Proceedings had by the Representative Assembly of the State Bar of Michigan at Ypsilanti Marriott at Eagle Crest, Ypsilanti, Michigan, on Thursday, September 14, 2006, at the hour of 9:30 a.m.

AT HEADTABLE:

LORI A. BUIEWEG, Chairperson
EDWARD L. HAROUTUNIAN, Vice-Chairperson
ROBERT C. GARDELLA, Clerk
JOHN T. BERRY, Executive Director
HON. CYNTHIA D. STEPHENS, Parliamentarian
ANNE SMITH, Staff Member

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Chairperson Buiteweg: The September 14, 2006 meeting of the State Bar of Michigan Representative Assembly is hereby called to order.

Mr. Clerk, is there a quorum?

Clerk Garrella: Madam Chairperson, yes, there is a quorum, and I certify we have the numbers.
CHAIRPERSON BUITEWEG: Thank you, sir.

Is there a motion to adopt the proposed calendar?

VOICE: So moved.

VOICE: Support.

CHAIRPERSON BUITEWEG: I heard a motion and support on the calendar. Is there any discussion?

All those in favor of adopting the proposed calendar, please say yes.

Any opposed?

Any abstentions?

Motion carries. The calendar is adopted.

Is there a motion to approve the April 29th minutes?

VOICE: So moved.

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VOICE: Support.

CHAIRPERSON BUITEWEG: I heard a motion and a second to approve the April 29th minutes. Is there any discussion?

All those in favor say yes.

Any opposed?

Abstentions?

Motion carries.

I am going to introduce Carl Chioini, the chairperson of our Assembly Nominating and Awards Committee, and I would ask you to please pull the white sheet from the packet at your desk which contains an amended list of nominations, and Mr. Chioini is going to go to the microphone up front here and present the interim nominations.
MR. CHIOINI: If the parties are in the room, would you please stand.

From the 1st judicial circuit, Mr. Barry Poulson of Hillsdale. From the 6th judicial circuit we have one vacancy, Martin Krohner of Farmington Hills. From the 6th judicial circuit we have one vacancy till 2008, Joan Vestrand of Rochester.

From the 17th judicial circuit, one vacancy, Mr. Nelson Miller from Grand Rapids. From the 28th judicial circuit, one vacancy, Mr. Shane Pranger of Cadillac. From the 51st judicial circuit, one vacancy, Jeffrey Nellis of Ludington.

And the last one from the 53rd judicial circuit, Mr. Daniel Martin of Cheboygan.

CHAIRPERSON BUITEWEG: You have a motion?

MR. CHIOINI: I do move that the members, the nominees be appointed, seated.

CHAIRPERSON BUITEWEG: Is there a second?

VOICE: Support.

CHAIRPERSON BUITEWEG: Any discussion?

All those in favor of the motion to appoint these individuals as interim appointees to the State Bar of Michigan Representative Assembly, please say aye.

Any opposed?

Any abstentions?

The motion carries, and welcome. Please take your seats if you haven't already.

(Appause.)

CHAIRPERSON BUITEWEG: And I owe an apology...
to these folks right out of the gate. I was supposed
to have a new member meeting out in the front in the
lobby at 9, and I became a little distracted with
other matters this morning. I promise I will give you
an orientation at some point, but, believe me, you

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will be oriented by the end of the day.

Those of you who are sitting next to a new
member, please help them along if they have some
questions. I know you will do that.

Again I have Mr. Chioini coming forward to
present consideration of the award recipients for the
awards that we will be giving at the luncheon today,
and those are the Michael Franck and Unsung Hero
Awards.

MR. CHIOINI: Again, thank you. For the
Michael Franck Award, all of you have in your packets
all of the nominations. You can see that this one is
well deserved. The committee selected the Honorable
Judge William Leo Cahalan. The committee would ask
the Assembly to support the motion.

CHAIRPERSON BUITEWEG: Support?

VOICE: Support.

CHAIRPERSON BUITEWEG: Is there any
discussion?

All those in favor of awarding the Michael
Franck Award to the Honorable William Leo Cahalan,
please say yes.

Any opposed?

Any abstentions?

Motion carries.
MR. CHIOINI: The next one is the Unsung Hero Award, and the committee has nominated Mr. Jay D. Kaplan, who is the Legal Project Staff Attorney for the ACLU. Again, I would move the committee's recommendation be approved.

VOICE: Support.

CHAIRPERSON BUITEWEG: Is there a second?

Thank you.

I have heard a motion and a second to award the Unsung Hero Award to Jay D. Kaplan. Is there any discussion?

All those in favor say yes.

Any opposed?

Abstentions?

Motion carries. Congratulations to the award recipients, and we will talk more about them at the luncheon today.

Mr. Chioini, don't go away yet. We have you on the calendar for consideration of an amendment to the Permanent Rules of Procedure regarding Awards, 8.8, and that is the tab four of your packet.

MR. CHIOINI: The committee has suggested to the body that we avoid a little bit of a problem that we have logistically, and that is having the
nominations done in the morning and having the lunch
in the afternoon, and the proposal from the committee
would require the Assembly to vote on the awards at
the April meeting. This would be the official, when
they would receive their awards, and the idea being to
avoid all of the difficulties we have when we have the
morning nominations and a luncheon this afternoon.
I would ask that the Assembly adopt the
recommendation of the Rules Committee, Nominating
Committee.

CHAIRPERSON BUITEWEG: Is there a support?
VOICE: Support.

CHAIRPERSON BUITEWEG: There is a motion and
a second to support the proposal that the April
meeting of the Assembly be established as a deadline
for the Nominations and Awards Committee to meet and
recommend to the Assembly qualified members of the
State Bar as recipients of the Michael Franck and
Unsung Hero Awards. Is there any discussion?
All those in favor of the motion, please say
yes.
Any opposed?
Abstentions?
Motion carries. Thank you, Mr. Chioini.
We turn now to our item which I am sure is of
great interest to all of those in the room, the jury
reform proposals, which you will find at tab number
five of your packet. I am going to ask you to look at
your yellow and blue sheets that are at your desk.
Those are the Exhibits A and B that are referenced in
the packets, and specifically that is the press
release that was issued by the Supreme Court and the
actual Court Rule amendment. Those were also sent to
you by electronic mail, and we also have them
available to put up on the screen.

The first thing that we need to do with
respect to this portion of the agenda is I need to
have Tom Rombach from Special Issues come forward and
propose some special rules for how we are going to
handle this matter. Mr. Rombach.

