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.

RECORD

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

VOICE: Second.

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

Nays? Any abstentions?

Thank you very much, Kathy Kakish.

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

VOICE: So moved.

VOICE: Second.

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

Nays. Any abstentions. Motion carries.

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

MR. QUICK: Good morning.

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

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

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

VOICE: Second.

CHAIRPERSON WARNEZ: I am not used to this yet.

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

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

MR. QUICK: And a round of applause.
(Applause.)

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

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

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

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

When we met in September, I told you that we had hopes that we would be able to accomplish that at the end of the last legislative session, and I told you that I would introduce to you in this session
Elizabeth Lyon, our former governmental relations counsel's successor, Peter Cunningham, but he had a pass in September because he was the new father of days old twins.

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

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

So what we did accomplish at the end of the last legislative session that you are also responsible for is the enactment of a Custodial Interrogation Recording Task Force, custodial interrogation
recording legislation based on the task force that you
called into being through your resolution, so another
example of making a fundamental difference for being
here.

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

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

Finally, and I said I would be short, we have
been extraordinarily busy in the last couple of weeks,
and I have discovered that you can be interacting with
the president of the State Bar and running around and
doing all kinds of things and fail to coordinate with what your messages are going to be to the Representative Assembly, and I have discovered that Bruce is planning to say almost everything else that I wanted to say, so in light of that, the only proper thing for me to do is to sit down and wish you a great meeting and turn over the substance to Bruce when he speaks. So thank you very much.

(Applause.).

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

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

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

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

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

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

Again, that's not why we are here. Elizabeth was one of the originators of the Diversity Initiatives that was undertaken by the Federal Bar Association in the Eastern District of Michigan. As a
result of that initiative, in 2009 the FBA established a diversity committee, which Elizabeth chaired originally and continues to chair to this day. That diversity committee from those humble beginnings has grown to be a nexus of diversity efforts across the state. The FBA has undertaken to organize contact between the various affinity bars and bar associations committed to diversity efforts to organize their resources, to increase communication, to share best ideas, and of course the FBA's diversity committee itself has undertaken a number of very proactive and worthwhile initiatives.

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

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

VOICE: So moved.

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

VOICE: Support.

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

Any nays? Any abstentions? The motion carries.

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

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

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

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

VOICE: Support.

CHAIRPERSON WARNEZ: Any further discussion?
All in favor of the motion, please signify by saying aye.


MR. QUICK: Thank you.

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

(Appause.)

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

I spent some time up in the U.P. with Dana. One of the first things the State Bar president does
is go on a swing of the U.P. It's a pretty intense three-and-a-half-day period, sitting in a car, driving for hours to go make a couple speeches, to drive several hours, to go make a couple speeches, but it's a great time to learn more about your Assembly counterpart, and I can tell you that Dana is a fantastic representative of this body. She is an outstanding spokesperson for it and advocate for it and great leader.

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

Vanessa is the only disappointing member of the leadership, and she is disappointing in two regards. The first is the Rep Assembly elections were not held until the day after I had to appoint my executive committee. Had they been a day earlier, I would have loved to have had the opportunity to
appoint her to the executive committee, because she really is outstanding. I am also disappointed that I only get to work with her for one year.

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

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

I am happy to report the Bar is in outstanding shape, fiscally and in every other way imaginable. We are doing more, offering more programs to more attorneys. In fact, we just found out yesterday, according to the latest statistics, we now have 42,600 attorneys in the state of Michigan, an increase of 650 roughly this fiscal year. We are doing that with less dues to our members. I don't know if you noticed, but last fall you got a $10 dues decrease. And not only that, when you compare our dues across the board around the state, it's amazing
the bargain. I know it seems difficult to believe when you are writing that check every year, but it really is a great benefit and a great bargain compared to what our counterparts around the state are paying.

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

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

Since the soft launch of that website in August, which it hasn't been really publicized, there hasn't been a lot of hoopla about it, we have had 400,000 page views since that public launch. There have been approximately 70,000 unique users to go and use that website. This is a website, for those who
may not realize it, that it has basic SCAO-approved forms for people seeking legal assistance who may not be able to afford it otherwise.

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

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

So it's doing what we had hoped it would, which is for the very basic, simple forms, people are
able to access them, but it's driving them to go talk
to attorneys, to get legal advice. So I think that's
great.

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

There have been a few issues that have taken
my time in the last seven months. One was that little
quiz that some law students took last July. I don't
know if you heard about it. For those who were not
aware of the circumstances of the Bar exam, we had a
62 percent overall pass rate for first-time takers in
July. My phone was ringing off the hook, not only
from the law schools who were upset about it, because
it made them look bad, the law students who had taken
the exam who felt that the rules had changed, and
lawyers around the state, but the funny thing about
the lawyers around the state, there were two distinct
camps. One was the camp saying, This is terrible, how
can we do this to these kids who spent $120,000 on
their education and now the rules have changed? And
the other camp was saying, It's about time somebody
pulled up the ladder. There aren't enough jobs.

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

Second issue that I would like to talk a
little bit about is indigent criminal defense. Janet
mentioned it. You know, we just observed the 50th
anniversary of Gideon versus Wainwright, which
established the right of all indigents to have
criminal defense counsel that are facing jail time. I
wish that I could tell you as we sit here today that
Michigan has met that promise, but I think you all
realize that we haven't.

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

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

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

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

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

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

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

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

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

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

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

How can they ever understand that sometimes a
judge has to make a decision that's unpopular because
it's the right thing to do, because constitutionally
by making that decision that judge is protecting every
one of our rights. It's not a technicality that this
criminal defendant gets off. It's a constitutional
right that is being saved, that is being protected by
that judge. If these people can't understand that,
our whole justice system is at risk.
So that's why I do it. That's why I encourage you to do it. I encourage you to talk to any group that you can. The State Bar has a great resource on its website with the civic and legal related education website. It's got a full page of links to articles, to curricula, to anything that you would need if you wanted to go speak to a group from second grade to senior citizen.

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

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

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

(Appause.)

