievance Commission, and the Grievance  
6 Commission petitioned the court to set up a  
7 conservatorship. I named two lawyers to that, but  
8 what I did though, I retained my son's helper,  
9 assistant, a law student, to prepare letters which I  
10 drafted to send to the clients. The clients were  
11 asked to come in and pick up the file, which they did.  
12 It took some time, but we got through it all.

13 In the meantime, I had to call judges and  
14 others to adjourn hearings that were on his docket,  
15 but, in any event, one thing else I did, I had to  
16 reimburse the clients for any retainers which my son  
17 had indicated. But in any event, there is definitely  
18 a need for a simpler way than petitioning the  
19 Grievance Commission, petitioning, filing a document  
20 in court. It's you designate a lawyer to be the  
21 attorney to contact the client, tell them to come pick  
22 up the file. It's as easy as that.

23 MR. PUGH: The materials you have been  
24 provided include questions and answers that respond to  
25 many of the questions we have received, including

1 those we received the last time we appeared before  
2 you. Perhaps the most frequent questions that have  
3 been asked are the following: What if I have  
4 difficulty find someone to serve as an inventory  
5 attorney? What happens if I don't comply? How do I  
6 address potential conflicts of interest? Which is the  
7 court involvement?

8 Well, without in any way diminishing the  
9 lawyer's concerns, we truly believe that the very fact  
10 of difficulty in locating someone willing to serve as  
11 your inventory attorney demonstrates the need to have  
12 one, because that means that there is going to be an  
13 even bigger problem if you haven't done any  
14 pre-planning and there is no one that's around to step  
15 in.

16 Remember also, the rule does not require an  
17 inventory attorney to complete client matters. It  
18 only speaks in terms of notifying clients of the  
19 change in lawyer status and returning or retaining the  
20 lawyer's files as appropriate. Please remember also  
21 that the rule itself makes provisions for the named  
22 inventory attorney to communicate a change of mind  
23 about a willingness to serve by providing that the  
24 lawyer will name a substitute. So persons who agree  
25 to be an inventory attorney are not making an

1           irrevocable commitment nor is the reporting attorney  
2           making any irrevocable choices.

3                   MR. RUTHERFORD: On the question of what  
4           happens if a lawyer does not comply, we can only  
5           reemphasize that this rule is not placed in the Rules  
6           of Professional Conduct or in the disciplinary  
7           procedural rules, and there is no language that makes  
8           a failure to comply grounds for administrative  
9           suspension, and there are no provisions whatever that  
10          impose a sanction or penalty on a named inventory  
11          attorney who, upon being contacted that the lawyer has  
12          died, declined to undertake the duties in winding down  
13          the lawyer's practice.

14                   When this rule was discussed in the fall,  
15          Rhonda Pozehl with the Attorney Grievance Commission  
16          who handles receiverships filed by the Attorney  
17          Grievance Commission said that this office views the  
18          requirements as providing the Attorney Grievance  
19          Commission with a person to contact if they learn of a  
20          lawyer's death because clients or others are calling.  
21          So it assists the Bar in that way.

22                   MR. PUGH: On the conflicts of interest  
23          question, one would hope that a lawyer would not  
24          choose someone as an inventory attorney who is  
25          routinely an opposing counsel because of geographic

1 location and similarity in areas of practice. So the  
2 first response is a lawyer should chose one whom it is  
3 unlikely there would be a likelihood of representing  
4 numerous adverse parties. Certainly there may always  
5 be some conflicts, but you don't want to try to have  
6 the guys across the courtroom from you every time as  
7 your inventory attorney.

8 Secondly, lawyers who maintain client  
9 databases is and a way that would permit someone to  
10 access names and addresses without having to  
11 physically open files would assist the inventory  
12 attorney in identifying potential conflicts before  
13 assessing information protected by the Michigan Rules  
14 of Professional Conduct, 1.6.

15 Thirdly, lawyers can provide in fee  
16 agreements notice to clients of the succession plans  
17 that affords access to files by the inventory attorney  
18 in order to facilitate providing clients with notice  
19 of another lawyer who must be brought into complete  
20 the representation. Nothing in the rule requires the  
21 inventory attorney to complete the lawyer's matters.  
22 That is something that the lawyers can agree to  
23 between themselves if they choose to, but it's not a  
24 requirement of the language of the rule.

25 Our proposed rule, unlike many of the

1 existing state rules, does not require court  
2 involvement, rather it's an agreement between two  
3 attorneys to protect the reporting attorney's clients  
4 and his or her family and estate.

5 If you have any questions, otherwise I  
6 believe that there may be a proposed amendment. Tom.

7 CHAIRPERSON WARNEZ: I would recognize  
8 Tom Rombach at this time.

9 MR. ROMBACH: Tom Rombach, 16th circuit. I  
10 rise today in order to propose an amendment to the  
11 inventory attorney rule. I have, as have others, read  
12 the comments of the different Assembly members with  
13 regards to this proposal.

14 Pursuant to the Assembly rule, I have  
15 circulated copies of my proposed amendment, because it  
16 is over six words in length, and I certainly take  
17 Charlie and Ed at their words as far as what this  
18 proposal is going to do, and I leave it up to the  
19 wisdom of the Assembly as to whether this should be  
20 adopted.

21 At the same time, in reviewing this together  
22 with other perhaps experts in the field, including my  
23 colleague, Brian Einhorn, the concern is, as Charlie  
24 and Ed has addressed, that this may add some level of  
25 professional responsibility to either the inventory

1 attorney or to the reporting member. And to try to  
2 allay that concern, my first amendment in Rule 2(b) is  
3 that we delete, quote, to carry out his or her  
4 professional responsibilities by reason of death,  
5 disability, or disappearance.

6 I have great concern about referring to  
7 something like professional responsibilities in a rule  
8 that isn't adding any level of professional  
9 responsibilities or isn't supposed to entail any  
10 professional responsibilities.

11 Additionally, the proposal basically is just  
12 deleting some then superfluous language, because the  
13 next sentence actually defines incapacity anyway. So  
14 I don't think it impacts the substance of the rule,  
15 but I do think it helps cure some of the Assembly  
16 concerns that this may add a level of professional  
17 responsibility.

18 Secondly, I am also concerned, although again  
19 I certainly take them at their word, that the  
20 representation about this not adding any conflicts  
21 analysis or adding to perhaps our burden of  
22 malpractice insurance, but I do think that there is a  
23 perception that there could be conflicts analysis  
24 applied to this rule, and in that regards I would like  
25 to add in Rule 2(b) (2), add a second sentence that

1 goes in between the first and now the third sentence  
2 in that rule, No attorney-client relationship is  
3 established by this rule between the inventory  
4 attorney and the clients of the reporting member.

5 Then, again, at least I am trying to cure a  
6 perceived defect from a lot of the commenters online  
7 and by letter that said that we would have to  
8 undertake a conflicts analysis in this regards. And,  
9 again, it may not be perfect, but I am doing my best  
10 in order to salvage the intent of this rule and to  
11 make it easier for the Assembly to decide this  
12 proposal up or down on its merits and try to be true  
13 to the intent of the Master Law Section in making the  
14 proposal.

15 CHAIRPERSON WARNEZ: Thank you, Tom. If I  
16 may, as a point in procedure, first ask for a motion  
17 to approve the proposal as written in the book so that  
18 we could entertain an amendment thereafter.

19 VOICE: So moved.

20 VOICE: Support.

21 CHAIRPERSON WARNEZ: Motion and support. Any  
22 discussion?

23 All in favor of the proposal in the book,  
24 please signify by saying aye.

25 Please any opposed.

1 I think the ayes have it. I am going to  
2 accept it.

3 VOICE: Roll call.

4 CHAIRPERSON WARNEZ: I am sorry. Let me back  
5 up. We have a motion and a second, which would allow  
6 us to have discussion. My apologies. I am with you.

7 We have a motion and a second. I am going to  
8 call for discussion. Tom has preempted this  
9 discussion with some recommended changes. Those  
10 changes are in force. Now I could ask the proponents  
11 if they would be -- motion to amend, I have a motion  
12 from Tom to amend the rules.

13 PRESIDENT COURTADE: Support.

14 CHAIRPERSON WARNEZ: Support. Now further  
15 discussion on the amendment of the rule is what we are  
16 procedurally postured to take.

17 Sorry, Tom. Do you have any more comments  
18 that you would like to add after that?

19 MR. ROMBACH: No, I would be willing to  
20 respond. I tried to lay out why this is being  
21 proposed, and I know there are other members of the  
22 Assembly that would perhaps like to comment. I would  
23 be willing to respond to any questions, so at least  
24 from my portion of this proposal.

25 CHAIRPERSON WARNEZ: This discussion is on

1 Tom's amendment at this point in time.

2 MR. MORGAN: Ken Morgan from the 6th. I  
3 would support the proposed amendment except in one  
4 regard. The proposed new Rule 2(b)(2), the text says,  
5 No attorney-client relationship is established. I  
6 think the focus is to make certain that there is no  
7 unintended duty imposed upon the attorney who assumes  
8 the responsibility, but to say there is no  
9 attorney-client relationship has other implications,  
10 including privilege. It would probably be necessary  
11 in the course of undertaking some activity to  
12 communicate with the client, and that communication  
13 ought to be protected by the attorney-client privilege  
14 under the appropriate circumstances, and this would, I  
15 think, negate that the.

16 MR. POULSON: Barry Poulson, 1st circuit. I  
17 guess I am asking the question related to the  
18 amendment, but I have to reference a statement made at  
19 the podium that I heard to be that there was no duty  
20 to carry out the continuation of the client's case, if  
21 I understood that correctly, in which case if there is  
22 no duty as an attorney, I don't understand why the  
23 designation has to be an attorney at all. If the  
24 responsibility, as I am hearing your amendment, the  
25 fact that it is simply return the files and any money,

1 then why can't that just be a secretarial staff  
2 function? There is no attorney relationship, there is  
3 no attorney discernment, there is no duty to carry on  
4 the case, why does this have to be an attorney at all  
5 I guess is my question then?