MR. ROMBACH: Madam Chair, Tom Rombach from
the 16th circuit. At this time I would like to
propose adoption of special rule of procedure in order
for us to suspend certain and amend certain parts of

VOICE: We cannot hear back here.

MR. ROMBACH: Madam Chair, I am Tom Rombach
from the 16th circuit. At this time I would like to
move that we adopt the proposed rules for the Assembly
debate regarding the jury reform proposals. This is a
special rule that will suspend certain of Robert's
Rules and also would amend certain of Robert's Rules,
for this discussion only.

CHAIRPERSON BUITEWEG: Before I ask for a
second, I am going to allow the Assembly a moment to
view this up on the screen. Nancy, if you could get
the whole thing up there, because you do not have this
in front of you. You were sent a draft of it by
electronic mail, and the panel met yesterday evening
and made some minor revisions to it. So I do
apologize, this is the first time you are seeing this.
I will walk you through it briefly. Can you make it
the whole screen?

   MS. BROWN: I can't.

   CHAIRPERSON BUITEWEG: This is going to grant
floor privileges to all of the panelists that you see
in front of you who I will introduce momentarily, as
well as Justice Markman, who is here and will
introduce the rules to us. We will also appoint our
own Assembly member, Wallace Kent, Jr., judge from
Tuscola County, to serve as moderator of the panel.
It will also allow us to have the panel discuss the
proposals in clusters, clusters first affecting juror
materials, proposals that affect juror participation,
that affect the role of the judge, the role of the

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   attorney, that affect the submission of evidence.
   What will happen under this special rule is
that the clusters will be discussed by the panel in a
group. They have each chosen rules that they would
like to address. We will then open it up to the floor
for discussion and debate and questions proposal by
proposal. We will take a vote one proposal at a time
and then move on to the next cluster, and that is
basically what this special rule says.
   So that is the motion to adopt this rule, and
is there a second?

   VOICE: So moved.

   CHAIRPERSON BUITEWEG: Is there any
discussion? All right.
All those in favor of adopting the special rule, say yes.

Any opposed?

Any abstentions?

Motion carries. The rules are adopted.

Thank you.

I would next like to introduce our esteemed guest, the Honorable Justice Stephen J. Markman, who is going to introduce the proposed jury reforms to us. Justice Markman was appointed to the Michigan Supreme Court by Governor John Engler effective October 1, 1999 to fill the seat vacated by Justice James H. Brickley. In 2000 he was elected to complete the term which expired January 1, 2005. In 2004 he was reelected to an eight-year term which expires January 1, 2013.

Prior to this Justice Markman served for four years as an assistant attorney general of the United States after being nominated by President Ronald Reagan and confirmed by the United States Senate. Would you please join me in welcoming Justice Markman at this point in time.

(Applause.)

JUSTICE MARKMAN: Thank you very much, Lori. This is a very daunting audience here, and I expect I will see the same kind of unanimity on this issue that we did on the last issue on the agenda.

It is an honor to be here this morning to introduce the deliberations of the Representative Assembly on the matter of jury reform, and I know I
speak for all of my colleagues when I say that we are very much looking forward to your thoughts and your feedback on this issue.

As you know, the Supreme Court several months ago issued proposed reforms for public comment. In addition to the kind of forum for discussion that we are witnessing today, the Court hopes to receive comments, not only from members of the Bench and Bar and from key organizations, such as this of course, but also from individuals who themselves have participated in jury service.

Our comment period will culminate, I expect, sometime early next year with an administrative hearing before the full court at which any person or organization will be invited to share their comments, and I really do urge your individual participation, as well as your participation through the Representative Assembly and the Bar.

Each one of you is welcome to participate and share your particular thoughts on any aspect of jury reform, and we have this public comment system now. We have three or four administrative hearings a year which we open them up to the public, and we found this to be a very valuable process for eliciting comments from the public, and they have been extremely helpful. Again, we invite you to participate.

I am not here this morning to urge your approval of any or all of these reforms but only your thoughtful consideration. I suspect that there is no member of my court, including myself, who favors each
of these specific reforms. They are proposals that have been collected together from various sources, and they were thought sufficiently meritorious or provocative to warrant dissemination for public review.

Therefore, there is much that these reforms do not have in common. Some are couched in terms of what trial courts may do and others in terms of what trial courts shall do. Some represent current practice in Michigan and are merely consolidated here, while others represent new initiatives. Some are drawn from other jurisdictions and some are not.

However, what these proposals do have in common is that each is designed, at least intended, to enhance the quality of the jury's deliberative process and thereby further the truth seeking function of the jury trial. Each is designed to strengthen the ability of the jury to undertake to make informed and intelligent decisions by making evidence more accessible.

Each is designed to diminish opportunities for gamesmanship in the trial process and to facilitate the ability of the jury to assess the evidence before it, and each is designed to render somewhat less true Robert Frost's famous adage that a jury consists of 12 persons chosen to decide who has
the better lawyer.

There may be other proposals designed to further these same purposes that may be worthy of consideration, and I invite you to share your thoughts in this regard. We do not purport that the proposals that we have issued for public comment are exclusive. Are there additional reform proposals that would empower the jury in a manner consistent with the architecture and constitutional premises of our overall legal system to better carry out its responsibility of distinguishing between truth and falsity?

While there is no particular brief that I or any of my colleagues have for any particular reform, there is nonetheless tentatively strong support, I believe, for the idea that these reforms should be seriously explored.

Undeniably the burden of persuasion in this realm must be upon the proponents of change, not that the system cannot be strengthened but simply that there is at least as much potential for the system to be weakened. As John Randolph once remarked in the Continental Congress, change is not reform.

The present rules of the game have worked well in enabling the jury to carry out its missions,

and those rules should not be altered lightly or without struggling to anticipate the unanticipated consequences of change.
At the same time there is considerable evidence drawn from the experiences of other states that at least some of these proposals have succeeded in further strengthening the jury's ability to apprehend what has taken place in the courtroom and to rely upon such evidence in reaching accurate and responsible factual determinations.

My court seeks your collective and individual response, and we will take your comments very, very seriously, as I believe we always do with respect to the Representative Assembly. We appreciate the expertise here, and it is unfathomable to me that your comments on this matter or on any other matter would not be given the most serious consideration by my court.