PRESIDENT COURTADE: Janet, you do not have any idea how much trouble Janet saves the State Bar from. One thing she just wanted me to clarify is that the Solutions on Self-Help website, the State Bar
supports it, but it is not a State Bar website. It's a separate website. It came as a result of the Solutions on Self-Help Task Force that Justice Marilyn Kelly created and solicited volunteers for. So even though we are fully supportive, it's not a State Bar website. Any questions? Thank you, everybody.

CHAIRPERSON WARNEZ: Thank you so much, Bruce.

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

It's been said, and I think about it a lot, don't ever underestimate what one person can do, what a difference that one person can do in their activities, and in that regard I encourage you and charge you and challenge you today to put in effort, time. I know you already have, but in the debates that I expect to be coming from the proposals that are
on our calendar, I invite everybody to truly, please actively participate, engage, and make a difference, speak your mind.

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

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

With the inventory rule, I think about in that regard, you just never know what's going to happen. So the intentions of that proposal, I think, is meant to acknowledge that and not be about how hard it is on us but how it might be helpful to those we
love and to our clients that we have duties and obligations to. I am not advocating, but I do like to look at that proposal in those terms more so than others.

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

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

(Appause.)

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

(Appause.)

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

(Appause.)

CHAIRPERSON WARNEZ: Eilisia is chair of our
Hearings Committee, which is not always as active as others, but so important.

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

(Applause.)

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

(Applause.)

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

(Applause.)

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

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

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

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

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

I understand that you grew up in the city of Detroit. You are the youngest of three children from your family. You graduated from MacKenzie High School. Education has been a primary part of your efforts throughout your career. I acknowledge that
you received a Bachelor of Arts from Eastern Michigan University and studied in Paris at -- forgive me. I won't even try. My pronunciation of French would be impossible, but I know you have been far and wide studying. You have a Master's from Middlebury College, obtained a law degree from Wayne State, from which you were acknowledged as a distinguished alumni, and have been reintegrated into teaching, I believe, and on, I assume, the Board there as well.

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

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

(Applause.)

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

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

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

Judge James Ryan, formerly Justice Ryan of the Michigan Supreme Court and Judge Ryan of the 6th Court of Appeals, and United States Supreme Court Justice, retired, Sandra Day O'Connor and I set up this commission in 2010 to study proposed needed
changes to Michigan's method of selecting Supreme Court justices. Although we focused only on Supreme Court justices, the implications for the other 700-some judges in our state are obvious.

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

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

The work of the task force was funded entirely by its members, all of whom are volunteers, by the C. S. Mott Foundation, by the League of Women
Voters and principally by the State Bar of Michigan Foundation. Wayne State University Law School furnished the meeting facilities, and one of the professors, Justin Long, attended voluntarily all of the meetings and served as reporter, writing the report.

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

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

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

I can say that the deliberations of this group were an outstanding example of earnest debate and respectful consideration of other people's views, which is remarkable considering the diversity of the group and the strongly felt and divergent views of its members.
Ultimately there were six recommendations that came out. There were no dissents. All of the recommendations were the consensus of the members. In a nutshell, here is what they were. Number one, the Legislature should amend the Michigan Campaign Finance Act to require full disclosure of the source of all funding of judicial campaign ads, and this includes issue ads.

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

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

And this undisclosed judicial election spending is not occurring just at the Supreme Court.
level these days. It's spilling into the lower courts. So that in November, in the November election in 2012, in Oakland Circuit Court, unreported TV advertising was $2.1 million that's unreported. Again, the disclosure rate was a mere 25 percent. We don't have any record of who spent the other 75 percent. We didn't know it before the election, and we don't know it today, and we will probably never know it.

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

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

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

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

The public, you know, we know, we all believe, should be confident that justices decide cases without worrying whether their ruling conforms with party ideology or otherwise puts their party's support at risk.
The third task force recommendation is that an independent, nonpartisan citizens campaign oversight committee should be formed to monitor judicial campaign advertisements, check them for factual accuracy, and report to the electors on their findings before election day. The task force encourages nonpartisan civic groups to form such a campaign oversight committee. Members of the media have assured us that they would welcome such an effort and would assist in publicizing an independent committee's findings.

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

Voter ignorance about judicial elections is a major problem with our election system. If it's going to survive and work, the voters have to know more about candidates and care more about voting for them. As much as a third that go to the poles to vote don't vote the nonpartisan ballot, don't vote for the judges at all. If the Secretary of State were to distribute information by way of the website, the cost of implementing this recommendation would be pretty low.
The fifth recommendation is the Governor should promulgate an executive order creating an advisory commission to screen candidates for Supreme Court vacancies. It should recommend new justices to the Governor based on merit. Again, Michigan's current law stands out among all the states. The Governor here is allowed to fill vacancies on the Supreme Court with utterly no checks and balances on his or her decision.

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

Now, last spring some of us sat down with Governor Snyder, some of us from the commission, task force. We put this before him. He listened and asked questions, but he didn't take any action at all. And,
as you know, he has now chosen a new Supreme Court justice to fill a vacancy and, again, did it without any change in the method used before, no check and balance whatsoever on his decision except such as he wished to make.

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

The age 70 years limitation was drawn before we were using words, I think, like age discrimination. Back in the 1908 constitution it was created at a time when there was no Judicial Tenure Commission to review judges who didn't function well in office and recommend their removal. So it was created more than
a hundred years ago when it was more difficult to remove dysfunctional judges from office and when fewer people had a effective working life into their 70s.

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

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

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

The bottom line is that the climate to date does not appear to be favorable to enacting most of
these recommendations, even though the polls show that the public is solidly behind a number of them. But, of course, we all know that important change is usually slow in coming. An influential body like this Representative Assembly can help turn the tide in my opinion by speaking out. So I leave it to you, and I would be happy to answer questions. Yes.

CHAIRPERSON WARNEZ: Please come forward at the mike.

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

JUSTICE KELLY: Yes, there was.