6 MR. LINDEN: Jeff Linden, 6th circuit. I  
7 know procedurally we are limited to the discussion on  
8 the amendment portion. With regard to that, with all  
9 due respect and acknowledgement to my distinguished  
10 colleague who is proposing the amendment, I think in  
11 the amended 2, the problem of privilege is not  
12 addressed, whether or not there is professional  
13 responsibility or attorney-client relationship  
14 established, because in the proposed original rule in  
15 (b) (2) where part of the obligation is to return files  
16 and papers as appropriate and retain files as  
17 appropriate, that will necessarily require the  
18 inventory attorney or whatever we call it to review  
19 privileged, confidential communication, and any of us  
20 who has had to return a file, find a substitute  
21 attorney, transfer a file, there is always a, and  
22 there are several rules and ethical opinions about  
23 what is retained, what is disclosed, what is client  
24 property, what is not. So now you have a  
25 nonattorney-client relationship established by the

1 amendment, but you have got a clear violation of  
2 privilege in the eyes of the Grievance Commission.

3 And with regard to the other, the author's  
4 statements that nothing is intended to create an  
5 ethical obligation, while they acknowledge that, there  
6 is an ethical rule which says any lawyer who does not  
7 follow or who violates the Rules of Professional  
8 Conduct is a disciplinary offense, including  
9 incorporated within that the Court Rules. So no  
10 matter where this rule in general goes, it does, its  
11 violation, intentional or inadvertent, can be a  
12 disciplinary offense.

13 I sit as a hearing member of the Attorney  
14 Discipline Board. I have done so for approximately  
15 eight years, and the Grievance Commission when they  
16 take their advocacy rule takes a very aggressive  
17 position most of the time, and if it's in here, it  
18 will create or potentially create an obligation. It  
19 will create a potential for risk, a potential for  
20 discipline, whether it's intended or not, if there  
21 isn't language that clearly excises that out.

22 For those reasons and others that I will  
23 reserve for discussion on the proposal, I would  
24 respectfully vote against the amendment and the rule  
25 in general.

1 CHAIRPERSON WARNEZ: Any further comments on  
2 the amendment? Please come forward.

3 PRESIDENT COURTADE: Bruce Courtade, 17th  
4 circuit. Regarding the question about whether, why  
5 you would have to have an attorney, why it couldn't be  
6 anybody other than an attorney, hearing  
7 Mr. Rutherford's story about what he went through  
8 dealing with his son, I would think that you  
9 absolutely would need to have an attorney involved,  
10 because only an attorney is going to be able to  
11 recognize, not only the client confidences that are  
12 there, but also be able to look at a file and say  
13 there is a hearing coming up next Tuesday, I have to  
14 contact the court to get that delayed and wouldn't  
15 know how to do that. I think if you had -- if I chose  
16 my sister, who is a social worker, as the inventory  
17 control person, she would not have any idea about  
18 where to go, so I think it's crucial that the  
19 successor be an attorney.

20 MR. HAUGABOOK: Terrence Haugabook,  
21 3rd circuit. One of the things that concerns me is  
22 the shifting of costs from a firm or partnership who  
23 would have a built-in inventory attorney to solo  
24 practitioners who would have to pay for that inventory  
25 attorney, and so that creates a disparity to the

1 effect of how much time it takes, and I worked with  
2 Mr. Rutherford's son, I know your son. I knew your  
3 son when we worked together at the Wayne County  
4 Prosecutor's Office, and so that's one of the  
5 considerations that bothers me and that several  
6 people, defense attorneys that I have practiced  
7 against have asked me to express here today is the  
8 fact of how they would be unduly burdened by this cost  
9 on them.

10 CHAIRPERSON WARNEZ: If I may interrupt, your  
11 comments are directed towards the amendment, and I  
12 think they really are suited towards the proposal, so  
13 I don't want you to eliminate your comments, but maybe  
14 reiterate them when we get to the substance of the  
15 proposal.

16 MR. HAUGABOOK: Thank you.

17 MR. BARRON: Richard Barron for the 7th  
18 circuit. I just wanted to ask the proponents if they  
19 would respond to the amendment before we vote on it.

20 MR. PUGH: We talked with Tom about the  
21 proposal, and, in fact, the writing, the language for  
22 the second one was generated by Charlie Rutherford.  
23 We are in favor of the amendment. I cannot be the  
24 proponent of it, because it would have to come from  
25 the Master Lawyers Section, which of course can't hold

1 a meeting right at this moment, but speaking as the  
2 chairman of this committee, we would be in favor of  
3 the amendment and with regard to the deletion in  
4 Rule 2(b) to carry out his or her professional  
5 responsibility by reasons of death, disability, or  
6 disappearance. It's meaningless language, because  
7 it's really upon the incompetency, so the incompetency  
8 is very clearly defined later. So we have no  
9 objections to the amendment.

10 CHAIRPERSON WARNEZ: I am going to call the  
11 question on the motion to amend, to accept the  
12 amendment as offered by Mr. Rombach. I would ask all  
13 in favor of amending the rule to signify by saying  
14 aye.

15 Any nays.

16 Could I ask for a standing vote, please. All  
17 in favor of the amendment please stand so we could see  
18 you.

19 Could all who voted nay stand. Thank you.

20 Any abstentions? Any abstentions please  
21 stand.

22 Based on the observation of the standing  
23 vote, I would call that the amendment passed, has  
24 passed, so now we can move to further discussion on  
25 this proposal, as amended, the substance of that

1 proposal, so I invite comments relative to the  
2 proposal as amended.

3 Mr. Poulson.

4 MR. POULSON: I would like to offer an  
5 amendment, and I would like to offer it as excepting  
6 for indigent defense attorneys. That's the five  
7 words, I believe. So that indigent defense attorneys  
8 who already are functioning at a loss will have --

9 CHAIRPERSON WARNEZ: Would you please repeat  
10 the proposed amendment in context of the rule.

11 MR. POULSON: In terms of the people who are  
12 covered, which is up there somewhere, above on the  
13 screen, and just add the exception as follows: Except  
14 for indigent defense attorneys.

15 And the reason, of course, is indigent  
16 defense attorneys with our 18 boxes of, banker boxes  
17 of materials can't possibly afford to do anything like  
18 this. We are already running at a loss.

19 CHAIRPERSON WARNEZ: Would you identify in  
20 the rule where you want to insert.

21 MR. POULSON: Right up there above. I can't  
22 scroll it.

23 CHAIRPERSON WARNEZ: We need a few minutes to  
24 make sure the proposal on the screen reflects the  
25 adequate amendment, so give us just a minute.

1 MR. POULSON: Yes. Thank you.

2 Madam Chair, I have been handed a paper copy.  
3 I think it's in Section 2(b), and if I can -- so I  
4 believe that's slightly above it physically on the  
5 screen.

6 CHAIRPERSON WARNEZ: Mr. Poulson, may I  
7 please ask you just to wait for one more moment.

8 MR. POULSON: I am trying to help guide the  
9 scrolling.

10 CHAIRPERSON WARNEZ: I think it would be  
11 helpful if we let the first amendment be completed.

12 MR. POULSON: I see. Thank you.

13 CHAIRPERSON WARNEZ: Mr. Poulson, I believe  
14 we are ready for you. Thank you for your patience.

15 MR. POULSON: If you scroll very slightly  
16 upward to (b) where it says -- I am looking at 2(b).  
17 I guess it's now physically below.

18 CHAIRPERSON WARNEZ: I think that you are  
19 talking about Rule 2(b), so we need to continue to  
20 scroll up to (b).

21 MR. POULSON: Thank you so much. Yes. Right  
22 after the word "member" on the first line, comma,  
23 except for those representing indigent clients, comma.

24 CHAIRPERSON WARNEZ: Six has to be in  
25 writing.

1 MR. POULSON: I am sorry. Representing  
2 indigents, pleural.

3 CHAIRPERSON WARNEZ: Mr. Poulson, we can keep  
4 that sixth word. It would be if we went over seven we  
5 would need it in writing, except for those  
6 representing indigent.

7 MR. POULSON: The indigent, I guess that  
8 would be my amendment.

9 CHAIRPERSON WARNEZ: Mr. Poulson's motion for  
10 this amendment, do we have a second to support that?

11 VOICE: Second.

12 MR. POULSON: Could I ask the proponents then  
13 to accept this as a friendly amendment, is that  
14 appropriate at this point?

15 CHAIRPERSON WARNEZ: We need a motion to  
16 amend and a second so there is further discussion on  
17 this. Anyone want to discuss the addition of these  
18 six words? That's what we are able to discuss at this  
19 moment.

20 Mr. Smith, is your comment going to be  
21 directed at these six words?

22 MR. SMITH: It is not.

23 CHAIRPERSON WARNEZ: Could you reserve your  
24 comment, please.

25 Is there anyone who wants to make a comment

1 about the new proposed six words to be added, except  
2 for those representing the indigent.

3 MR. JANKOWSKI: Mike Jankowski, 30th circuit.  
4 What defines indigent? What portion of your practice  
5 need be representing indigent clients? Are we talking  
6 about bankruptcy law, Social Security disability,  
7 Medicaid?

8 MR. POULSON: Indigency is well defined in  
9 the Court Rule, and there is a formula, a form that  
10 has to be signed by the person. It's well defined.

11 CHAIRPERSON WARNEZ: Is there any further  
12 comment?

13 MS. OEMKE: Kathleen Oemke, 44th circuit.  
14 Indigency in criminal law is defined by Court Rule;  
15 however, it's not defined in civil law, and the last  
16 comment is well marked.

17 MR. POULSON: I would accept a friendly  
18 amendment to my six words to add criminal defendants,  
19 but I can't add it. I don't have a typewriter.

20 CHAIRPERSON WARNEZ: There has been no motion  
21 for that purpose.

22 MR. POULSON: All right. Then it stands as I  
23 am proposing it.

24 CHAIRPERSON WARNEZ: Any further comments  
25 about the latest proposed additional language?

1 Mr. Courtade.

2 PRESIDENT COURTADE: Bruce Courtade, 17th  
3 circuit. Respectfully, the indigent are the ones who  
4 need the most help, so if we accept this amendment,  
5 indigent clients would never or could never get notice  
6 that their attorney is no longer on the scene, so I  
7 would oppose the proposed amendment for that reason.

8 MR. MCCARTHY: Tom McCarthy, 17th circuit.  
9 It just goes to the language. If we were going to do  
10 this, rather than have a separate clause, wouldn't we  
11 just tag it onto the clause we already have? A member  
12 who represents the client, other than the member's  
13 employer or indigent clients, comma.

14 CHAIRPERSON WARNEZ: I accept your comments.  
15 We are talking about these specific words.

16 MR. POULSON: Counsel can move for it to be a  
17 friendly amendment.

18 CHAIRPERSON WARNEZ: I think we should  
19 continue to be efficient and let's comment on these  
20 words for right now.