In 1875 the Lieutenant Governor of our state, Charles May, addressed the then new University of Michigan Law School and stated at the time, The jury system is the handmate of freedom. No civil liberty can dispense with any of her armaments. I believe that a jury is always the best and fittest tribunal to find the facts of a case. The facts to be found in a trial in the courts are generally the facts of common life. The deductions and conclusions to be drawn from these facts in nine cases out of ten are the deductions and conclusions of ordinary human experience. They do not so much require learning and logic as practical, common sense, knowledge of human nature as seen in men and not in books, and intuitive perceptions of right and wrong. Qualities often are
found combined, I think, in the jury box than upon the
bench.

Among other matters, I would urge you to
reflect on Lieutenant Governor May's observations and
share with us your thoughts as to whether the factual
determinations of the trial continue mostly to concern
the facts of common life. And whatever your answer, I
would urge you to reflect upon whether current
procedures and practices and rules in our state can be
improved to allow the jury to better carry out its
extraordinarily important responsibilities in self
government in ascertaining both common and uncommon
facts.

And we would ask you, of course, as I know is
implicit in all of your considerations, is to consider
this not merely from the perspective of the Bar, not
merely from the perspective of the Bench and Bar, but
also from the perspective of the larger public
interest.

Thank you again for the efforts of the
Michigan Bar and particularly its Representative
Assembly to assist my court in the development of our
state's law. Thank you very much.

(Appause.)

CHAIRPERSON BUIEWE: Thank you very much,
Justice Markman.

All right. I am going to at this time
introduce our panelists. We have with us today in
alphabetical order, and if you could raise your hand
as I call your name, James Bell. James Bell is a
member of the white collar practice group at the
Indianapolis law firm of Bingham McHale. He practices
in the area of the criminal defense at both the trial
and appellate levels and defends attorneys in
disciplinary matters. James is a frequent speaker on
the issues of ethics, trial practice, and criminal
defense. He received his undergraduate degree from
DePauw University in 1996 and graduated from Indiana
University School of Law at Indianapolis in 1999.

He brings with him today his personal
courtroom experience in using some of the jury reforms
that we are considering today in Indiana.

Next we have the Honorable William Caprathe.
He has been a circuit court judge since 1981 and was a
trial attorney for 15 years before that. He served as
chief judge from 1984 to 1997. He is from Bay City.
In 2004 and 2005 he served on the American Bar
Association's American Jury Project that paved the way
for the ABA Board of Governors' passing of the
principles for jury and jury trials.

He is presently a member of the ABA's
Commission on the American Jury Project that is
assigned the task of disseminating information about
the principle throughout the country.

Next we have James Dimos. Jim is a partner
of Locke Reynolds and chair of the firm's intellectual
property group. He also serves as a member of the
firms management committee. He is also an attorney
from Indiana who has personal experience in the
courtroom trying cases using some of these jury
Mr. Dimos represents businesses in all areas of law and is also very active in professional organizations, such as Indiana State Delegate to the American Bar Association House of Delegates. Mr. Dimos is also a member of the Indiana State Bar Association and served on its Board of Governors from 2002 to 2004. He received his B.A. from Wabash College in 1983 and his J.D. from Washington University School of Law in early '86.

Next we have the Honorable Giovan the infinite judge of the Wayne County Circuit Courts since January 1976. Judge Giovan has written extensively of the Bench and Bar on matters of evidence and civil procedure. Judge Giovan is the chair of the Michigan Supreme Court Advisory Committee on the Rules of Evidence and was a member of the original committee appointed by the court in 1975 to recommend proposed rules of evidence for the state of Michigan.

He is also chair of the Supreme Court committee on Model Civil Jury Instructions. Judge Giovan is one of the authors of the two volume treatise in West Michigan called Civil Procedure Before Trial.

Next we have the Honorable Daniel G. Heath. He is a ten-year veteran of the Allen Superior Court Civil Division located in Fort Wayne, Allen County, Indiana.

Prior to becoming a judge he practiced law in
Fort Wayne concentrating on civil and family law. He brings with him many years of experience presiding over cases involving many of the jury reforms we are examining today.

Next we have the Honorable Wallace Kent, Jr., our own Representative Assembly member who is the moderator. He obtained his B.A. from Kalamazoo College in 1965 and his J.D. from University of Michigan Law School in 1967. He has been the Tuscola County Probate Judge since 1977 and is the past president of the Tuscola County Bar Association. He is also a member of the Assembly.

Next we have Terrence Miglio. Terrence is the president of the Michigan Defense Trial Council. He is also a member and vice president of the law firm Keller Thomas in Detroit, Michigan. His practice is devoted to representing and advising clients in such areas as employment law, labor relations, civil rights, personal injury defense, school law and municipal liability. Mr. Miglio graduated from University of Michigan undergraduate and has his J.D. from Wayne State University School of Law, cum laude.

Next Doug Shapiro, who is a partner at Muth & Shapiro in Ypsilanti, right here. He focuses on serious personal injury and medical malpractice cases and has practiced as a trial lawyer for 15 years.

Prior to his work in trial practice Doug spent three
years as the law clerk to Michigan Supreme Court Justice James Brickley and an additional two years in full-time appellate practice. Doug graduated with a B.A. with high distinction from the University of Michigan and also received his J.D. cum laude from University of Michigan. He is a past Representative Assembly member from the 22nd circuit.

Have I got everybody? Okay. All right.

What we are going to do now is we are going to have Mr. Rombach come forward, and he is going to introduce the first cluster of proposals to us.

Well, before we do that, if we could have Nancy please put up on the screen the visual. What we have done for you with this is to break down for you the proposals that emanated or were propounded by the ABA jury reforms and those that have been similarly or wholly enacted in Indiana. This is just to give you a point of reference as to which reforms are coming to us from the ABA and which ones are being used in Indiana. That's just really for your reference.

Tom, if I could have you introduce the first cluster, and we will have Judge Kent moderate the panel on that, then open up each individual proposals to the Assembly for questions and debate.

MR. ROMBACH: Good morning. Tom Rombach. I am chair of the Special Issues Committee and also serving on behalf of the 16th circuit, Macomb County.
As chair of the Special Issues Committee, I am not a proponent of these jury reform proposals in a traditional sense. The Special Issues Committee met and discussed these. We are not making a recommendation on any of them. So, therefore, my role today is more of a presenter. I do, however, reserve the right to express my own personal opinion in an appropriate manner, at least as an appropriate manner as I can muster.

With that proviso, I will move to the first cluster that Lori referred to. That's proposals affecting jury materials under A. Just for your reference, in your materials that were sent to your respective offices, the trial notebook proposal, the first one we will be considering is actually on page seven of your materials under the tab referencing the jury reform proposals. So page seven is the first under consideration.