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

JUSTICE KELLY: We talked about it, because it's certainly a viable suggestion, and I think in the end we ended up with the recommendation to simply abolish it, partly because there is no particular age that can be identified as being the right age to force somebody out and that people aren't forced out in other public office because of age and that there is, as I said earlier, a mechanism now to get rid of people who shouldn't be in that didn't exist before. It's certainly a debatable issue, but, again, there seems to be no good age to set a limit at if we were going to set a limit.

CHAIRPERSON WARNEZ: Come forward.

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

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

MR. PHILO: John Philo from the 3rd circuit. I just wanted to follow up on the age requirement, because I do think there is some discomfort having this arbitrary age limitation. It just doesn't, you know, just doesn't sit right, but on the other hand I do think there is a very real problem with the sense of entitlement to an office. I know that it isn't in other political offices. Many of us think maybe it should be, because it just becomes an entrenched, and nobody wants to speak against that, someone who has had a life, their entire life. The Judicial Tenure Commission does not seem to be set up to address that at this point.
Was there some consideration of more objective criteria that might be added to the Tenure Commission or anything of that nature?

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

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

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

JUSTICE KELLY: The issue of age?

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

JUSTICE KELLY: Well, that's an excellent
question. It's really a question that's lurking sort of behind the scenes on this whole report.

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

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

But that's lurking behind all of this, and it's my strong opinion that if we can't make changes to reform the system we have got right now, we are going to have to seriously talk about just going,
leaving them, but it certainly is worthwhile to try to improve the system we have, and it has worked in the past quite well. It's been mostly recently, in my opinion, with this influx of unidentified money and the increased voterization of the court that we have had so much difficulty and so much public opinion that questions the impartiality and independence of our judges.

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

The fact is, unless you have that age limitation or have term limits, you have effectively zero turnover in judge positions unless and until a judge decides to retire. I think that's problematic for several reasons.
I will give an example, the U.S. Supreme Court. I don't know what the median age of the U.S. Supreme Court is. It's old. It's very old. And not that I am exactly young anymore.

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

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

Some of the statements I heard during the gay marriage debates from the court I think were absolutely cringe worthy. I am sure that a lot of people in their 80s might feel that way, but a lot of people in their 20s don't. Gay rights would be an issue on which there is wide divergence and it's largely generational, but those are two separate issues. One, the fact is, an elected position without an age limit, you do have, it's at the higher end of the age pool for various reasons, but at the same time, if you have elected judges, for good or ill, they just don't lose their races. Very rarely.
JUSTICE KELLY: You make good points. I will say this to you. We have as many or more people appointed to the bench in Michigan at all levels than we have elected, and that is because there is a lot of turnover. A lot of judges do quit right in the middle of their terms or die. So that, in fact, we do have an influx of new people that we wouldn't have if that wasn't the case.

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

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

PRESIDENT COURTADE: Bruce Courtade from the 17th circuit. I am going to take the time to correct an oversight from my earlier presentation and then ask a question based on that. The oversight was I forgot
to report to this body that with the appointment of Justice Viviano the State Bar Judicial Qualifications Committee received glowing reviews from everybody involved. That body is appointed by the State Bar presidents, historically has been geographically diverse, politically diverse, age diverse, and seems to provide, as I look at the proposal, a lot of the things that would be provided by the Advisory Screening Commission.

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

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

Secondly, as things stand right now, the Governor isn't required to go to you at all at any
time, and so it's totally at the Governor's discretion how much to listen to you, if at all. But certainly the Governor has no obligation to act on your recommendations favorably, and that also would change with this commission.

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

(Applause.)

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

(Break was taken.)

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

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

MR. CHIOINI: Good morning. I too am going to be brief, try to be brief, but I do want to give
you a little bit of background as to what the Assembly Review Committee has been doing for the last seven or eight months.

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

We decided initially to look possibly into a survey to find out what the members would be interested in and what we could do to make these meetings more interesting and more meaningful. And we
met with Anne Vrooman, and Anne sat down and talked to us, and ultimately we came up with the conclusion that maybe we were only going to get a 20 percent response and this wasn't the group of people that would help us.

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

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

We were also successful with Anne. Anne Smith got us the publication in Lawyers Weekly where we got a blurb in Lawyers Weekly that told
everybody about what the agenda is and some of the topics of the agenda we would be discussing this afternoon. If you saw that, that's also another methodology.

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

Any questions on the part of anyone? Thank you.

(Applause.)

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

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

(Appause.)

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

In 2007 the American Bar Association began
its recommendation that the states adopt an inventory
attorney rule. At last count, at least 20 states had
adopted a rule for the succession of attorneys
practice. Some call it an inventory rule, others call
it names such as successor attorney, assisting
attorney, attorney surrogate or receiver attorney. So
if you try and Google inventory attorney, you are going to find only a third of the states that have this type of a rule.

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

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

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

MR. RUTHERFORD: Thank you. We need to
protect our clients so that if something unforeseen happens their interests will be protected. We need to protect nonlawyer family members so that they will not be left with the situation that has to be sorted out unassisted.

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

Wyoming has a short one-page rule that they call the designation of attorney surrogate. Florida's rule which dates back to 2005 and was revised in 2010 is now a one-page rule. Indiana's is four pages long in small print. Washington state has a half page rule with just a planning ahead handbook, but all of the states that we have looked at are considering something along these lines. Because lawyers have many different kinds of practices and practice in quite a variety of circumstances, constructing a one-size-fits-all way for an attorney, an inventory attorney to act, made little sense. So the rule is written in a way that permits the attorneys to determine the scope of what the inventory attorney is agreeing to do.
MR. RUTHERFORD: We made a deliberate choice to require lawyers who have clients to designate a lawyer who has agreed to serve as inventory attorney, because the protection of clients' interests are that important, but we also made a deliberate choice not to make this an ethical rule requirement or a requirement that could subject a lawyer to administrative suspension for noncompliance, as is the case with one who does not pay his or her dues.