21 MS. STANGL: Terri Stangl from the 10th  
22 circuit. I am still weighing back and forth whether I  
23 personally support the overall motion, but I am deeply  
24 concerned that we would be setting up a two-tiered  
25 process where indigent persons, whether civil or

1 criminal, have a lesser standard of protection. The  
2 clients do need to know. If we are setting up for  
3 attorneys a process that we are going to follow  
4 consistently, it should be followed across the board.  
5 If we are not going to do that, that's a different  
6 matter, but I am disturbed by setting up two systems  
7 protecting the clients merely because of how people  
8 can pay

9 MR. POULSON: May I speak to my own  
10 amendment?

11 CHAIRPERSON WARNEZ: Yes.

12 MR. POULSON: There already is a two-tiered  
13 system. There are indigent defense counsel who,  
14 practically speaking, are nearly indigent and couldn't  
15 possibly afford to comply with this law, and then  
16 there are the rich and the powerful, the powerful  
17 being prosecutors who are fully funded and the  
18 indigent counsel who, despite all the goods works of  
19 Elizabeth Lyon and all that, there has not been one  
20 penny allocated from the State of Michigan for  
21 indigent defense. To put that new burdon on an  
22 indigent defender, whether you want to read it one way  
23 or the other, is unbearable. Fifteen-hundred pounds  
24 of paper in banker boxes per rack is unaffordable.

25 CHAIRPERSON WARNEZ: I believe we are

1 starting to talk about the substance of the larger  
2 rule.

3 MR. POULSON: As long as I am out as an  
4 indigent, I can afford it, and that's why I am  
5 speaking. And that's why I am sitting down finally.

6 MS. WASHINGTON: Good morning. Erane  
7 Washington, 22nd circuit. I oppose the actual  
8 amendment for indigency. I just wanted to speak out  
9 on that as a person who does frequently and most often  
10 represent indigent clients, I have to whole-heartedly  
11 agree with our president, Bruce Courtade, that that is  
12 whole-heartedly unfair to the indigent. If we are  
13 going to have such a system, then it should apply to  
14 everyone, and this is a part of the reason we do what  
15 we do.

16 I think that despite the fact that it may  
17 cause some additional burden on the indigent defense  
18 attorney's office, it is necessary if we are going  
19 apply it, and we should not have the two-tiered  
20 system. So thank you.

21 MR. HILLARD: Martin Hillard, 17th circuit.  
22 I rise in opposition to the proposed amendment. I  
23 recognize my colleague's concerns, but, first, it  
24 doesn't address the practice where some of it  
25 represents indigent clients, some of it does not, do

1 they fall within the exception or not, but more  
2 importantly, if the rule is needed, it's needed for  
3 all practices, not just for those representing the  
4 nonindigent, and perhaps there becomes a concern that  
5 needs to be addressed in the larger reform of indigent  
6 defense work, but if this rule is needed, it's needed  
7 for everyone.

8 CHAIRPERSON WARNEZ: Thank you.

9 MR. POULSON: Madam Chair, I sense the  
10 meaning of the room and withdraw my motion then, my  
11 amendment. Thank you. That will simplify things and  
12 moved forward.

13 CHAIRPERSON WARNEZ: I will call the  
14 question. My parliamentarian is giving me a ruling we  
15 are unable to withdraw based on the procedural status,  
16 so I am going to call the question.

17 All in favor of removing those six words,  
18 please indicate by saying aye.

19 All opposed, please indicate by saying nay.

20 Any abstentions?

21 MR. HORNBERGER: Abstain.

22 CHAIRPERSON WARNEZ: We are going to take  
23 those out.

24 Now, this leaves us it procedurally where we  
25 are looking at the proposal as amended by Tom's

1 amendment, and I would encourage or accept now  
2 comments going to the substance of the proposal.

3 MS. VANHOVEN: Maureen VanHoven, 20th  
4 circuit. I really see a need for this. I am a solo  
5 practitioner. I share space with two other solo  
6 practitioners. One is Ron Foster, used to be a member  
7 of this Assembly.

8 Ron and I talk about this all the time, but  
9 that's all we do is talk about it. We have gone as  
10 far as suggesting between the two of us we come up  
11 with a sheet that goes in every file that says  
12 something like Jane and John Smith, adoption, 17th  
13 circuit, you know, home study finished. You know,  
14 something that is real easy, with the bare bones, so  
15 that if something happened to him -- I don't do  
16 adoptions -- I could pick up the phone, call the 17th  
17 circuit and say, Hey, Ron is dead and you have got the  
18 Smith adoption, and at least somebody knows what's  
19 going on.

20 The problem is, Ron keeps all his contacts in  
21 his cell phone, so I would have to have his wife come  
22 in, pull up his cell phone. We would have to go  
23 through and find the phone numbers. For me, I keep  
24 everything on my laptop. Now, my husband is disabled.  
25 He has a lot of surgeries. At any given time, you

1 know, I could become a widow, but on the other hand,  
2 you know, I could get hit by a car driving to one of  
3 these meetings in Lansing.

4 We have a death book. I realize a lot of  
5 people probably don't have a death book, but we have a  
6 death book, and it has things like what do I do with  
7 that mess of wires in the circuit breaker box in the  
8 basement, and it has things in there on my pages that  
9 say I keep all my files on my laptop under these file  
10 folders and if I die you need to copy these file  
11 folders and turn that flash drive over to someone.

12 He is not a lawyer. He wouldn't have any  
13 idea what to do more than that, but right now that's  
14 my plan, and that's not really a very good plan, but  
15 like most of us, unless you make me do it, I am  
16 probably not going to do much more than what's in my  
17 death book.

18 So even if this isn't what we vote on today,  
19 we really need to do something like this, even if it  
20 becomes a huge pain in the tuckus. Thank you.

21 MR. MORGAN: Ken Morgan, 6th circuit. My  
22 objection to the proposed amendment has to do with --

23 CHAIRPERSON WARNEZ: It has already been  
24 amended, and we are discussing this rule as amended.

25 MR. MORGAN: Well, I believe that's what I am

1 dealing with, as amended, specifically related to that  
2 language.

3 CHAIRPERSON WARNEZ: That's fine.

4 MR. MORGAN: My concern has to do with  
5 protecting the communication that occurs between the  
6 inventory attorney and the client. And it's not an  
7 academic question.

8 I was appointed as a receiver by circuit  
9 court over a law practice and then the attorney  
10 involved died. I was placed in a position where I had  
11 to deal with the substance of those matters. I was  
12 deposed, I was called as a witness, I was put in a  
13 position where we had to deal with the issue of  
14 whether my communication was or was not privileged.

15 I think that as drafted there is at least an  
16 implication that that communication wouldn't  
17 necessarily be privileged. So perhaps this isn't the  
18 most procedurally correct approach. I would suggest  
19 another amendment. I would move for another amendment  
20 to insert the word "solely" between -- in the as  
21 amended language in rule 2(b)(2), the added language  
22 is, No attorney-client relationship is established by  
23 this rule. I would propose to amend it to insert the  
24 word "solely" between the words "established" and  
25 "by."

1 VOICE: Second.

2 CHAIRPERSON WARNEZ: I hear a first and a  
3 second, so we have to address that first, correct? We  
4 are going to now, if you have risen to provide  
5 comments, I would ask you to return to your seats, and  
6 I will now accept comments to the addition of the word  
7 "solely." I have a first and a second, so anyone  
8 willing to speak to the addition of the word "solely,"  
9 I will accept your comment.

10 MR. SMITH: Perhaps we should take the  
11 amendments before we have people get up, sit down, get  
12 up, sit down. That might be a good idea.

13 CHAIRPERSON WARNEZ: Is there any comments  
14 about adding the word "solely."

15 Hearing none, I will call the question. All  
16 in favor of adding the word "solely," please signify  
17 by saying aye.

18 All opposed signify by saying nay.

19 Ayes have it as far as I am concerned. Any  
20 abstentions?

21 MR. POULSON: Aye abstention.

22 CHAIRPERSON WARNEZ: I think the ayes carried  
23 it, so we will include the word "solely." Now I can  
24 accept more comments as to the substance of the  
25 proposal. I apologize, we need to go back to the

1 comments to the rule. Any more comments on this rule?

2 MS. MCNAMARA: Anne McNamara, 47th circuit.  
3 This may for a lot of us become a moot point, because  
4 our malpractice carriers are requiring it. I have  
5 talked to a number of attorneys where I practice, and  
6 I already know mine has.

7 And, secondly, I also had the experience with  
8 having a law partner die and going through the files  
9 and doing all this work was a lot, and what it made  
10 some of us do is start to do some better planning in  
11 terms of our files, how we kept the information,  
12 keeping notes up to date, et cetera. So it's similar  
13 in some respects to what we ask our clients to do in  
14 terms of planning. So not necessarily all of the  
15 language here, but I would support this concept.  
16 Thank you.

17 MR. SMITH: Actually this has been the third  
18 time I have been up to comment. There is an  
19 interesting aspect of this that I don't know if the  
20 Master Lawyers Committee has thought of, but what  
21 affect would amending the rules in this way have on  
22 civil liabilities? That is, I don't know if it's a  
23 reasonable and customary practice to name an inventory  
24 attorney. As soon as you put it in the Court Rule,  
25 it, in fact, becomes one and somebody can sue on those

1 grounds, and there can be two possible grounds, either  
2 an attorney who fails to appoint an inventory attorney  
3 could have a suit against him or her or his or her  
4 estate or his or her business, and on the second part  
5 an attorney who is appointed as an inventory attorney  
6 but, you know, 20 years later has totally forgotten  
7 about it and then says, Well, I don't want to serve as  
8 one or, Hey, I am with my family in Disney World. I  
9 am not going back to Michigan to dole out these files.  
10 There is at least a potential for civil liability on  
11 the part of that person who fails to serve in that  
12 capacity. Has the Master Lawyers Committee thought of  
13 that aspect?

14 MR. PUGH: When we have established that the  
15 inventory attorney can at any time say I no longer  
16 wish to be inventory attorney, it can be at time that  
17 he should be acting, it could be a year before when he  
18 says I don't want to do it anymore, but there is no  
19 liability on the inventory attorney for not acting.  
20 In fact, if the attorney is unwilling or unable to  
21 act, then the Court Rules apply instead. So the  
22 inventory attorney never has to act.

23 MR. SMITH: If that's what the Court Rule  
24 would say, my question is, if it goes to court and a  
25 judge or jury can say, Listen, it's in the Court Rule.

1 Maybe you were in Disney World and having a great  
2 time, but, guess what, there were people over here for  
3 whom you agreed to be the inventory attorney. They  
4 were harmed. They have a suit against you based on a  
5 reasonable standard of practice.