The next jury instructions is going to be listed on page ten of your materials. And the final one in this cluster, the proposal regarding final instructions, is actually on page 11. So if you want to sing along with the experts, you may do so in the appropriate pages.

At this point, I will now defer our discussion to the chair of our panel and our fellow Representative Assembly member, Judge Kent.

JUDGE KENT: Thank you. By way of introduction, first of all, I wanted to thank Justice Markman for his comments and assure you that
in my experience the Supreme Court really does want your comments, not only today, but in the future until this matter is resolved.

Secondly, I want to think Lori for all the work she has put into structuring this. This is almost a Herculean task to debate these matters in the time allotted, and Lori and others have worked diligently in order to get this organized.

Many of the proposals will have generated some very strong opinions, many of them we may find that there is general consensus. Because of the time allotted, I am going to ask that to the extent possible you spend the bulk of your time in comment on those matters concerning which there may not be any basic consensus in order that we may spend more time listening to the comments of all persons who have views on the matters concerning which there is not consensus.

With that having been said, regarding this first cluster, I would ask if either of the gentlemen from Indiana wish to speak about the experience that they have had with any of these three issues, because Indiana has already implemented some of these proposals in their Court Rules, and they can speak from actual experience.

Excuse me. I have been reminded before we do that Judge Caprathe is going to briefly discuss the genesis of this whole litany of proposals as generated by ABA.

JUDGE CAPRATHE: Many of the proposals that
are here have come from the principles that were referred to earlier that the ABA passed in 2005 at the annual meeting, the Board of Governors passed. Can you hear me back there? And many of them haven't come from those principles. Some of the principles would support in concept rather than directly.

The one that we start with has a criticism from myself and many of the judges from the Michigan Judges Association, and that is that it uses the term "must encourage," which is rather confusing. In a sense it's sort of contradictory. But we would support that rule for notebooks if it were to say "may," because, depending upon the complexity of the case, the length of the case, the issues involved, the attorneys, there are a lot of considerations before you would want to take that big step of using a notebook in a particular case, and, therefore, we would support it if it were to be changed in that respect.

And that cuts through many of these suggestions, that if the word "may" would replace "must" or "shall" or "should," we would prefer it, and then we would be able to make a group decision with the attorneys and the judge as to how to proceed, with the judge making the ultimate decision.

JUDGE KENT: Thank you, Judge Caprathe. Judge Heath, would you like to comment at all?

JUDGE HEATH: Yes, thank you very much. We have, in fact, the words "may authorize" in our Jury Rule Number 23 in Indiana regarding trial notebooks.
It says, In both criminal and civil cases the court may authorize the use of juror trial books, and I won't read the rest of the rule, but those are the pertinent words we use.

I have been using trial notebooks for many years, well before this jury rule was adopted. Generally what happens, and you are probably doing some of that as well already without this rule,

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Generally what happens, we meet at a final status conference and go over many things, but among them will be the things in the jury trial notebook. Those usually include those matters to which the attorneys have stipulated the authenticity of the exhibits. Those materials that have not been stipulated to are kept out of the trial notebook, at least in my court, and they are treated like any other exhibit and considered for admission at the time pertinent during trial.

So the trial notebook contains stipulated material. Record is made outside the presence of the jury before the trial begins about those matters of which they wish to preserve objection. For example, I think I mentioned some comments I gave to the committee before I got here. Medical costs or medical records may be in the trial notebook, but counsel often makes a record that just because there is an exhibit that has the total costs involved for medical care in no way is an admission or stipulation as to causation or as to the right of the attorney to further controvert the total cost of the medical care
and so on.

So that's normally what happens, and in the practice itself when the jury is there and they have the notebooks presented to them, the attorneys make a record at that time that they stipulate to the authenticity of those exhibits before they are actually handed to the jury, and then they are given to the jury, and, frankly, it's neater, it's cleaner, it's more efficient. The attorneys themselves often direct during examination a certain exhibit in the trial notebook, so they can turn to it quickly.

The old system when I first started on the bench was that the exhibits would be disseminated to the jury as they occurred during trial, and that was a slow, laborious process. Now they are in a notebook ready to go.

The court has one, the attorneys each have one, each of the jurors have one and then -- now, sometimes during the trial the exhibits are not discussed at all. It just happens that way, and at times perhaps before it's over something might be removed, and that's true. But generally during the trial the trial notebook is noncontroversial. It's something that's been decided weeks beforehand, and also motions in limine can take care of some of the concerns about trial notebooks. So my experience has been very beneficial to the use of trial notebooks.

JUDGE KENT: Also included in this cluster is
the proposal about providing the jury with written
copies of the preliminary and the final instructions.
Do any panelists wish to comment on that?

JUDGE HEATH: Just a quick comment. We give
our jurors both the preliminary instructions and the
final instructions. Each juror gets one. We read it
to them. We don't stop reading instructions just
because they have a copy. We read it to them, and we
find them going through the instructions with us one
by one reading along with them, and then they have the
instructions with them, and we have found that to be
extremely beneficial, and, frankly, now that we have
been doing that for a few years I can't imagine doing
it the other way, because some these instructions --
it makes the instructions more usable by the jury. It
doesn't require them to rely completely on their
memory, which could be foggy about the language of
some instruction, and so I find it very beneficial.

JUDGE KENT: Mr. Dimos, I believe you also
had some comments on this cluster.

MR. DIMOS: I did. Thank you, Your Honor.
On the notebooks, one concern that I saw
expressed in the materials and is a legitimate concern
is human nature in that when someone has something in
their hands they are going to page through it during a
that perhaps might be considered inflammatory, pictures in a personal injury situation, we have sort of done a modified approach as described by Judge Heath, and that is pass certain exhibits out at a time or pass all the exhibits out still but have them stored in the notebook. It doesn't save the time, but it allows you to avoid the situation of, if you will, the jury reading ahead. That's something though that the parties generally work towards an agreement and seems to work out fine.

On the jury instructions, I think the notebooks -- this whole cluster addresses a bigger point that people who try cases need to be well aware of, and that is you have to be cognizant of how people learn. We are in the education business as much as the advocacy business, and human nature is such today that they need to see things more than once. They need to read along while listening, and so while these may be different than the practice you are used to, I would ask that you consider them and the notion of how do people learn today.