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

MR. RUTHERFORD: We have not chosen to exempt anyone in a firm with other lawyers, because all lawyers who have clients should have a plan in place, not just sole practitioners. It may simply be easier for lawyers in firms to designate someone such as a managing partner to be the inventory attorney than for a solo practitioner, but all lawyers with clients should give thought to developing a plan.
I, in 2005, lost my son in a boating accident up in Lake St. Clair. Still hard to talk about it, but at least my son, who was a sole practitioner, had a dad who knew something about it and what to do, so I petitioned the Grievance Commission, and the Grievance Commission petitioned the court to set up a conservatorship. I named two lawyers to that, but what I did though, I retained my son's helper, assistant, a law student, to prepare letters which I drafted to send to the clients. The clients were asked to come in and pick up the file, which they did. It took some time, but we got through it all.

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

MR. PUGH: The materials you have been provided include questions and answers that respond to many of the questions we have received, including
those we received the last time we appeared before you. Perhaps the most frequent questions that have been asked are the following: What if I have difficulty find someone to serve as an inventory attorney? What happens if I don't comply? How do I address potential conflicts of interest? Which is the court involvement?

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

Remember also, the rule does not require an inventory attorney to complete client matters. It only speaks in terms of notifying clients of the change in lawyer status and returning or retaining the lawyer's files as appropriate. Please remember also that the rule itself makes provisions for the named inventory attorney to communicate a change of mind about a willingness to serve by providing that the lawyer will name a substitute. So persons who agree to be an inventory attorney are not making an
irrevocable commitment nor is the reporting attorney making any irrevocable choices.

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

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

MR. PUGH: On the conflicts of interest question, one would hope that a lawyer would not choose someone as an inventory attorney who is routinely an opposing counsel because of geographic
location and similarity in areas of practice. So the first response is a lawyer should choose one whom it is unlikely there would be a likelihood of representing numerous adverse parties. Certainly there may always be some conflicts, but you don't want to try to have the guys across the courtroom from you every time as your inventory attorney.

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

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

Our proposed rule, unlike many of the
existing state rules, does not require court involvement, rather it's an agreement between two attorneys to protect the reporting attorney's clients and his or her family and estate.

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

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

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

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

At the same time, in reviewing this together with other perhaps experts in the field, including my colleague, Brian Einhorn, the concern is, as Charlie and Ed has addressed, that this may add some level of professional responsibility to either the inventory
attorney or to the reporting member. And to try to
allay that concern, my first amendment in Rule 2(b) is
that we delete, quote, to carry out his or her
professional responsibilities by reason of death,
disability, or disappearance.

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

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

Secondly, I am also concerned, although again
I certainly take them at their word, that the
representation about this not adding any conflicts
analysis or adding to perhaps our burden of
malpractice insurance, but I do think that there is a
perception that there could be conflicts analysis
applied to this rule, and in that regards I would like
to add in Rule 2(b)(2), add a second sentence that
goes in between the first and now the third sentence in that rule, No attorney-client relationship is established by this rule between the inventory attorney and the clients of the reporting member.

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

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

VOICE: So moved.

VOICE: Support.

CHAIRPERSON WARNEZ: Motion and support. Any discussion?

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

Please any opposed.
I think the ayes have it. I am going to accept it.

VOICE: Roll call.

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

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

PRESIDENT COURTADE: Support.

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

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

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

CHAIRPERSON WARNEZ: This discussion is on METROPOLITAN REPORTING, INC. (517) 886-4068
Tom's amendment at this point in time.

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

MR. POULSON: Barry Poulson, 1st circuit. I guess I am asking the question related to the amendment, but I have to reference a statement made at the podium that I heard to be that there was no duty to carry out the continuation of the client's case, if I understood that correctly, in which case if there is no duty as an attorney, I don't understand why the designation has to be an attorney at all. If the responsibility, as I am hearing your amendment, the fact that it is simply return the files and any money,
then why can't that just be a secretarial staff function? There is no attorney relationship, there is no attorney discernment, there is no duty to carry on the case, why does this have to be an attorney at all I guess is my question then?

MR. LINDEN: Jeff Linden, 6th circuit. I know procedurally we are limited to the discussion on the amendment portion. With regard to that, with all due respect and acknowledgement to my distinguished colleague who is proposing the amendment, I think in the amended 2, the problem of privilege is not addressed, whether or not there is professional responsibility or attorney-client relationship established, because in the proposed original rule in (b)(2) where part of the obligation is to return files and papers as appropriate and retain files as appropriate, that will necessarily require the inventory attorney or whatever we call it to review privileged, confidential communication, and any of us who has had to return a file, find a substitute attorney, transfer a file, there is always a, and there are several rules and ethical opinions about what is retained, what is disclosed, what is client property, what is not. So now you have a nonattorney-client relationship established by the
amendment, but you have got a clear violation of privilege in the eyes of the Grievance Commission. And with regard to the other, the author's statements that nothing is intended to create an ethical obligation, while they acknowledge that, there is an ethical rule which says any lawyer who does not follow or who violates the Rules of Professional Conduct is a disciplinary offense, including incorporated within that the Court Rules. So no matter where this rule in general goes, it does, its violation, intentional or inadvertent, can be a disciplinary offense.

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

For those reasons and others that I will reserve for discussion on the proposal, I would respectfully vote against the amendment and the rule in general.
CHAIRPERSON WARNEZ: Any further comments on the amendment? Please come forward.

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

MR. HAUGABOOK: Terrence Haugabook, 3rd circuit. One of the things that concerns me is the shifting of costs from a firm or partnership who would have a built-in inventory attorney to solo practitioners who would have to pay for that inventory attorney, and so that creates a disparity to the
effect of how much time it takes, and I worked with
Mr. Rutherford's son, I know your son. I knew your
son when we worked together at the Wayne County
Prosecutor's Office, and so that's one of the
considerations that bothers me and that several
people, defense attorneys that I have practiced
against have asked me to express here today is the
fact of how they would be unduly burdened by this cost
on them.

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

MR. HAUGABOOK: Thank you.