6 MR. PUGH: I think that that would be kicked  
7 though immediately just based upon the rule. I think  
8 the attorney that brought it might even have sanctions  
9 against them for bringing it.

10 MR. SMITH: You think that, but we don't know  
11 that. I think that's a risk that should at least be  
12 considered.

13 MR. PUGH: That's the same risk that anyone  
14 with a hundred dollars can sue anyone for anything.

15 MR. SMITH: Some of the attorneys have more  
16 than a hundred dollars.

17 MR. PUGH: 150. That's what happens when you  
18 get old. It used to be 30.

19 MR. SMITH: I don't deny that that's  
20 humorous, but that's a fairly blithe way to deal with  
21 other people's potential liability.

22 MR. PUGH: But, as the rule says, there is no  
23 liability for that inventory attorney, so you could  
24 sue everyone in this room because they voted for it,  
25 but still there is no real responsibility for that.

1 MR. SMITH: That's not my understanding of  
2 tort law. I would ask the Master Lawyers Committee to  
3 look at it, look at it in depth and intelligently.

4 CHAIRPERSON WARNEZ: You've been waiting.  
5 Thank you for your patience.

6 MR. KAYE: Good morning, everyone. It's  
7 still morning. Douglas Kaye, 3rd circuit. I have  
8 never had an issue come up where I have gotten such a  
9 negative response from practicing attorneys. A lot of  
10 practicing attorneys don't even know what we are  
11 doing, but on this issue I have gotten a lot of  
12 negative response. Mostly the people think there are  
13 too many unanswered questions about how much of a  
14 burden this is going to put on solo practitioners.  
15 Are we going to limit disability to permanent  
16 disability. Are we going to deplete a practitioner's  
17 estate to pay for an inventory attorney? Are we going  
18 to freeze assets of that deceased attorney? Are we  
19 going to create hardships for his family?

20 Also, I think we need to be careful that we  
21 are not going to be creating niche jobs for larger  
22 corporations. And along that line, I am thinking I  
23 have to wonder why we are going to have a civil court  
24 administer this under the Court Rule MCR 9.119(G).  
25 Why is it that we haven't considered a probate court

1 as administering it under the Court Rule?

2 I would recommend that we -- the Probate and  
3 Estate Planning Section made the suggestion that the  
4 administration of the Court Rule should be done in the  
5 probate court, and to me it makes sense. A lot of  
6 these cases are going to be in front of the probate  
7 court anyway. That's all the comments I have. I am  
8 willing to make that an amendment, propose that as an  
9 amendment.

10 CHAIRPERSON WARNEZ: Do I hear a second? You  
11 have to have language of an amendment to this rule.  
12 We can't accept at this time unless it is six words or  
13 less.

14 MR. KAYE: Six words or less, no. Because of  
15 that, I think this needs more study, and that's what I  
16 am going to suggest right now. As far as the  
17 amendment to have these cases heard on the probate  
18 court, I can't do that right now. All I can do is say  
19 on page four of our material on this section, the  
20 Probate and Estate Planning Section made the  
21 suggestion, and I was going to just suggest that we do  
22 their words starting -- let me try this. All  
23 proceedings involving -- no, I can't do it.

24 CHAIRPERSON WARNEZ: Thank you for your  
25 comments. I would like to take the gentleman behind

1           you. He has been waiting as well.

2                   MR. ELKINS: Mike Elkins from the 6th  
3           circuit. Probably be heckling some of the things. I  
4           rise in opposition. I have been a member of this  
5           Assembly for, I think, four terms now, most of that  
6           marked by gross indifference from my constituents as  
7           to anything that happens here. However, I have been  
8           inundated. By inundated, I mean received a numerous  
9           amount of emails, letters, and telephone calls, which  
10          are universally against this proposal, most of them  
11          from sole practitioners or small offices. So on the  
12          basis of representing my constituents I have to rise  
13          against it, but personally I think it's a rule looking  
14          for a problem that doesn't exist.

15                   Initially we have someone who gets appointed  
16          or nominated by requirement on the State Bar form who  
17          doesn't have to serve, who says, I don't want to do  
18          it. So it goes then to default provision under the  
19          Court Rule which exists right now very comfortably, so  
20          we are saying let's do this, but we don't need it  
21          because, even though we have a situation where we  
22          already have a procedure in place for it.

23                   I have a number of questions from people,  
24          such as if we are putting someone in their place who  
25          is going to be looking at the confidences of my

1 clients, do I have to put their name in my fee  
2 agreement to have my client sign off in advance on the  
3 fee agreement that so-and-so is designated as my  
4 inventory attorney and may be looking at your file.  
5 You have to sign off that's okay. But then what  
6 happens if my inventory attorney has to change? Does  
7 that invalidate my fee agreement? Do I have to start  
8 with something else again.

9 There is a number of questions that have not  
10 been dealt with. I echo the fact that it seems as if  
11 it's nothing more than starting a cottage industry for  
12 a number of people who will offer their services as an  
13 inventory attorney to the depletion of a disabled or a  
14 deceased attorney's estate, because there is an  
15 economic interest in having these matters taken care  
16 of by people friendly to the estate. Those attorneys,  
17 and I think most of us who are sole practitioners,  
18 have already established relationships with other  
19 attorneys who are familiar with the areas in which  
20 they work.

21 For example, Mr. Poulson here does complex  
22 criminal defense litigation. To say that a neophyte  
23 or retiree who has never done criminal law should come  
24 in and decide who should take care of his files is  
25 absurd. They don't know what has to be done, how to

1 handle them or even to whom they should be referred or  
2 the client should be referred. You can't just say I  
3 think to the client, here is your file, go away,  
4 because I think the client realistically is going to  
5 say, Where should I go? They are now going to call  
6 the State Bar. State Bar is going to say, Call your  
7 local bar. Local bar says, Oh, we have a list of  
8 people who have been practicing a couple weeks. We  
9 have a list. I think that is not a wise way to do it.  
10 I think somebody is designated --

11 CHAIRPERSON WARNEZ: I call time. My clerk  
12 is giving me time. Thank you.

13 MR. ELKINS: I am against it.

14 MR. LINDEN: Jeff Linden, 6th circuit.  
15 Again, I am rising in opposition to the proposal. I  
16 would like to incorporate my comments from the  
17 amendment so I don't have to reiterate them at this  
18 point in the record. I would like to incorporate the  
19 comments of my other colleagues in opposition. They  
20 are all good reasons. And I also want to state that I  
21 don't believe the proposal is bad intentioned. I  
22 believe it is very well intentioned. Perhaps it's  
23 better placed in an educational outreach, continuing  
24 education, best practices, practice management forum,  
25 circumstance, location of the Bar, the State Bar, and

1 the website and materials.

2 There are a number of problems. I have been  
3 a member of the Assembly, I think this is -- I was  
4 appointed for a term. This is probably my second  
5 term. Somewhere between six-plus years. I have never  
6 seen a proposal come before this body before where the  
7 only people bothering to sign written comments and  
8 send them into the body are all negative. In the  
9 materials distributed to us there wasn't a single I  
10 support this motion. The closest to that we got were  
11 to State Bar committees that said we take no position,  
12 but if it's going to go, we think it should do that,  
13 which is one way arguably positive. It's also  
14 arguably negative, because it implies there are  
15 continuing problems with the proposal.

16 The other thing I want to point out is that,  
17 although there are statements about no liability and  
18 privilege and other things, we all know that there is  
19 a difference between privileges and confidences and  
20 secrets of our clients, and we are held to keep them  
21 all inviolate.

22 If an inventory attorney has to go through  
23 this process and becomes a party or knowledgeable  
24 about confidences and secrets and privileged  
25 information, not only does it create problems and

1 conflicts, but now these people who are inventory  
2 attorneys before their actions are potentially  
3 conflicted out of taking other cases, and it circles  
4 around and around and around.

5 There are many problems. I believe it's well  
6 intentioned. I believe it's not appropriate for the  
7 rule, especially if the carve-out of the rule is you  
8 don't have to comply with it, the inventory attorney  
9 doesn't have to do the job, then we go to the pool  
10 that already exists, which is the default procedure.  
11 So we are creating a rule without any need to comply  
12 with it and creating lots of risks and problems. I  
13 believe it should be better studied and put into place  
14 where it's an assistance to the Bar, a best practices  
15 and outreach and educational program, as opposed to a  
16 rule. Thank you.

17 MR. JANKOWSKI: Michael Jankowski, 30th  
18 circuit. I would echo the last speaker and say I  
19 certainly believe the proposed rule is nobly  
20 intentioned, but also ultimately the named attorney  
21 need not serve. Whether this rule is in place or not,  
22 my clients are dependent on the kindness of my  
23 colleagues, and so I don't see that any actual  
24 protection is guaranteed to my clients. I think the  
25 rule is unnecessary.

1 MS. JOLLIFFE: Good morning, Madam Chairman.  
2 Elizabeth Jolliffe on behalf of the 22nd circuit.  
3 Also here wearing a hat, as many of us do, I am very  
4 active in the Washtenaw County Bar, the Detroit Bar  
5 Association, as chair of the Law Practice Management  
6 Section and active in the Women Lawyers Section. In  
7 all those roles I reached out to lots and lots of  
8 people, many of my clients and lots of solos I know,  
9 and I am here rising in opposition to the motion. The  
10 rule is certainly very well intentioned. I don't know  
11 that anybody really disputes that.

12 We had a public relations issue with this,  
13 and I echo what Mr. Linden says in terms of getting  
14 more education out there to our members. So many  
15 people, so many solos especially, because this really  
16 affects them, are so confused by this. I realize that  
17 we have answers here. They didn't read it as deeply  
18 and as closely as all of us did. They have a lot of  
19 grave concerns about this, and I think we can do a  
20 much better job of getting the information to them.

21 And I believe that -- for one point, I am  
22 sure somebody here will have an answer, many fine  
23 answers, as to why does the inventory attorney have to  
24 be an inventory. Many solos -- yes, some solos have  
25 support staff. Many, many solos have support staff.

1 Many solos do not, but it might be much easier for  
2 them to find a person who could keep the password.

3 I mean, if that's a big problem that somebody  
4 needs to have the passwords to get into the files to  
5 be able to do that, that would be so much easier and  
6 we wouldn't run into the conflict and the privilege  
7 issue and all that. This is sort of an administrative  
8 procedure like that. Because, in fact, the rule says,  
9 and the speakers have said, you know, really all the  
10 inventory attorney shall do is shall notify active  
11 clients of the changed status of the reporting member,  
12 return files and papers as appropriate, and retain  
13 files that are appropriate.