A small aside, I have a nine-year-old son who was working on a Power Point the other night for class. If nine-year-olds are using Power Points in
MR. SHAPIRO: Very briefly. Terry and I were whispering to each other that one thing that should be brought to the Assembly's attention which differs from the Indiana proposal and I think merits its own consideration under this one is that the trial notebook under the proposed Michigan rule would provide not only for admitted exhibits, but it says, And other appropriate information to assist jurors in their deliberations. What such other materials may be other than materials that have been properly entered into evidence is hard to imagine, and I think that that portion of the rule is questionable in terms of how it would be administered and whether or not it would require modification to the Rules of Evidence.

MR. BELL: It's been our practice in Indiana to only put the exhibits in. Judge, is that your practice as well?

JUDGE HEATH: That's right.

MR. BELL: Our rule does provide you can put witness lists and some other items in there, but I have never seen statutes or witness lists or anything other than agreed upon exhibits in those notebooks.

JUDGE KENT: Any other comments?

JUDGE GIOVAN: I have a comment. Strangely enough, of all the new provisions, the one that I am personally afraid of the most is being required in 100 percent of the cases to prepare written instructions to the jury. I am in a busy urban trial court. We try sometimes, you know, cases one right after another. Sometimes people are on standby, and the
cases differ vastly in their complexity.

In many cases the jury instructions are practically irrelevant, and a good example is the case that I just finished yesterday where the sole issue in the case was did the plaintiff burn his own house down? That was the question that we put to them. It was a claim under insurance policy. There were no issues about the policy or the extent of damages. Did the plaintiff set the fire or not?

For us to sit down and do all the instructions I think would have been a waste of time. We have the ability under the present rules to do either a complete or a partial set of jury instructions, and I object to being required to do it

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REPRESENTATIVE ASSEMBLY 9-14-06

in 100 of the cases regardless of the complexity or simplicity.

CHAIRPERSON BUITEWEG: Tom, I am going to have you come up and introduce 2.513(E) to the Assembly and then invite the Assembly members to come forward as they wish and comment or ask questions.

MR. ROMBACH: Thank you, Lori. At this time, for purposes of facilitating the Assembly discussion and debate, I am moving for adoption of the trial notebook provision. That's located on page seven under the appropriate tab, and that issue is should the courts be required to encourage attorneys in civil and criminal cases to provide jurors with a reference document or notebook, the contents of which should include, but not limited to, witness lists, relevant statutory provisions, and copies of the relevant
If we could get that actual Court Rule up there, 2.513(E), with the proposed revisions to it. That's at your desk in the green, I believe -- no, not green. Yellow. If you look at the yellow, the yellow document, and flip to 2.513(E), all right, which is on page five, middle of the page. Does everybody see that? That's the actual Court Rule that coordinates with this proposal.

So we have a motion and a second. Is there discussion? Now is not the time to be shy. Come on down to the microphone.

I am sorry for the logistics. If you know you are going to want to talk about any of the three proposals in this cluster, you might want to line up at the microphone now, since it does take a little while to get through the seating. And please state your name and circuit for the record.

MR. ANDREE: Gerard Andree from the 6th circuit. I have a point of order question. Are we limited to the wording as indicated here, or may we propose an amendment?
CHAIRPERSON BUITEWEG: You may propose an amendment.

MR. ANDREE: First of all, I would propose that we take out the words "must encourage" and substitute the words "may, in the court's discretion, allow," so it reads, "The court may, in the court's discretion, allow counsel," et cetera.

CHAIRPERSON BUITEWEG: That's a proposed from the amendment. Does the proponent accept the friendly amendment?

MR. ROMBACH: Yes, I will accept that.

CHAIRPERSON BUITEWEG: Is there a second on this proposed amendment?

VOICE: Support.

CHAIRPERSON BUITEWEG: Is there discussion on the proposal as amended?

MR. ANDREE: I just have a question. Are we allowed to put it to the panel members?

CHAIRPERSON BUITEWEG: Yes.

MR. ANDREE: I am asking this question based on questions proposed by the judges of the 6th circuit. Among those, they wanted to know is there one notebook that is jointly used, or does each side give a notebook?

MR. BELL: The trials I have been a part of, each juror has had his own or her own notebook.

MR. ANDREE: No, no, does each side give their own notebook? Does each juror end up with two notebooks?
CHAIRPERSON BUITEWEG: One notebook.
MR. DIMOS: Though it can be in multiple volumes, given the size of the case.
MR. ANDREE: That is the only question I have.
CHAIRPERSON BUITEWEG: Is there further discussion on this proposal as amended?
MR. LOOMIS: Daniel Loomis, 35th circuit. I am in agreement with the amendment that the court may authorize, but I had a question for the panel. What kind of expense has been added to the process because of the notebook being used?
CHAIRPERSON BUITEWEG: You are asking this of the Indiana attorneys?
MR. LOOMIS: Yes.
MR. BELL: I can comment in a murder trial I did this summer there were probably 380 exhibits, so there were 15 notebooks for 15 jurors with the alternate, one for the court, one for the parties, and there was probably one of our paralegals billing by the hour, you know, at the courthouse for at least two days getting those together, so certainly there is xerox costs and things like that.
MR. DIMOS: Though at the same time, at least before we had notebooks we were making copies of
exhibits for each juror anyway, and so I think that
the cost is really somewhat incremental to having to
put a binder in. The fact is we had to copy our
exhibits and have enough for all the jurors. That
same time was being spent making the copies, the same
copying costs. It's just binding them together.

JUDGE HEATH: I might add that I was
requiring each one of the lawyers to make a copy for
each juror anyway before the notebook, because I
didn't want to have to pass an exhibit around to each
juror. The trial time is just exponent -- you know,
enlarged if you have to do that, so you want each
juror to have a copy anyway.

CHAIRPERSON BUITEWEG: Mr. Romano, then
Buchanan.

MR. ROMANO: Vince Romano, 3rd circuit. I
wonder if the panelists -- I have two issues having to
do with content of these notebooks. I wonder if,
particularly some of the folks that sit on the bench,
if they are bothered by providing relevant statutory
provisions to the jurors.

JUDGE HEATH: If I could address that.

MR. ROMANO: Second, at the very end, other
appropriate information. How in the world is that
other appropriate information going to be determined?

JUDGE HEATH: I think --

MR. ROMANO: Those two issues, relevant
statutory documents and other appropriate information.

JUDGE HEATH: The relevant statutory
documents often end up in instructions anyway, final
instructions. I, frankly, have never included statutes or other material in my trial notebooks. They have always been stipulated documents by the attorneys. I will admit that some attorney might want to get a statute in that.

I normally determine the admissibility of such statutes in argument through motions in limine before trial. So I really don't have a problem with including them, because it will have been predetermined that a statute applies or not.