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

MR. PUGH: We talked with Tom about the
proposal, and, in fact, the writing, the language for
the second one was generated by Charlie Rutherford.
We are in favor of the amendment. I cannot be the
proponent of it, because it would have to come from
the Master Lawyers Section, which of course can't hold
a meeting right at this moment, but speaking as the chairman of this committee, we would be in favor of the amendment and with regard to the deletion in Rule 2(b) to carry out his or her professional responsibility by reasons of death, disability, or disappearance. It's meaningless language, because it's really upon the incompetency, so the incompetency is very clearly defined later. So we have no objections to the amendment.

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

Any nays.

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

Could all who voted nay stand. Thank you.

Any abstentions? Any abstentions please stand.

Based on the observation of the standing vote, I would call that the amendment passed, has passed, so now we can move to further discussion on this proposal, as amended, the substance of that
proposal, so I invite comments relative to the proposal as amended.

Mr. Poulson.

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

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

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

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

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

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

CHAIRPERSON WARNEZ: We need a few minutes to make sure the proposal on the screen reflects the adequate amendment, so give us just a minute.
MR. POULSON: Yes. Thank you.

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

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

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

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

MR. POULSON: I see. Thank you.

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

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

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

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

CHAIRPERSON WARNEZ: Six has to be in writing.
MR. POULSON: I am sorry. Representing indigents, plural.

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

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

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

VOICE: Second.

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

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

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

MR. SMITH: It is not.

CHAIRPERSON WARNEZ: Could you reserve your comment, please.

Is there anyone who wants to make a comment
about the new proposed six words to be added, except for those representing the indigent.

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

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

CHAIRPERSON WARNEZ: Is there any further comment?

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

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

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

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

CHAIRPERSON WARNEZ: Any further comments about the latest proposed additional language?
Mr. Courtade.

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

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

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

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

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

MS. STANGL:  Terri Stangl from the 10th circuit. I am still weighing back and forth whether I personally support the overall motion, but I am deeply concerned that we would be setting up a two-tiered process where indigent persons, whether civil or
criminal, have a lesser standard of protection. The clients do need to know. If we are setting up for attorneys a process that we are going to follow consistently, it should be followed across the board. If we are not going to do that, that's a different matter, but I am disturbed by setting up two systems protecting the clients merely because of how people can pay

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

CHAIRPERSON WARNEZ: Yes.

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

CHAIRPERSON WARNEZ: I believe we are
starting to talk about the substance of the larger rule.

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

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

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

MR. HILLARD: Martin Hillard, 17th circuit. I rise in opposition to the proposed amendment. I recognize my colleague's concerns, but, first, it doesn't address the practice where some of it represents indigent clients, some of it does not, do
they fall within the exception or not, but more importantly, if the rule is needed, it's needed for all practices, not just for those representing the nonindigent, and perhaps there becomes a concern that needs to be addressed in the larger reform of indigent defense work, but if this rule is needed, it's needed for everyone.

CHAIRPERSON WARNEZ: Thank you.

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

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

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

All opposed, please indicate by saying nay.

Any abstentions?

MR. HORNBERGER: Abstain.

CHAIRPERSON WARNEZ: We are going to take those out.

Now, this leaves us it procedurally where we are looking at the proposal as amended by Tom's
amendment, and I would encourage or accept now comments going to the substance of the proposal.

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

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

The problem is, Ron keeps all his contacts in his cell phone, so I would have to have his wife come in, pull up his cell phone. We would have to go through and find the phone numbers. For me, I keep everything on my laptop. Now, my husband is disabled. He has a lot of surgeries. At any given time, you
know, I could become a widow, but on the other hand, you know, I could get hit by a car driving to one of these meetings in Lansing.

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

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

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

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

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

MR. MORGAN: Well, I believe that's what I am
dealing with, as amended, specifically related to that language.

CHAIRPERSON WARNEZ: That's fine.

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

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

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

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

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

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

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

All opposed signify by saying nay.

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

MR. POULSON: Aye abstention.

CHAIRPERSON WARNEZ: I think the ayes carried it, so we will include the word "solely." Now I can accept more comments as to the substance of the proposal. I apologize, we need to go back to the
comments to the rule. Any more comments on this rule?

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

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

MR. SMITH: Actually this has been the third time I have been up to comment. There is an interesting aspect of this that I don't know if the Master Lawyers Committee has thought of, but what affect would amending the rules in this way have on civil liabilities? That is, I don't know if it's a reasonable and customary practice to name an inventory attorney. As soon as you put it in the Court Rule, it, in fact, becomes one and somebody can sue on those
grounds, and there can be two possible grounds, either an attorney who fails to appoint an inventory attorney could have a suit against him or her or his or her estate or his or her business, and on the second part an attorney who is appointed as an inventory attorney but, you know, 20 years later has totally forgotten about it and then says, Well, I don't want to serve as one or, Hey, I am with my family in Disney World. I am not going back to Michigan to dole out these files. There is at least a potential for civil liability on the part of that person who fails to serve in that capacity. Has the Master Lawyers Committee thought of that aspect?

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

MR. SMITH: If that's what the Court Rule would say, my question is, if it goes to court and a judge or jury can say, Listen, it's in the Court Rule.
Maybe you were in Disney World and having a great
time, but, guess what, there were people over here for
whom you agreed to be the inventory attorney. They
were harmed. They have a suit against you based on a
reasonable standard of practice.

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

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

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

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

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

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

MR. PUGH: But, as the rule says, there is no
liability for that inventory attorney, so you could
sue everyone in this room because they voted for it,
but still there is no real responsibility for that.
MR. SMITH: That's not my understanding of tort law. I would ask the Master Lawyers Committee to look at it, look at it in depth and intelligently.

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

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

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

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

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

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

CHAIRPERSON WARNEZ: Thank you for your comments. I would like to take the gentleman behind
you. He has been waiting as well.

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

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

I have a number of questions from people, such as if we are putting someone in their place who is going to be looking at the confidences of my
clients, do I have to put their name in my fee agreement to have my client sign off in advance on the fee agreement that so-and-so is designated as my inventory attorney and may be looking at your file. You have to sign off that's okay. But then what happens if my inventory attorney has to change? Does that invalidate my fee agreement? Do I have to start with something else again.