14 And I understand that people might say, well,  
15 only an attorney could decide what's proper to retain  
16 and what's proper to return, but I don't think that's  
17 actually necessarily what's, you know, what's really  
18 the issue, and I think we just need somebody to go in  
19 there and have the password to be able to get into  
20 some things and it shouldn't be the spouse, or else it  
21 is going to be the spouse. Maybe it will be the  
22 spouse, but I think that might be a much easier thing.  
23 We should study that.

24 But I rise in opposition to the rule and  
25 would really urge this body to ask for more of the

1 information that the Master's Committee has put  
2 together. We don't have any comparative analysis, and  
3 I realize that we do have it and I know that many  
4 states do have rules. I think it would sit much  
5 better with our members and our constituents if we  
6 have that information available to them.

7 I like this one idea that Mr. Sepsey and  
8 Ms. -- I can't remember her name -- said about like  
9 these disaster work sheets, things like that making it  
10 so easy for our members. I am against it and my  
11 constituents are. Thank you.

12 MS. BUIREWEG: Madam Chair, this is  
13 Lori Buiteweg. I am secretary of the State Bar this  
14 year and also from the 22nd circuit. I don't share my  
15 fellow colleague's position on this rule. I do rise  
16 in support of it. My purpose for coming to the mike  
17 is to address a question about need that was raised  
18 earlier and whether this rule is really necessary.

19 Mr. Rutherford mentioned about how he needed  
20 to determine whether his son's files had unused  
21 retainers that had to be returned to clients. Unused  
22 retainers is, unearned retainers is something that we  
23 deal with on the Professional Standards Committee for  
24 the State Bar, which I chair this year, and we are  
25 charged with refunding from the Client Protection Fund

1 unearned retainers.

2 I cannot tell you how many claims we get from  
3 deceased or disabled attorneys who have had to leave  
4 their practice and leave their clients in a lurch and  
5 keep all of the money and we have to return the unused  
6 portion of the retainer. The meeting that I had  
7 yesterday morning from 8 a.m. to 9:30 included  
8 probably close to a hundred claims, many of which  
9 involved deceased attorneys. The books were that  
10 thick. So if you don't think there is a need for  
11 this, it may be because you are just not aware of it.

12 MR. CHADWICK: Good morning. Tom Chadwick  
13 from the 8th circuit. I move the previous question.  
14 I understand this motion does not require a second and  
15 is not debatable.

16 CHAIRPERSON WARNEZ: You intend to call the  
17 question?

18 MR. CHADWICK: Yes.

19 CHAIRPERSON WARNEZ: I am going to accept one  
20 more comment. Whoever is standing I am going to  
21 accept comments from at this time.

22 MR. LARKY: Sheldon Larky from the 6th  
23 circuit. Imagine for a moment that you are reffing a  
24 college soccer game one night and you get shortness of  
25 breath and you go home and you tell your wife, I have

1 shortness of breath, and your wife, being the good,  
2 conscious woman that she is, says, Let's go see a  
3 doctor. And that doctor tells you you didn't have a  
4 heart attack but you have blockage, and he says then,  
5 Go to see the surgeon, let's figure things out. And  
6 that surgeon says, Oh, sir, you do have a blockage.  
7 You have not two, but three grafts that you are going  
8 to need and you have got to get it done. And your  
9 wife says, Well, can you get me in tomorrow morning so  
10 you can save my husband? And the doctor looks at her  
11 incredulously and says, No, the best we could do is in  
12 a week. And at that point you have 30 to 50  
13 mediations or arbitrations that you are the mediator  
14 on, that you are a part-time magistrate in the court,  
15 that you are representing two attorneys in legal  
16 malpractice cases because they don't have coverage,  
17 and that you have four of your own pending divorce  
18 cases, and all of a sudden this doctor says this is  
19 successful, can be a very successful type of surgery,  
20 but you might die.

21 Now, that's Shel Larky. It was November of  
22 2006, at which time yours truly found out that he had  
23 to go through what is known as a CABG, coronary artery  
24 bypass graft, and you had to go through three  
25 graftings on that surgery.

1 Can you imagine as a sole practitioner, you  
2 say holy crap, what am I going to do? What am I going  
3 to do? At least I had a week in which to make phone  
4 calls, to send out letters to try to adjourn cases,  
5 but if I had a serious heart attack and I didn't have  
6 that, what would happen to all those issues that I  
7 have, all those clients that I have?

8 When we heard the presentation last fall, I  
9 hired an inventory attorney. I have got one on board,  
10 and I have got this person and we were talking about  
11 the codes and talking about all the client cases and  
12 we are cleaning up files, and some of the things that  
13 concern me here is the discussion of I am a sole  
14 practitioner, this unduly burdens me.

15 Ladies and gentlemen, I am a sole  
16 practitioner. We don't have the efficiencies of cost  
17 as sole practitioners as the large firms do. We are  
18 all unduly burdened as sole practitioners. So to use  
19 the idea that economically it's going to come out of  
20 my pocket because I have to hire this attorney or my  
21 wife is going to have to hire this attorney, it's the  
22 cost of doing business and it's something we have to  
23 do to protect our clients.

24 CHAIRPERSON WARNEZ: My clerk has a timer  
25 going. I have been trying to keep maximum comments to

1 four minutes.

2 MR. LARKY: May I continue?

3 CHAIRPERSON WARNEZ: Finish your statement.

4 MR. LARKY: The concerns are some people  
5 said, Well, what about the idea that we don't have the  
6 idea of best practices. Yes, we should all put notes  
7 in every file after we do something, but we don't, and  
8 it will cost me money, but I got to tell you, I think  
9 we have to have this inventory rule. I think for  
10 every attorney, we have to protect ourselves, we have  
11 to protect ourselves.

12 CHAIRPERSON WARNEZ: Thank you.

13 PRESIDENT COURTADE: Bruce Courtade, 17th  
14 circuit. I am the 78th president of the State Bar of  
15 Michigan. In 1935 Roberts P. Hudson, the first  
16 president of the State Bar of Michigan, wrote in his  
17 first presidential column words that are now attached  
18 to the wall of the State Bar of Michigan. Those words  
19 are, No organization of lawyers shall long survive  
20 which has not for its primary object the protection of  
21 the public. Not of the profession, of the public.

22 When I look at this proposal, I see that it  
23 protects the public. Will it burden some of our  
24 members? Yes, it absolutely will. Do the Rules of  
25 Professional Conduct burden some of our members? They

1 absolutely do. Are they absolutely necessary? Can  
2 anybody disagree that they are?

3 This rule is necessary to protect the public.  
4 Is it a perfect rule? Probably not. We have got 150  
5 of us sitting in this room. I guarantee you that we  
6 can beat this rule to death, and I think that there  
7 are some in this room, frankly, that would like to do  
8 that, but, again, I urge you to keep in mind what is  
9 our primary obligation. What is the organized Bar's  
10 primary obligation? It is not to serve our members.  
11 That is a secondary obligation. The primary object of  
12 this organization is to protect the public. This rule  
13 does this.

14 Again, getting back to what -- I learned a  
15 lot of things from my mother and grandmother through  
16 the years, and one thing my mother always told me was,  
17 if you want to slow something down, send to committee.  
18 If you want to kill it, send it to a subcommittee. We  
19 cannot afford to send this back for redrafting. We  
20 cannot afford to send it back for further study. It's  
21 been studied to death. We have had our staff look  
22 around the country to see what people are doing. We  
23 have had the Master Lawyers add their years of  
24 expertise and their personal knowledge about what is  
25 required. I urge you to pass this.

1 MR. ARD: Josh Ard, 30th circuit. I would  
2 like to disagree with what Bruce just said, because I  
3 am afraid -- I am not as good as Lyndon Johnson. I  
4 can't tell you what the vote's going to be, but from  
5 listening, I can tell you this is going to fail, and  
6 that's a shame. We need something, but we need to  
7 think about this and figure out how to do it.

8 The focus has been on the person, the  
9 inventory attorney. That's not the problem. The  
10 problem is information. How do we get this  
11 information out here? How do we have all of this done  
12 in a standard form that somebody can find the things  
13 they need? And we also need to worry about these  
14 other rules, about liability. Whatever our rule says  
15 doesn't have anything to do with the statute, the  
16 statute of malpractice. There are a lot of things we  
17 have got to look at. I want to see something done  
18 that's going to help the public and do it right, but I  
19 am afraid if we just have this go to a vote right now,  
20 it's going to fail, and then that's going to mean  
21 nothing is getting done, and that's it. All I got to  
22 say.

23 CHAIRPERSON WARNEZ: And I want to make a  
24 comment. Mr. Chadwick made a motion, and my  
25 parliamentarian indicated that a call to the question

1 does require a second and a two-thirds vote.

2 VOICE: Second.

3 VOICE: You need a two-thirds vote to vote on  
4 the thing that's on the floor.

5 MADAM CHAIR: I have a motion and a second.  
6 That motion is not debatable, so at this point we are  
7 going to call the question.

8 All in favor of the proposal as amended,  
9 please signify by saying aye. I am sorry. We will  
10 get it right. We will get it right.

11 I have a call the question, a second, so we  
12 are going to vote to call the question. All in favor  
13 to call the question, please signify by saying aye.

14 All not in favor, please signify by saying  
15 nay.

16 Because it's a two-thirds vote -- any  
17 abstentions?

18 Because it's a two-thirds vote, I am going to  
19 ask all who indicated in favor of calling the question  
20 to please stand.

21 Thank you. All who voted nay, please stand.

22 I am indicating there is consensus. There is  
23 two-thirds vote to call the question.

24 Now we are going to vote on the question.  
25 All in favor of the proposal as amended, please

1 indicate by saying aye.

2 All not in favor of the proposal, please  
3 indicate by saying nay.

4 Any abstentions? One abstention. The voice  
5 vote carries as nay. Thank you.

6 We are over time, so we will focus on the  
7 next proposal. It will be my privilege and pleasure  
8 to introduce the proponent, John Mayer.

9 MR. MAYER: The good news is that  
10 Justice Kelly gave most of my talk. I am John Mayer  
11 from the 3rd circuit, and I am here to propose the  
12 resolution which follows tab 11 in your materials. I  
13 am going to try very hard just to say things that she  
14 did not say.

15 Last things first, at the end of the proposal  
16 I stated the test JRF, which is the legislative  
17 embodiment of this proposal, had been reported out of  
18 the Senate Judiciary Committee and referred to the  
19 committee of the whole on January 31st. There has  
20 been no further action as of yesterday.