Now, I have the rare case in which I had to wait for the evidence to see if I thought a statute did apply. I had a recent trial like that. I would not include that controversial statute -- I shouldn't say controversial -- that statute that I hadn't determined yet without evidence. I wouldn't put that in the trial notebook. I would leave it out until we hear the evidence and determine that it is a relevant statute, and then if it is relevant and the evidence shows that it is, then that becomes part of my final

So I wouldn't get bogged down with this statutory stuff, because I think what you are going to find is the trial notebook is just going to be your stipulated, admissible documents, as counsel said beforehand. I have never had a case where it has been anything but that.

CHAIRPERSON BUITEWEG: Mr. Buchanan.

MR. BUCHANAN: Robert Buchanan from 17th circuit. I guess my question is more of a
clarification. Is the notebook -- I understand it's one, and is it agreed, meaning both parties have to agree what goes in the notebook would be my first question. The second, with respect to witness lists, is the expectation that this is the list that's filed early in the pre-trial process and we are disclosing our witnesses, and, obviously, as trial is a fluid process, we may change and decide we don't want to bring a particular witness or an expert has a scheduling conflict, what is the expectation with respect to the type of witness list that goes in this document? I guess that is my question.

JUDGE HEATH: I have not put witness lists in it, so I can't really answer that, but my only comment would be that if I did it would be the final witness list at the final status conference just days before trial, if at all, but we haven't done that.

MR. BUCHANAN: And in Indiana is it an agreed notebook, so what goes in both parties agree, so it's not --

JUDGE HEATH: Yes.

MR. BUCHANAN: -- plaintiff gives them one, defense gives them one?

JUDGE HEATH: Yes.

MR. MIGLIO: I think the issue is what does the proposal say versus what has been the practice. I think what you are hearing is that there isn't a significant opposition to having a judge in his or her discretion decide that juries are entitled to see a jury notebook that's comprised of jury instructions
under some circumstances and exhibits that have been admitted. Unfortunately the proposal uses the term reference documents, statutory provisions, and other appropriate information, which is highly unusual, which means that things get before the jury that have not been sanctioned through the evidentiary process, and that's the concern that I have as a trial lawyer, allowing that information to get in the jury's hands when it hasn't been admitted.

CHAIRPERSON BUITEWEG: State your name and circuit for the record.

MR. HERRINGTON: David Herrington from the 52nd circuit. I move to amend sub (E) as follows: Next to the last line after "jury instructions," I would put, after the word "instructions," "and," the word "and," then go to the next line and delete "and other appropriate information," and then pick up with "to assist jurors in their deliberations."

CHAIRPERSON BUITEWEG: If we could have 2.513(E), the proposal itself, back up on the screen, it is on the screen, and make those proposed modifications, then I will find out if Mr. Rombach will agree to that modification.

MR. SHAPIRO: May I just point out that the proposal does not mirror the actual text of the proposed rule.

CHAIRPERSON BUITEWEG: Yes, I understand.

JUDGE CAPRATHE: Could I make a comment, Lori, while we are doing that?

CHAIRPERSON BUITEWEG: Yes.
JUDGE CAPRATHE: I should have mentioned this earlier when we were talking about the American Jury Project, the ABA principles. How they came about was the president of the ABA during his term made that the purpose of his term, to attempt to improve the jury system in America, and so he appointed prosecutors, defense attorneys, plaintiffs lawyers, defense lawyers, professors and judges from all around the country, and we met for over a year, and we heard what people were doing all over the country, and we had a symposium, invited interest groups to come to it, and we came up with these principles.

So they do reflect what's happening around the country, and with this particular one, it is in the principles, and it indicates, I just would like to read one short paragraph, it says, "Jurors in appropriate cases be supplied with identical trial notebooks, which may include such items as the court's preliminary instructions, selected exhibits which have been ruled admissible, stipulations of the parties, and other relevant materials not subject to genuine dispute." That was the suggestion of the principle in that respect.

CHAIRPERSON BUITEWEG: Thank you, Judge Caprathe. That was very helpful.

I understand people are having difficulty hearing towards the back of the room, so when you are speaking make sure you speak right into the microphone so you can be heard.

Mr. Rombach, we have a proposal to amend the
MR. ROMBACH: Yes, I tell you what, for the purposes of our motions going forward, I would prefer to actually go from the language of the proposed statute rather than -- or the Court Rule rather than go off of the kind of derivative language that we have before us. So if there is no objection to that, at this time I would like to amend this particular proposal to reflect word for word what's actually in front of you on the yellow sheets with the language that our esteemed colleague, Mr. Andree from the 6th circuit, had inserted about the permissive language with may allow the parties.

CHAIRPERSON BUITEWEG: Are there any objections? And I will just give you some background on this. Historically the Assembly has found itself not to be particularly great drafters because of the size of this body, and we have traditionally tried to sort of keep away from doing group drafting, but if the preference of the Assembly is to look at each individual Court Rule and to make proposed modifications to them, you know, that's your decision. You are the Assembly, and that's your decision. That's what Mr. Rombach is suggesting. The proposals that you have are a bit, a bit more general
in terms, but I am going to leave that up to the Assembly, and that's what's been proposed, and I am not hearing any objections.

So if I could, just by a voice vote, find out if some of these preferences to address the actual court ruling, which versus the proposals that you see in the book. Is there a second to that?

VOICE: Support.

CHAIRPERSON BUITEWEG: Is there any discussion about that?

Everybody in favor.

Any opposition?

Abstentions?

Motion carries.

We will work with the actual Court Rules. I hope that Nancy will be able to accommodate us with that in terms of putting it up on the screen. So does everybody follow now? We are now looking at the yellow packet. We are on page five, and I need a second to the amendment that was just made. Is there a second on the friendly amendment?

VOICE: Support.

CHAIRPERSON BUITEWEG: Now, Nancy, do you need --

NANCY BROWN: I need the amendment again.

CHAIRPERSON BUITEWEG: Could you please restate that.

MR. HERRINGTON: My proposed amendment is in sub (E), the second line from the bottom after "jury
instructions" --

    VOICE: Madame Chair, point of order, we still can't hear.

    MR. HERRINGTON: Can you hear me now? My proposed amendment is in the first line up in the bottom of sub (E) after the words "jury instructions," delete the comma, insert the word "and," and then going to the next line, which is the last line, after the word "exhibits," to delete the words "and other appropriate information," then pick up with "to assist jurors in their deliberations."