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

For example, Mr. Poulson here does complex criminal defense litigation. To say that a neophyte or retiree who has never done criminal law should come in and decide who should take care of his files is absurd. They don't know what has to be done, how to
handle them or even to whom they should be referred or the client should be referred. You can't just say I think to the client, here is your file, go away, because I think the client realistically is going to say, Where should I go? They are now going to call the State Bar. State Bar is going to say, Call your local bar. Local bar says, Oh, we have a list of people who have been practicing a couple weeks. We have a list. I think that is not a wise way to do it. I think somebody is designated --

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

MR. ELKINS: I am against it.

MR. LINDEN: Jeff Linden, 6th circuit. Again, I am rising in opposition to the proposal. I would like to incorporate my comments from the amendment so I don't have to reiterate them at this point in the record. I would like to incorporate the comments of my other colleagues in opposition. They are all good reasons. And I also want to state that I don't believe the proposal is bad intentioned. I believe it is very well intentioned. Perhaps it's better placed in an educational outreach, continuing education, best practices, practice management forum, circumstance, location of the Bar, the State Bar, and
There are a number of problems. I have been a member of the Assembly, I think this is -- I was appointed for a term. This is probably my second term. Somewhere between six-plus years. I have never seen a proposal come before this body before where the only people bothering to sign written comments and send them into the body are all negative. In the materials distributed to us there wasn't a single I support this motion. The closest to that we got were to State Bar committees that said we take no position, but if it's going to go, we think it should do that, which is one way arguably positive. It's also arguably negative, because it implies there are continuing problems with the proposal.

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

If an inventory attorney has to go through this process and becomes a party or knowledgeable about confidences and secrets and privileged information, not only does it create problems and
conflicts, but now these people who are inventory attorneys before their actions are potentially conflicted out of taking other cases, and it circles around and around and around.

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

MR. JANKOWSKI: Michael Jankowski, 30th circuit. I would echo the last speaker and say I certainly believe the proposed rule is nobly intentioned, but also ultimately the named attorney need not serve. Whether this rule is in place or not, my clients are dependent on the kindness of my colleagues, and so I don't see that any actual protection is guaranteed to my clients. I think the rule is unnecessary.
MS. JOLLIFFE: Good morning, Madam Chairman.

Elizabeth Jolliffe on behalf of the 22nd circuit.
Also here wearing a hat, as many of us do, I am very
active in the Washtenaw County Bar, the Detroit Bar
Association, as chair of the Law Practice Management
Section and active in the Women Lawyers Section. In
all those roles I reached out to lots and lots of
people, many of my clients and lots of solos I know,
and I am here rising in opposition to the motion. The
rule is certainly very well intentioned. I don't know
that anybody really disputes that.

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

And I believe that -- for one point, I am
sure somebody here will have an answer, many fine
answers, as to why does the inventory attorney have to
be an inventory. Many solos -- yes, some solos have
support staff. Many, many solos have support staff.
Many solos do not, but it might be much easier for them to find a person who could keep the password. I mean, if that's a big problem that somebody needs to have the passwords to get into the files to be able to do that, that would be so much easier and we wouldn't run into the conflict and the privilege issue and all that. This is sort of an administrative procedure like that. Because, in fact, the rule says, and the speakers have said, you know, really all the inventory attorney shall do is shall notify active clients of the changed status of the reporting member, return files and papers as appropriate, and retain files that are appropriate.

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

But I rise in opposition to the rule and would really urge this body to ask for more of the
information that the Master's Committee has put together. We don't have any comparative analysis, and I realize that we do have it and I know that many states do have rules. I think it would sit much better with our members and our constituents if we have that information available to them.

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

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

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

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

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

CHAIRPERSON WARNEZ: You intend to call the question?

MR. CHADWICK: Yes.

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

MR. LARKY: Sheldon Larky from the 6th circuit. Imagine for a moment that you are reffing a college soccer game one night and you get shortness of breath and you go home and you tell your wife, I have
shortness of breath, and your wife, being the good, conscious woman that she is, says, Let's go see a doctor. And that doctor tells you you didn't have a heart attack but you have blockage, and he says then, Go to see the surgeon, let's figure things out. And that surgeon says, Oh, sir, you do have a blockage. You have not two, but three grafts that you are going to need and you have got to get it done. And your wife says, Well, can you get me in tomorrow morning so you can save my husband? And the doctor looks at her incredulously and says, No, the best we could do is in a week. And at that point you have 30 to 50 mediations or arbitrations that you are the mediator on, that you are a part-time magistrate in the court, that you are representing two attorneys in legal malpractice cases because they don't have coverage, and that you have four of your own pending divorce cases, and all of a sudden this doctor says this is successful, can be a very successful type of surgery, but you might die.

Now, that's Shel Larky. It was November of 2006, at which time yours truly found out that he had to go through what is known as a CABG, coronary artery bypass graft, and you had to go through three graftings on that surgery.
Can you imagine as a sole practitioner, you say holy crap, what am I going to do? What am I going to do? At least I had a week in which to make phone calls, to send out letters to try to adjourn cases, but if I had a serious heart attack and I didn't have that, what would happen to all those issues that I have, all those clients that I have?

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

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

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

MR. LARKY: May I continue?

CHAIRPERSON WARNEZ: Finish your statement.

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

CHAIRPERSON WARNEZ: Thank you.

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

When I look at this proposal, I see that it protects the public. Will it burden some of our members? Yes, it absolutely will. Do the Rules of Professional Conduct burden some of our members? They
absolutely do. Are they absolutely necessary? Can
anybody disagree that they are?

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

Again, getting back to what — I learned a
lot of things from my mother and grandmother through
the years, and one thing my mother always told me was,
if you want to slow something down, send to committee.
If you want to kill it, send it to a subcommittee. We
cannot afford to send this back for redrafting. We
cannot afford to send it back for further study. It's
been studied to death. We have had our staff look
around the country to see what people are doing. We
have had the Master Lawyers add their years of
expertise and their personal knowledge about what is
required. I urge you to pass this.
MR. ARD: Josh Ard, 30th circuit. I would like to disagree with what Bruce just said, because I am afraid -- I am not as good as Lyndon Johnson. I can't tell you what the vote's going to be, but from listening, I can tell you this is going to fail, and that's a shame. We need something, but we need to think about this and figure out how to do it.