21 The 50 states of the union are divided almost  
22 half and half between those which have lodged this  
23 issue and a limit for judges and those which have not.  
24 Twenty-six states placed the issue in their  
25 constitution, 24 states have either governed it only

1 by statute or not at all. Seven by statute, and 17  
2 have nothing either in constitution or statute  
3 concerning age limit for judges.

4 Keeping my promise to you to try to keep this  
5 brief, I do want to touch on the point that was raised  
6 in the earlier discussion and also acknowledged by  
7 Justice Kelly. Each of us has had personal experience  
8 with judges who have served too long, but if we are  
9 honest with ourselves, most of us, I hope all of us,  
10 can recall judges that we have admired and respected  
11 who were forestalled from further judicial service by  
12 this age limitation in our constitution.

13 Furthermore, and this is a relatively new  
14 development, the enforcement of earlier retirement  
15 dates in law firms, especially the medium-sized and  
16 larger law firms, means there are increasing numbers  
17 of able lawyers approaching and even passed age 70 who  
18 may be looking for meaningful public service to cap  
19 their careers.

20 I ask for your support for the resolution.  
21 Thank you.

22 VOICE: Second.

23 CHAIRPERSON WARNEZ: I have a motion on the  
24 floor, and I just heard a second, which would require  
25 a call for discussion. Do we have anyone interested

1 who wants to make comments at this time, please come  
2 forward.

3 MR. HAUGABOOK: Good morning, Madam Chair.  
4 Terrence Haugabook, 3rd circuit. I am opposed to  
5 this. Here is why. In 2006 I ran for 36 district  
6 court as a judge for the City of Detroit because I was  
7 tired of certain things I had seen on TV, such as, you  
8 know, judges who were late showing up because they had  
9 gone to the salon and things like that before taking  
10 the bench. And Justice Kelly kind of talked about  
11 this when she was up here earlier when she talked  
12 about the voter ignorance. The voter ignorance -- I  
13 lost the election. Those incumbents are still sitting  
14 on the bench today, right.

15 So one of the things that bothers me and that  
16 I heard Justice Kelly talk about is judges are the  
17 only persons who are subject to this rule, unlike  
18 other elected officials. Other elected officials in  
19 our state are term limited. So if we are going to do  
20 something to bring the judges in line with the other  
21 elected persons in our state, let's bring them in line  
22 that way with term limits if nobody else has to stand  
23 for the 70-year age rule.

24 The other thing about that is that this  
25 creates lifetime appointment basically for judges

1 because of the simple fact is, you know, I have seen  
2 it in my years, you know, come from a certain name or  
3 certain family money, okay, you get on the bench and  
4 you kind of stay there as an incumbent. So to this  
5 extent I think that, you know, having the 70-year age  
6 limit is great because it gives young blood an  
7 opportunity to get in and vie for a seat when the  
8 person reaches that level.

9 You talk about the Judicial Tenure  
10 Commission, and unless you have done something, like  
11 unfortunately a good friend of mine did that's all  
12 over the news by Charlie LeDuff, unless you do  
13 something like that, it's pretty hard for the Judicial  
14 Tenure Commission to take action against you and to  
15 remove you if someone says that your cognitive  
16 abilities are waning, and so, because that becomes so  
17 amorphous, and so, you know, such a shifting standard  
18 that who can really say. And so I think the 70-year  
19 age limit is appropriate. Otherwise, let's term limit  
20 the judges to make them equal with everyone else.  
21 Thank you.

22 MR. SMITH: I was going to move to table. I  
23 think that we just had a pretty lengthy debate over a  
24 fairly important policy issue. I think that, since  
25 not as many people are standing as that, this should

1 also engender a pretty healthy debate given the very  
2 significant policy issue, and we are already running  
3 late, so I move to table this until the September  
4 meeting.

5 CHAIRPERSON WARNEZ: Is there a second to  
6 Mr. Smith's motion?

7 VOICE: Second.

8 CHAIRPERSON WARNEZ: Discussion on the  
9 motion?

10 JUDGE CHMURA: It's really not a motion  
11 to table. A motion to table is only appropriate if  
12 there is some contingency or something that came up to  
13 prevent immediate consideration. What you are really  
14 doing, I think, is making a motion to postpone to a  
15 date certain. That's the proper motion, not to table.

16 MR. SMITH: Whatever it is, that's fine.

17 CHAIRPERSON WARNEZ: We have our  
18 parliamentarian. That changes the motion. Does the  
19 second, still second?

20 MR. LARKY: Is that debatable or not  
21 debatable?

22 JUDGE CHMURA: Yes.

23 CHAIRPERSON WARNEZ: We have a second, a  
24 first motion, amended motion to postpone to a date  
25 certain. Do I have a second?

1 VOICE: Second.

2 CHAIRPERSON WARNEZ: There is debate on this.  
3 The date certain would be to the next meeting in  
4 September, so those comments are going to address  
5 whether we should postpone this till September.

6 MR. LARKY: Sheldon Larky, 6th circuit. I am  
7 going to oppose this motion. We have been doing this  
8 for too many years. It's time that we as a Bar take a  
9 stand whether for or against at this the particular  
10 point. The issue is very simple, and I think that we  
11 should oppose this motion. Thank you.

12 MS. VANHOVEN: Maureen VanHoven, 20th  
13 circuit. I think, I could be wrong, what people are  
14 forgetting is that in order to eliminate the 70-year  
15 age requirement, to permanently draw that line through  
16 and delete it, that has to be done by constitutional  
17 amendment. So all we are doing here is saying that we  
18 support a constitutional amendment to remove this. We  
19 are not making a policy decision that we think it's  
20 okay for someone who is 70 years old to run for judge.  
21 All we are saying is we would throw our support as the  
22 Representative Assembly behind the idea to ask the  
23 voters of the state of Michigan to amend our  
24 constitution. So I am opposed to postponing this,  
25 because we are really not making a policy decision.

1 We are just deciding whether or not we are going to be  
2 cheerleaders for our constitutional amendment.

3 MR. LINDEN: Jeff Linden, 6th circuit. I  
4 rise in opposition to the motion to postpone. I think  
5 it's an important issue. I incorporate some of my  
6 colleagues' comments that all we are asking is whether  
7 or not this should be an issue that the Bar supports  
8 that should go to constitutional referendum.

9 It's the voters who amend the Constitution  
10 and make this decision. I think it's a good policy.  
11 It smacks of -- the arbitrary age line, there are  
12 issues that should be addressed, perhaps by the  
13 Legislature, perhaps by the Constitution. With regard  
14 to judicial term limits, those are another thing. I  
15 think it clears the way to open that discussion by  
16 removing an arbitrary age-based barrier that has  
17 nothing to do with chronology, not competence, not  
18 politics, not position. I think it should be voted  
19 on.

20 MS. WASHINGTON: Good afternoon. At this  
21 point I move to oppose the actual postponement of  
22 this. There were very few people in line at the time  
23 that that had come up. I think we are taking longer  
24 to debate that issue than we could have debated the  
25 entire thing.

1 CHAIRPERSON WARNEZ: I will take that as a  
2 suggestion we call the question. Motion to call the  
3 question. Is there a second?

4 VOICE: Second.

5 CHAIRPERSON WARNEZ: All in favor, signify by  
6 saying aye.

7 Any nays? Any abstentions?

8 We are going to call the question.

9 VOICE: Which question are you calling?

10 CHAIRPERSON WARNEZ: We are going to vote on  
11 the motion to postpone to September. So we are  
12 calling the question, should we move this to  
13 September?

14 All in favor of moving this to September,  
15 please signify by saying aye.

16 All opposed, please signify by saying no.

17 Any abstentions? We are going to vote today  
18 on it.

19 That renews comments on the substantive  
20 proposal.

21 MR. PHILO: I will keep it brief.

22 John Philo, 3rd circuit. I oppose it for the reason  
23 that it is an important question, and when we are just  
24 saying eliminate this language, we are ignoring the  
25 realities that there are problems with genuine

1 diversity at the top of our Bar. We are ignoring that  
2 issue that there is a potential problem with creating  
3 a de facto lifetime appointment. If we are going to  
4 do this, I think we have to have a recommendation for  
5 those alternatives attached to it, because it sends a  
6 message that that alone is all we are doing. And I am  
7 opposed to that for the reasons that other folks have  
8 said today.

9 MR. BARTON: Bruce Barton, 4th circuit. I am  
10 opposed to the motion based upon the demeanor of some  
11 judges in this state who are long-term judges and who  
12 change as they get close to when they should be  
13 retiring.

14 I have had the experience a number of times  
15 with judges who are arbitrary, demeaning, and these  
16 are judges who were very, very sympathetic and good  
17 judges early in their careers, but after a long time  
18 on the bench they have been, as I said, arbitrary,  
19 demeaning of lawyers. I kind of figure they would  
20 make George Patton look like a whimp.

21 Perhaps just one example, and this is only  
22 one of a number I can give you. I appeared before a  
23 judge in a one-judge circuit in southern Michigan some  
24 years ago. He is a man that I had appeared before  
25 years before that when he first took the bench. When

1 he was, however, at retirement age, let's put it this  
2 way, he would not be able to run again -- I know he  
3 would have run again if he had the opportunity -- but  
4 in any event, I was making a motion to set aside a  
5 plea of guilty. I began speaking to the motion, and  
6 the judge cut me off. He said, Mr. Barton, that's not  
7 an arguable point. I won't hear any more of it.  
8 Apparently I had enough in there before that, but in  
9 any event I was faced with a dilemma of doing my duty  
10 to my client that I thought was a viable and arguable  
11 point or facing contempt. I doubt very much that  
12 there is anyone in this room who would be comfortable  
13 in that situation, representing a client to my best  
14 knowledge as best I could and being told I would be in  
15 contempt if I did so.

16 Now, I was in a similar situation a number of  
17 times, but that's just one example. But I use that  
18 example because I can tell you that that very point  
19 that he wanted to cut me off on and not let me argue  
20 was one of a number of arguments brought up in the  
21 Court of Appeals, but that was the one the Court of  
22 Appeals chose to set aside the conviction, set aside  
23 the plea of guilty or remand to the circuit court.  
24 That was something that I really was faced with a  
25 dilemma of trying to back off. So I had enough on the

1 record or something like that, and my point, of  
2 course, is that is only one example, and I can give  
3 you others, of judges who changed in a long term on  
4 the bench from good judges, sympathetic and so forth,  
5 and arbitrary capricious and very demeaning judges.