    CHAIRPERSON BUITEWEG: So, Mr. Rombach, why don't you read the rule as you are proposing it now in its entirety.

    MR. ROMBACH: The proposal as it now stands is the court may -- the court may in its, or in the court's discretion, allow counsel in civil and criminal cases to provide the jurors with a reference document or notebook, the contents of which should include, which is not limited to, witness lists, relevant statutory provisions, and, in cases where the interpretation of a document is at issue, copies of the relevant document. The court and the parties may supplement the reference document during trial with copies of the preliminary jury instructions and admitted exhibits to assist the jurors in their deliberations.

    MR. ROMANO: Point of order. So you are accepting his as a friendly amendment?

    MR. ROMBACH: Yes.
CHAIRPERSON BUITEWEG: Yes, he was, and its been seconded.

MR. ROMBACH: I am striking, as a friendly amendment, "and other appropriate information."

CHAIRPERSON BUITEWEG: Is there any discussion on the reference documents Court Rule as amended?

MR. KROHNER: Martin Krohner, 6th circuit. My question goes to the -- not on? Supposed to be on. There we go.

My question revolves around the inclusion of the word "criminal" in this, the criminal cases, for the question that what has been the Indiana practice as it pertains to appointed cases, and how has that affected your appointed counsel budget?

MR. BELL: Being the only criminal lawyer on

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2 the panel here from Indiana, when I was a public defender we did not have these juror books, so I can't say. I will tell you most of my, when I was a public defender, most of our cases did not have many exhibits, so I doubt it would affect the budget too much.

MR. KROHNER: The way I am looking at the rule as it has been proposed, it mostly pertains to civil cases and not criminal cases, and so I would propose that we strike the word "criminal" out of this particular one, because I am concerned from the standpoint of the cost factor of whether or not we will be able to afford that in the appointed cases.

CHAIRPERSON BUITEWEG: Mr. Rombach.
JUDGE CAPRATHE: Can I answer that?

MR. ROMBACH: At this time I'd prefer you move that through the Assembly, because I believe that that's going to lop off half of the rules and text, so I am not going to accept that as a friendly amendment.

CHAIRPERSON BUITEWEG: It's been moved, is there a second to strike "criminal"?

VOICE: Support.

CHAIRPERSON BUITEWEG: Is there discussion?

Judge Caprathe.

JUDGE CAPRATHE: The court would --
So the motion to amend the proposal to strike the word "criminal" is before the Assembly, and I did hear a second. Is there any discussion on the proposal to eliminate the word "criminal" from this Court Rule? And I am looking, so if you have got discussion on that, then you can come up to the mike on this. You may only come to the microphone one time on each proposal.

MS. KIRSCH-SATAWA: I am Lisa Kirsch-Satawa, 6th circuit, in support of the motion to strike "and criminal." I think this would put a tremendous burden on indigent counsel. As this Assembly is very well aware of, Michigan has the second lowest fees for our court-appointed attorney, court-appointed counsel, and so they have to do an extreme amount of volume in order to make a living and provide the service and representation that they do. We are adding one more step in order for them to be, quote-unquote, effective, and I think it would be extremely burdensome on criminal cases, but even more so in cases where you do have an indigent defendant.

CHAIRPERSON BUITEWEG: Thank you. Is there further comment on that particular motion?

MS. STANGL: Terri Stangl from the 10th
for indigent defendants. However, as I read the rule now, it's only about allowing it, not requiring it, and if we need additional language to make that clear, I would support it, but it seems to me we should not prevent complicated criminal cases from using this when appropriate, but I absolutely agree it should not be required.

CHAIRPERSON BUITEWEG: Thank you. Is this on this particular motion?

MS POWELL: Yes.

CHAIRPERSON BUITEWEG: Okay.

MS. POWELL: Jaimie Powell from the 3rd circuit. I work for the Wayne County Prosecutor's Office. Again, the cost issue is a concern. It's not uncommon for our prosecutors to be doing two and three jury trials within a week. It would be almost impossible for us to put together these binders. We have limited resources as it is. I did have a question for Mr. Bell. Maybe I should table that until --

CHAIRPERSON BUITEWEG: You may ask it.

MS. POWELL: Mr. Bell, when you were doing your murder case, did the prosecutor bear the cost at all with you, or was it the defense that --

MR. BELL: That was an indigent case, so that was appointed case, and so the State paid for all the
fees on that case.

MS POWELL: And the jury instructions that were provided, did the court provide the jury instructions to the jurors, or did the defense do that?

MR. BELL: The court provided the jury instructions.

MS. POWELL: Copies for each?

MR. BELL: Copies for each, yes.

MS POWELL: Thank you.

CHAIRPERSON BUITEWEG: Yes.

MS. SAWYER: Elaine Sawyer, 24th circuit. Majority of my practice is indigent representation. I don't think "criminal" should be taken out. I think we have in there may in their discretion allow, and if it's going to be a burden, an expense, I think that can be taken up with the individual judge and a decision can be made. I think this would be helpful in certain criminal cases to supply this notebook to jurors, depending on what type of case it is. So I am not supportive of taking out criminal.

CHAIRPERSON BUITEWEG: I am going to ask everybody to be mindful of the time. We do need to put another proposal before the Assembly at 11:30. If necessary we can reconvene on these issues after the luncheon. If a point has already been made and you have heard it, I would ask that you please be mindful of the time and not make the same point again.
JUDGE CAPRATHE: Can I just make that one point?

CHAIRPERSON BUITEWEG: Yes.

JUDGE CAPRATHE: With it being may, either the court would pay for it out of the court's budget or would not do it, so that I think Terri Stangl answered the question.

CHAIRPERSON BUITEWEG: Yes, sir.

MR. PAUL: Rick Paul from the 6th circuit. By adding the Jerry Andree amendment, deleting the "must encourage" to "the court may, in the court's discretion, permit," and I think that would alleviate some of the concerns between criminal and civil dockets as well.

MR KANTOR: Alan Kantor, 6th judicial circuit. I just had a question for the gentlemen from Indiana in terms of their experience with respect to finding errors, missing exhibits, missing pages, whether that occurs during the course of the trial or it's found out afterwards, whether or not that would be grounds for a mistrial or potentially reversible error on appeal.

JUDGE HEATH: I had one case, it was a personal injury case in which counsel forgot to redact, and we go over this in chambers beforehand, any reference on the medical records about insurance plans. And, you know, that did open the door to some insurance problems, so it does happen. I have found it to be extremely rare. I have never found it to cause any kind of mistrial. I have never been
reversed on any matter that was in the trial notebook, and we have been doing it -- I have been doing trial notebooks for about eight, nine years, the last several years under our new rules, but I am doing the same thing I used to do. So I have not found it to be a problem.