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

CHAIRPERSON WARNEZ: And I want to make a comment. Mr. Chadwick made a motion, and my parliamentarian indicated that a call to the question
does require a second and a two-thirds vote.

VOICE: Second.

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

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

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

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

All not in favor, please signify by saying nay.

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

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

Thank you. All who voted nay, please stand.

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

Now we are going to vote on the question. All in favor of the proposal as amended, please
indicate by saying aye.

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

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

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

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

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

   The 50 states of the union are divided almost
half and half between those which have lodged this
issue and a limit for judges and those which have not.
Twenty-six states placed the issue in their
constitution, 24 states have either governed it only
by statute or not at all. Seven by statute, and 17
have nothing either in constitution or statute
concerning age limit for judges.

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

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

I ask for your support for the resolution.

Thank you.

VOICE: Second.

CHAIRPERSON WARNEZ: I have a motion on the
floor, and I just heard a second, which would require
a call for discussion. Do we have anyone interested
who wants to make comments at this time, please come forward.

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

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

The other thing about that is that this creates lifetime appointment basically for judges
because of the simple fact is, you know, I have seen it in my years, you know, come from a certain name or certain family money, okay, you get on the bench and you kind of stay there as an incumbent. So to this extent I think that, you know, having the 70-year age limit is great because it gives young blood an opportunity to get in and vie for a seat when the person reaches that level.

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

Thank you.

MR. SMITH: I was going to move to table. I think that we just had a pretty lengthy debate over a fairly important policy issue. I think that, since not as many people are standing as that, this should
also engender a pretty healthy debate given the very significant policy issue, and we are already running late, so I move to table this until the September meeting.

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

VOICE: Second.

CHAIRPERSON WARNEZ: Discussion on the motion?

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

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

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

MR. LARKY: Is that debatable or not debatable?

JUDGE CHMURA: Yes.

CHAIRPERSON WARNEZ: We have a second, a first motion, amended motion to postpone to a date certain. Do I have a second?
VOICE: Second.

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

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

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

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

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

MS. WASHINGTON: Good afternoon. At this point I move to oppose the actual postponement of this. There were very few people in line at the time that that had come up. I think we are taking longer to debate that issue than we could have debated the entire thing.
CHAIRPERSON WARNEZ: I will take that as a suggestion we call the question. Motion to call the question. Is there a second?

VOICE: Second.

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

Any nays? Any abstentions?

We are going to call the question.

VOICE: Which question are you calling?

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

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

All opposed, please signify by saying no.

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

That renews comments on the substantive proposal.

MR. PHILO: I will keep it brief.

John Philo, 3rd circuit. I oppose it for the reason that it is an important question, and when we are just saying eliminate this language, we are ignoring the realities that there are problems with genuine
diversity at the top of our Bar. We are ignoring that issue that there is a potential problem with creating a de facto lifetime appointment. If we are going to do this, I think we have to have a recommendation for those alternatives attached to it, because it sends a message that that alone is all we are doing. And I am opposed to that for the reasons that other folks have said today.

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

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

Perhaps just one example, and this is only one of a number I can give you. I appeared before a judge in a one-judge circuit in southern Michigan some years ago. He is a man that I had appeared before years before that when he first took the bench. When
he was, however, at retirement age, let's put it this way, he would not be able to run again -- I know he would have run again if he had the opportunity -- but in any event, I was making a motion to set aside a plea of guilty. I began speaking to the motion, and the judge cut me off. He said, Mr. Barton, that's not an arguable point. I won't hear any more of it. Apparently I had enough in there before that, but in any event I was faced with a dilemma of doing my duty to my client that I thought was a viable and arguable point or facing contempt. I doubt very much that there is anyone in this room who would be comfortable in that situation, representing a client to my best knowledge as best I could and being told I would be in contempt if I did so.

    Now, I was in a similar situation a number of times, but that's just one example. But I use that example because I can tell you that that very point that he wanted to cut me off on and not let me argue was one of a number of arguments brought up in the Court of Appeals, but that was the one the Court of Appeals chose to set aside the conviction, set aside the plea of guilty or remand to the circuit court. That was something that I really was faced with a dilemma of trying to back off. So I had enough on the
record or something like that, and my point, of course, is that is only one example, and I can give you others, of judges who changed in a long term on the bench from good judges, sympathetic and so forth, and arbitrary capricious and very demeaning judges.

CHAIRPERSON WARNEZ: Time. Thank you.

Mr. Larky.

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

People who, in the federal system, and, John, you were former court administrator for the Eastern District, people in the federal system, judges have lifetime appointments, and they make decisions that affect all of humanity in all of our country. There is no time limit or no age limit in the Supreme Court, there is none in the federal system, and those states
that have put limits have let good people go. And when I first started practicing there was no Attorney Grievance, there was no Judicial Tenure Commission, there was no Tenure Commission. It only came in in the 1983 Constitution, and there is the method, and it takes time.

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

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

I rise in support of the motion for a couple of reasons. First, age discrimination is wrong. If the proposal before this body was to support repeal of the age discrimination in the Employment Act, I suspect we would overwhelmingly oppose. It would be hypocritical to support age discrimination in one job, yet oppose it for the private employers in others.

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

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

MR. MCCLORY: Mike McClory, 3rd circuit. I will be very brief, but I just wanted to say that we just want to consider the consequence of this
decision, and someone said, with all due respect, we are not talking a substantive policy position, but we are because this has been introduced several times. It's in the Senate right now. If we do adopt this proposal, it's going to give a lot of impetus to this, and people will use this seal of approval as a way to get that through, and it will affect the dynamic of the legislative process. What I submit as one thing is that we are talking about the democratic process. This has been introduced a few times over the years, and the fact that there is no action taken on it, it indicates that there is not really -- from the public, so much for ground swell of support.