6 CHAIRPERSON WARNEZ: Time. Thank you.

7 Mr. Larky.

8 MR. LARKY: Sheldon Larky, 6th circuit. I am  
9 in favor of this motion. Bruce, you and I have been  
10 on this Representative Assembly I think since it's  
11 beginning in 1971. We just keep on coming up to bat.  
12 But I sit as a part-time magistrate in a court, and I  
13 have a different perspective, because I can see good  
14 judges and bad judges, and I have to interact with  
15 them. I must interact with them. And we are very  
16 fortunate in our state, but more than that, let's  
17 think for a moment about state versus federal, this  
18 idea of local versus nonlocal.

19 People who, in the federal system, and, John,  
20 you were former court administrator for the Eastern  
21 District, people in the federal system, judges have  
22 lifetime appointments, and they make decisions that  
23 affect all of humanity in all of our country. There  
24 is no time limit or no age limit in the Supreme Court,  
25 there is none in the federal system, and those states

1 that have put limits have let good people go. And  
2 when I first started practicing there was no Attorney  
3 Grievance, there was no Judicial Tenure Commission,  
4 there was no Tenure Commission. It only came in in  
5 the 1983 Constitution, and there is the method, and it  
6 takes time.

7 It does take time to get rid of judges that  
8 are bad or incompetent or arbitrary or capricious, and  
9 some of them still succeed to stay on the bench, but  
10 for the most part we are very lucky in our state. We  
11 have good judges, and, yes, sometimes our clients get  
12 the short end of the stick because the judge may be  
13 arbitrary and capricious, but that's what she or he is  
14 getting paid to do, the arbitrary or capricious,  
15 because in his or her eyes it appears to be fair and  
16 it appears to be correct.

17 This idea that -- I want to be open about it.  
18 I am 71 years of age. I feel just as good as a lawyer  
19 today as I did when I first started practicing, and I  
20 certainly know more, and I have a better temperament  
21 today than I ever did, and I can't see the idea of  
22 turning somebody out to pasture simply because you  
23 reach that magic age of 70 and sorry, sir, or ma'am,  
24 good-bye, good luck, good riddance, you are done. And  
25 I think that we should pass this. Thank you.

1 MR. HILLARD: Martin Hillard, 17th circuit.  
2 I rise in support of the motion for a couple of  
3 reasons. First, age discrimination is wrong. If the  
4 proposal before this body was to support repeal of the  
5 age discrimination in the Employment Act, I suspect we  
6 would overwhelmingly oppose. It would be hypocritical  
7 to support age discrimination in one job, yet oppose  
8 it for the private employers in others.

9 As for bad judges on the bench, yep, there  
10 are some, regardless of age. Age isn't what's turned  
11 them bad. Perhaps the Tenure Commission needs to be  
12 more aggressive. Perhaps the Tenure Commission needs  
13 to hire Charile LeDuff as an investigator.

14 Ultimately we choose a democratic method of  
15 selecting our judges, and what we are saying is we  
16 don't trust the voters. You know what, the voters  
17 make bad choices. They make bad choices sometimes  
18 with judges, of township trustees, of state  
19 legislators, of governors, of presidents, of any  
20 office, but we choose to live with it. The ultimate  
21 term limit is the voting booth. So I support the  
22 motion.

23 MR. MCCLORY: Mike McClory, 3rd circuit. I  
24 will be very brief, but I just wanted to say that we  
25 just want to consider the consequence of this

1 decision, and someone said, with all due respect, we  
2 are not talking a substantive policy position, but we  
3 are because this has been introduced several times.  
4 It's in the Senate right now. If we do adopt this  
5 proposal, it's going to give a lot of impetus to this,  
6 and people will use this seal of approval as a way to  
7 get that through, and it will affect the dynamic of  
8 the legislative process. What I submit as one thing  
9 is that we are talking about the democratic process.  
10 This has been introduced a few times over the years,  
11 and the fact that there is no action taken on it, it  
12 indicates that there is not really -- from the public,  
13 so much for ground swell of support.

14 What I am saying is that when we make this  
15 decision we have to carefully consider how -- excuse  
16 me, if we do adopt this, we are going to interject  
17 ourselves into the debate and get a lot of momentum.  
18 So if it hasn't been getting enacted to this point,  
19 what are the issues and the advantages or  
20 disadvantages of us taking this position and who wants  
21 to do so. That's all I have to say.

22 MS. STANGL: Terri Stangl from the 10th  
23 circuit. I support the proposal for two reasons.  
24 One, if, as a profession, we are talking about  
25 diversity and nondiscrimination, I don't see why that

1 should not apply to us like it does in other kinds of  
2 employment situations where arbitrary age limits would  
3 not allow.

4 Second of all, I think that the fact that  
5 there is an automatic retirement age has allowed us to  
6 avoid the harder question that Mr. Philo was talking  
7 about the way we pick judges and how the campaigns  
8 work and the way that Justice Kelly was talking about.  
9 Frankly, I think if we bite this bullet, then we  
10 really have to get to the harder questions about how  
11 judges throughout their career are elected, and those  
12 are really where the changes are made.

13 CHAIRPERSON WARNEZ: Seeing that there is no  
14 further comment, I am going to call for the vote.  
15 Should the State Bar adopt the following resolution  
16 calling for an amendment to Section 19 of Article VI  
17 of the Michigan Constitution of 1963 to remove the age  
18 limitation from eligibility criteria for judicial  
19 office? Resolved, that Section 19 of Article VI of  
20 the Michigan Constitution of 1963 be amended to remove  
21 the age limit from eligibility criteria for judicial  
22 office.

23 All in favor, please signify by saying aye.

24 All not in favor, please signify by saying  
25 nay.

1 I am going to call for a standing vote,  
2 please. Any abstentions first?

3 All who voted in favor of the motion, please  
4 stand up.

5 All who voted no, please stand up.

6 I think we are going to have to take a tally  
7 vote. Please sit down. Whoever voted yes, please  
8 stand up, and we are going to do that.

9 Thank you. All the no votes, please stand  
10 up.

11 The clerk has stated that it was 59 votes  
12 yes. Were any abstentions to be counted?

13 MR. HORNBERGER: Can we sit down?

14 CHAIRPERSON WARNEZ: Yes, I am sorry. You  
15 may sit down.

16 Were there any abstentions to be counted?  
17 Having no abstentions, the clerk is certifying that  
18 vote, Vanessa.

19 CLERK WILLIAMS: 59 yes and 41 no.

20 CHAIRPERSON WARNEZ: 59 yes, 41 no. That  
21 motion carries.

22 I would like to next call -- does anyone need  
23 a break?

24 VOICE: Keep going.

25 CHAIRPERSON WARNEZ: I would like to ask

1 Dan Quick to come forward. Dan is going to comment,  
2 as the proponent, consideration of MCR 2.306.

3 MR. QUICK: Good afternoon. We have three  
4 proposals in seven minutes, so should not be a  
5 problem. All of these proposals are recommendations  
6 from the State Bar of Michigan Civil Procedure and  
7 Courts Committee, and I am here on behalf of the  
8 committee today.

9 The first proposal, which is item number 12,  
10 seeks a modification of 2.306 to clarify that any sort  
11 of communication with a deponent while a question is  
12 pending in a deposition is verboten. It goes on to  
13 clarify even further that that includes electronic  
14 communication. One might ask, if we change the word  
15 from "convert" to "communicate," why do we need to  
16 reiterate in the next sentence that that includes  
17 electronic communication?

18 I would indicate only to you that the  
19 discussion at the committee was to hearken to the jury  
20 instructions, which have had to say it at least nine  
21 times to the jurors in all sorts of different ways,  
22 and I think that's in part because electronic  
23 communication is such a part of people's lives  
24 nowadays that they may not even think about it as  
25 communicating or conferring, and so the consensus on

1 the committee was that we did no harm by stressing  
2 that point and that given the role social media and  
3 whatnot plays in our society, we thought it was a good  
4 idea. So I move for your adoption of this proposal.

5 VOICE: Second.

6 CHAIRPERSON WARNEZ: Hear a motion and a  
7 second. Is there any discussion or comments? Invite  
8 them now. Hearing or seeing none, should the  
9 Representative Assembly recommend the adoption of the  
10 above proposal to amend MCR 2.306? All in favor,  
11 please signify by saying aye.

12 Any opposed, please signify by saying no.

13 Any abstentions?

14 Motion carries. Thank you.

15 MR. QUICK: Thank you. The next one, let me  
16 just say a few words by way of catch-up and  
17 clarification. First of all, you were provided a blue  
18 memo today which contains some modified language at  
19 the top, contains the modified language on the second  
20 page. It's in the form of an email from Dana and  
21 Anne Smith, and it should be -- I wonder if we have  
22 the correct language on the screen here or not. There  
23 it is.

24 The origin of this proposal was by  
25 Jules Olsman, who is State Bar Commissioner and cad

1 about town. Jules believes that the inspiration of it  
2 was a number of billboards around where the name and  
3 identity of a lawyer is not displayed at all, let  
4 alone prominently, in connection with that advertising  
5 which could lead the public to be confused as to who  
6 exactly is sponsoring the ad, what attorney is  
7 associated with it.

8 So the adjusted proposal falls under the  
9 Model Rule of Professional Conduct 7.2, not 7.1 as  
10 originally recommended. And the proposal simply seeks  
11 to clarify that in any advertisement that the name and  
12 office address of an active member in good standing of  
13 the State Bar of Michigan who is responsible for its  
14 content be displayed.

15 I will tell you that as the rule was  
16 considered and under revision, a number of different  
17 individuals were consulted on it. They include  
18 Professor Robert Sedler, who many of you know is a  
19 preeminent Michigan and federal constitutional  
20 scholar, and this is going to sound like a TV ad, but  
21 he approves this message. It included Josh Ard, who  
22 many of you know from this body, but also heavily  
23 involved in the unlicensed practice of law issue. He  
24 approves this message. It includes John Cameron, who  
25 is chair of the Professional Ethics Committee of the

1 State Bar of Michigan. His committee was unable to  
2 meet in time-wise in order to approve this, but John  
3 has authorized me to share with you that he at least  
4 personally sees no issues with this particular  
5 proposal.

6 And last, but not least, Mark Bernstein has  
7 written a letter of support which is in your materials  
8 for this. The concepts, that is not a limitation on  
9 advertising in any way, shape, or form but simply  
10 provides necessary, accurate information to the public  
11 in connection with the advertising. So with that, I  
12 would move for your support of this proposal.

13 VOICE: Second.

14 CHAIRPERSON WARNEZ: Hearing a motion and a  
15 second, time for discussion. I invite comments.

16 MR. LINDEN: Jeff Linden, 6th circuit. I  
17 just have a question, more of a clarification. The  
18 way the rule, as laid out in your proposal, subsection  
19 (d), which has been amended as we are seeing, follows  
20 the statement, A communication shall not.

21 MR. QUICK: In the original at 7.1 as  
22 modified, it's in 7.2. So it makes sense when you  
23 read it in the context of 7.2.

24 MR. LINDEN: Thank you. Do we have 7.2 in  
25 the packet?

1 MR. QUICK: No. 7.2, just the diction is  
2 different. It's entitled advertising. It has three  
3 subsections. Section (a) just says you may advertise.  
4 Section (b) says you've got to keep it for two years,  
5 a record of it for two years after you use it, and  
6 subsection (c) says you can't give anything of value  
7 to anybody for recommending your services, with some  
8 exceptions, so this would be (d) under that  
9 advertising rule. Sorry for that confusion.

10 CHAIRPERSON WARNEZ: Any further comment? So  
11 call the question. Should the Representative Assembly  
12 adopt the above resolution, amended resolution  
13 regarding MRP --

14 VOICE: Point of order. We have somebody  
15 here that may want to talk.

16 CHAIRPERSON WARNEZ: I am sorry. Come  
17 forward.

18 MS. WASHINGTON: Erane Washington, 22nd  
19 circuit. I am still just confused, because we got the  
20 blue language. Are you saying that the blue language  
21 is not an amendment to what you have provided here  
22 under 7.1?

23 MR. QUICK: Correct, it's in lieu of the 7.1  
24 language. Once it was considered, the decision was to  
25 put it under 7.2, which is the advertising rule. So

1           there would be no modification to 7.1. This would be  
2           now 7.2(d).

3           MS. WASHINGTON: Okay. So there is no  
4           request to amend this with the (d). You are just  
5           giving that for informational purposes.

6           MR. QUICK: No, the motion is to add  
7           subsection (d) to existing Rule 7. 2. No modification  
8           to 7.1.

9           MS. WASHINGTON: Okay. Thank you.

10          MS. JOLLIFFE: Elizabeth Jolliffe from the  
11          22nd circuit. We don't have 7.2 in front of us, but  
12          we are being asked to add a section D to 7.2, is that  
13          correct?

14          MR. QUICK: Correct.

15          MS. JOLLIFFE: I don't even practice law  
16          anymore, and this makes me a little nervous, but maybe  
17          nobody else here cares. For instance, this new or  
18          additional section (d), does this mean that, for  
19          instance, if someone has a billboard, it has to  
20          contain all this information?

21          MR. QUICK: That certainly would be under the  
22          rule, yes.

23          MS. JOLLIFFE: The billboard would have to  
24          say the name and office address of the active member?

25          MR. QUICK: And actually we have --

1 MS. JOLLIFFE: Is that new?

2 MR. QUICK: -- stuffed away. Can you show  
3 one of those. We have an example of one of the  
4 billboards that would be of concern under the existing  
5 rule, which is no rule. So you can see there is not a  
6 name of a law firm, there is not a name of a lawyer.  
7 The public really has no idea who is sponsoring or  
8 what attorney is promoting this. You can show the  
9 other one as well.

10 VOICE: I hope nobody in this room is  
11 responsible for that billboard.

12 MR. QUICK: But it's another example. There  
13 are many you could have, but yes, so you just have to  
14 have the name and address on there.

15 MS. JOLLIFFE: But it seems to me that some  
16 of the concern is there isn't the name of a lawyer  
17 licensed in Michigan on that billboard, but now we are  
18 saying it has to have the name of a lawyer licensed in  
19 Michigan, plus the office address. For instance, some  
20 lawyers in Michigan don't have an office. They don't  
21 have an office address.

22 MR. QUICK: Everybody has an address with the  
23 State Bar of Michigan, and that's why we tied it to  
24 the same information provided to the State Bar

25 MS. JOLLIFFE: Okay. All right.

1 MR. HERRMANN: Fred Herrmann, 3rd circuit.  
2 The original proposal addressing 7.1 was really quite  
3 different in substance in that it addressed the  
4 problem of the billboards that we just saw relative to  
5 just seeing an image or a service with a phone number  
6 and then the original proposal went on to say without  
7 also prominently including either the full name of the  
8 lawyer or the law firm.

9 My potential concern with the new proposal  
10 and putting under 7.2 is, for example, you may have a  
11 major law firm, it may have multiple offices, and  
12 merely putting the name of a prominent law firm on the  
13 advertisement, it seems to be unnecessary to also add  
14 the name of an individual lawyer on that and a  
15 particular address, office address. I am willing to  
16 further consider that. My only concern is because we  
17 have only seen the blue memo today and haven't had a  
18 chance to really consider that in context of the  
19 written rule, I would move that we postpone a decision  
20 on this new proposal until the next meeting.

21 VOICE: Second.

22 CHAIRPERSON WARNEZ: Mr. Herrmann, do you  
23 have a proposed date to which you would postpone this?

24 MR. HERRMANN: I would defer to Mr. Quick on  
25 this, but our next meeting should be sufficient. I

1 think this could be dealt with quickly there. I just  
2 personally would like an opportunity to see it in  
3 context and think further about it.

4 CHAIRPERSON WARNEZ: I heard a motion to  
5 postpone and a second. Any further discussion on the  
6 motion to postpone?

7 PRESIDENT COURTADE: Only this, and I think  
8 Anne is referring you to, we may be able to get that  
9 rule up on the screen in a second, and if we can  
10 dispose of it today, let's dispose of it today.

11 CHAIRPERSON WARNEZ: I will give the staff an  
12 opportunity it put the rule up. Are there any more  
13 comments relative to the motion to postpone?

14 MR. BARRON: While they are looking for the  
15 rule, Richard Barron, 7th circuit. This is not one of  
16 the more, in my opinion, difficult issues to come  
17 before this Assembly. We meet twice a year. If we  
18 are in the habit of postponing every issue to the next  
19 meeting because one or some people have some questions  
20 or would like to think about it longer, we will  
21 accomplish very little, and I think this is something  
22 we, again, should vote on today.

23 CHAIRPERSON WARNEZ: Mr. Romano, do you have  
24 a comment?

25 MR. ROMANO: I wish to speak to the substance

1 of the rule.

2 MS. STANGL: I have a question which kind of  
3 relates to what I might vote on this. I am curious  
4 about the Michigan portion of this. Because I can  
5 think of certain practices where people are not  
6 necessarily Michigan attorneys that may be only in  
7 federal court --

8 CHAIRPERSON WARNEZ: The comment would be  
9 directed on the motion to postpone. Do you have any  
10 comments.

11 MS. STANGL: It may affect my motion. If  
12 it's clear to me, I might vote. So if you would  
13 rather call for the question --

14 CHAIRPERSON WARNEZ: If you wouldn't mind  
15 holding the comment for right now.

16 MS. BRANSDORFER: Liz Bransdorfer from the  
17 17th circuit. This is my first meeting, so I am a  
18 little nervous about this, but I see a real difference  
19 between the two rules. The first one says you have to  
20 prominently display the name of the lawyer or law  
21 firm, and the second one says you have to display the  
22 name of the individual lawyer and their address. To  
23 me, those are very different, and especially people  
24 who practice at home, and I think because we don't  
25 have information about why the difference and what's

1 the meaning behind the difference, that postponing so  
2 we can get that additional information and maybe have  
3 an opportunity to talk to our respective  
4 constituencies about what difference that might make  
5 might be important.

6 CHAIRPERSON WARNEZ: Any further comment  
7 about the motion to postpone? Hearing none, all in  
8 favor of postponing this until September, please  
9 signify by saying aye.

10 All opposed, please signify by saying no.

11 Any abstentions to the vote? You guys are  
12 getting the workout, not me.

13 All who voted in favor to postpone, please  
14 stand, please. Thank you very much.

15 All who voted no, please rise.

16 Any abstentions?

17 I am going to ask for the tellers to make a  
18 count for me. Everyone who voted no, please sit, and  
19 those who voted yes, please stand. Thank you for  
20 standing.

21 All the no votes, please now rise. Thank you  
22 for standing.

23 The abstentions, please rise. Noting one  
24 abstention.

25 That motion to postpone carried 53 yes to 41

1 no and one abstention.

2 MR. QUICK: Lastly.

3 CHAIRPERSON WARNEZ: What's the question? Go  
4 ahead.

5 MR. QUICK: Lastly is item number 14, which  
6 is proposed amendment to MCR 2.203 as set forth in  
7 more detail in the supporting materials. Numerous  
8 commentators have noted that there is an existing gap  
9 in the Michigan Court Rules dealing with the procedure  
10 by which parties are added to a lawsuit by the  
11 defendant, either by way of counterclaim or otherwise.  
12 The practice noted in the committee is that the courts  
13 do not abide strictly by the existing third party  
14 practice rule, which suggests that new parties are  
15 limited on the third party claim, secondary liability,  
16 since the alternative would be to simply file a  
17 lawsuit, another lawsuit, add new parties and then to  
18 consolidate them, which is a lot of procedural hoopla,  
19 you get to a point where the federal rules expressly  
20 permit, which is the additional parties on a  
21 counterclaim.

22 And so the proposal under 2.203 is to add  
23 subrule (G), expressly authorizing the addition of  
24 parties by way of a counterclaim or crossclaim subject  
25 to the joinder rule, which is the same as exists in

1 the federal rule scheme, and then secondly adding that  
2 which currently does not exist, which is an expressed  
3 authority for the clerk to issue a summons as to those  
4 newly added parties. So at this time I would move for  
5 your vote on the amendment of MCR 2.203.

6 VOICE: Support.

7 CHAIRPERSON WARNEZ: Motion and support. Any  
8 comments?

9 Hearing none, should the Representative  
10 Assembly adopt the above resolution regarding  
11 MCR 2.203? All in favor, please signify by saying  
12 aye.

13 Any not in favor, please signify by saying  
14 no.

15 Any abstentions?

16 That motion carries.

17 Prior to requesting the motion for  
18 adjournment, I do want to thank everybody for their  
19 time, their patience, and for all the hard work that  
20 was put into this meeting, including staff, my fellow  
21 leadership officers, and all the committees and  
22 proponents who came here today. Thank you very much.

23 Do I hear a motion to adjourn?

24 VOICE: Motion to adjourn.

25 CHAIRPERSON WARNEZ: Second?