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

MS. STANGL: Terri Stangl from the 10th circuit. I support the proposal for two reasons. One, if, as a profession, we are talking about diversity and nondiscrimination, I don't see why that
should not apply to us like it does in other kinds of employment situations where arbitrary age limits would not allow.

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

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

All in favor, please signify by saying aye. All not in favor, please signify by saying nay.
I am going to call for a standing vote, please. Any abstentions first?

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

All who voted no, please stand up.

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

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

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

MR. HORNBERGER: Can we sit down?

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

Were there any abstentions to be counted?

Having no abstentions, the clerk is certifying that vote, Vanessa.

CLERK WILLIAMS: 59 yes and 41 no.

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

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

VOICE: Keep going.

CHAIRPERSON WARNEZ: I would like to ask
Dan Quick to come forward. Dan is going to comment, as the proponent, consideration of MCR 2.306.

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

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

I would indicate only to you that the discussion at the committee was to hearken to the jury instructions, which have had to say it at least nine times to the jurors in all sorts of different ways, and I think that's in part because electronic communication is such a part of people's lives nowadays that they may not even think about it as communicating or conferring, and so the consensus on
the committee was that we did no harm by stressing
that point and that given the role social media and
whatnot plays in our society, we thought it was a good
idea. So I move for your adoption of this proposal.

VOICE: Second.

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

Any opposed, please signify by saying no.

Any abstentions?

Motion carries. Thank you.

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

The origin of this proposal was by
Jules Olsman, who is State Bar Commissioner and cad
about town. Jules believes that the inspiration of it was a number of billboards around where the name and identity of a lawyer is not displayed at all, let alone prominently, in connection with that advertising which could lead the public to be confused as to who exactly is sponsoring the ad, what attorney is associated with it.

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

I will tell you that as the rule was considered and under revision, a number of different individuals were consulted on it. They include Professor Robert Sedler, who many of you know is a preeminent Michigan and federal constitutional scholar, and this is going to sound like a TV ad, but he approves this message. It included Josh Ard, who many of you know from this body, but also heavily involved in the unlicensed practice of law issue. He approves this message. It includes John Cameron, who is chair of the Professional Ethics Committee of the
State Bar of Michigan. His committee was unable to meet in time-wise in order to approve this, but John has authorized me to share with you that he at least personally sees no issues with this particular proposal.

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

VOICE: Second.

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

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

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

MR. LINDEN: Thank you. Do we have 7.2 in the packet?
MR. QUICK: No. 7.2, just the diction is different. It's entitled advertising. It has three subsections. Section (a) just says you may advertise. Section (b) says you've got to keep it for two years, a record of it for two years after you use it, and subsection (c) says you can't give anything of value to anybody for recommending your services, with some exceptions, so this would be (d) under that advertising rule. Sorry for that confusion.

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

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

CHAIRPERSON WARNEZ: I am sorry. Come forward.

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

MR. QUICK: Correct, it's in lieu of the 7.1 language. Once it was considered, the decision was to put it under 7.2, which is the advertising rule. So
there would be no modification to 7.1. This would be now 7.2(d).

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

MR. QUICK: No, the motion is to add subsection (d) to existing Rule 7.2. No modification to 7.1.

MS. WASHINGTON: Okay. Thank you.

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

MR. QUICK: Correct.

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

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

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

MR. QUICK: And actually we have --
MS. JOLLIFFE: Is that new?

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

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

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

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

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

MS. JOLLIFFE: Okay. All right.
MR. HERRMANN: Fred Herrmann, 3rd circuit.

The original proposal addressing 7.1 was really quite different in substance in that it addressed the problem of the billboards that we just saw relative to just seeing an image or a service with a phone number and then the original proposal went on to say without also prominently including either the full name of the lawyer or the law firm.

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

VOICE: Second.

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

MR. HERRMANN: I would defer to Mr. Quick on this, but our next meeting should be sufficient. I
think this could be dealt with quickly there. I just personally would like an opportunity to see it in context and think further about it.

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

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

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

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

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

MR. ROMANO: I wish to speak to the substance
of the rule.

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

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

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

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

MS. BRANSDORFER: Liz Bransdorfer from the 17th circuit. This is my first meeting, so I am a little nervous about this, but I see a real difference between the two rules. The first one says you have to prominently display the name of the lawyer or law firm, and the second one says you have to display the name of the individual lawyer and their address. To me, those are very different, and especially people who practice at home, and I think because we don't have information about why the difference and what's
the meaning behind the difference, that postponing so
we can get that additional information and maybe have
an opportunity to talk to our respective
constituencies about what difference that might make
might be important.

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

All opposed, please signify by saying no.

Any abstentions to the vote? You guys are
going the workout, not me.

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

All who voted no, please rise.

Any abstentions?

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

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

The abstentions, please rise. Noting one
abstention.

That motion to postpone carried 53 yes to 41
no and one abstention.

MR. QUICK: Lastly.

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

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

And so the proposal under 2.203 is to add subrule (G), expressly authorizing the addition of parties by way of a counterclaim or crossclaim subject to the joinder rule, which is the same as exists in
the federal rule scheme, and then secondly adding that which currently does not exist, which is an expressed authority for the clerk to issue a summons as to those newly added parties. So at this time I would move for your vote on the amendment of MCR 2.203.

VOICE: Support.

CHAIRPERSON WARNEZ: Motion and support. Any comments?

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

Any not in favor, please signify by saying no.

Any abstentions?

That motion carries.

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

Do I hear a motion to adjourn?

VOICE: Motion to adjourn.

CHAIRPERSON WARNEZ: Second?
VOICE: Second.

CHAIRPERSON WARNEZ: All in favor.

(Proceedings adjourned at 12:57 p.m.)

STATE OF MICHIGAN

COUNTY OF CLINTON

I certify that this transcript, consisting of 134 pages, is a complete, true, and correct transcript of the proceedings had by the Representative Assembly on Saturday, April 27, 2013.

May 25, 2013

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