Counsel is usually very careful and usually the adversarial process itself takes care of problems that can arise in the notebook. Counsel is usually very careful about what their opponent is doing putting in that notebook. And, again, the motion in limine process prior to trial also takes care of a lot of issues. I have not had a problem so far.

CHAIRPERSON BUITEWEG: All right. Please try not to be distracted by what's been going on behind me. The record is the record. We have a transcript of the proceedings. We know what we are voting on.

MR. REISING: Bill Reising, 7th circuit. I have one further friendly amendment consistent with Jerry Andree's earlier amendment. Third line down --

VOICE: Point of order, we still have an amendment pending.

CHAIRPERSON BUITEWEG: Right, we have a motion on the floor right now, and so if you don't have any discussion about that, I will ask you to hold off on your comment for a moment.
Is there any other discussion on the motion pertaining to the deletion of the word "criminal" from this Court Rule? The Court Rule.

Then may I hear by vote of the Assembly, everybody who is in favor of deleting the word "criminal," please say yes.

Opposed?

Abstentions?

We have tellers, and I am going to ask everybody who voted yes to stand up, and I would ask the tellers to please count and come forward.

In the future I would ask you to please not yell your answer. It makes it very difficult for the chair. I would ask that we approve Kathy Kakish, Barry Poulson and Colleen Cullitan from the 3rd, 1st, and 2nd circuits respectively as the tellers. May I have a motion?

VOICE: So moved.

CHAIRPERSON BUIWEWEG: And support?

VOICE: Support.

CHAIRPERSON BUIWEWEG: And all those in favor of these being the tellers say yes.

Objections?

Abstentions?

Motion carries.

Please, tellers, if you could count up the yes votes.

VOICE: Point of order. What is the vote? Are the stand-ups against it or for it?

CHAIRPERSON BUIWEWEG: If you are voting yes
in favor of deleting the word "criminal."

VOICE: One more point of order. Is this with or without the amendment "must"? Is this on "may"?

CHAIRPERSON BUITEWEG: This is on the "may."

VOICE: This is a "may"?

CHAIRPERSON BUITEWEG: Yes. All the friendly

amendments have been accepted. This has not been accepted. We are voting on this one.

If you want to strike the word "criminal," you should be standing.

(Vote being counted.)

CHAIRPERSON BUITEWEG: As soon as the tellers give me the number of yeses, I will ask the yeses to sit down and have the noes stand up.

Sir, in the back of the room without a badge, are you an Assembly member? Could you put your badge on, please, so we know to count your vote.

Please sit down, and everybody who wishes to leave the word "criminal" in the Court Rule please stand up.

Mr. Clerk, do you have a count?

CLERK GARDELLA: 65.

CHAIRPERSON BUITEWEG: Okay. You may sit down.

For the record, we have 40 people who would like to remove the word "criminal" from the Court Rule and 65 who want to leave it in, so the motion to remove the word "criminal" fails, and it will remain in.
Is there any further discussion regarding the Court Rule regarding reference documents?

MR. REISING: I have one further friendly amendment.

CHAIRPERSON BUITEWEG: Yes, sir.

MR. REISING: As I indicated earlier -- Bill Reising, 7th circuit, and I am making a friendly motion that the third line down of subsection (E), the word "should" be changed to the word "may" to make the proposed Court Rule consistent internally and to give the court the discretion it needs at the time that such a notebook is put together. Thank you.

CHAIRPERSON BUITEWEG: Is that amendment accepted, Mr. Rombach?

MR. ROMBACH: Yes, I accept that as a friendly amendment.

CHAIRPERSON BUITEWEG: Is there a second to the friendly amendment.

VOICE: Support.

CHAIRPERSON BUITEWEG: Any discussion? Is there further discussion?

MR. LOOMIS: Daniel Loomis, 35th judicial circuit.

The second friendly amendment that struck the words "other appropriate information" I think has the negative effect of limiting how the court and the parties may supplement this notebook. For example, we
may want to supplement it with the final instructions, but it only allows for preliminary jury instructions during the trial. So I think that has a negative effect.

MR. ROMBACH: If I may, Tom Rombach, but "which is not limited to" coming after "which may include," so I believe that would be broad enough language that would allow any other supplemental material.

MR. LOOMIS: But doesn't that last sentence refer to supplementing during the trial and the first sentence at the beginning?

MR. ROMBACH: Again, at this point I have already accepted that as a friendly amendment. For logistical purposes I don't think I should reconsider it.

CHAIRPERSON BUITEWEG: Are there other comments?

MR. CRAMPTON: Jeff Crampton, 17th circuit. I am troubled that this rule doesn't even use the word "exhibit." When we were talking about or Judge Heath was talking about what is in notebooks in Indiana, or at least in his courtroom, he said typically it is primarily just exhibits, and this rule doesn't even use that. Frankly, I would like to see us replace it with the rule that Judge Caprathe read, but I would add a friendly amendment which addresses the concern
of not only indigent criminal defense, but also those that work in legal aid. I would move that we add a friendly amendment that says, If the court determines that one or more parties are indigent, a notebook shall not be provided to the jurors unless all parties consent.

CHAIRPERSON BUITEWEG: Mr. Rombach, there has been a friendly amendment request. Your response.

MR. ROMBACH: Again, I am not going to accept that as a friendly amendment simply because I think it would be against the spirit of the vote that the Assembly had taken before. If you want to offer that as an amendment for which the Assembly could vote, that would be allowable under the rules.

MR. CRAMPTON: I would offer that as a rule.

CHAIRPERSON BUITEWEG: Would you please state your motion again.

MR. CRAMPTON: The amendment would be to add a sentence at the end of whatever rule ultimately gets adopted that says, If the court determines that one or more parties are indigent, a notebook shall not be provided to the jurors unless all parties consent.

CHAIRPERSON BUITEWEG: Did your motion also include the request to add the word "exhibits," "stipulated exhibits"?

MR. CRAMPTON: Whatever -- I used the word notebook. This was very quickly and unartfully drafted, but with regards to "with a reference document or notebook, the contents of which shall include," that's what I am talking about. So perhaps
it should say, "If the court determines that one or more of the parties are indigent, a reference document or notebook shall not be provided to the jury unless all parties consent."

CHAIRPERSON BUITEWEG: Is there a second to that?

VOICE: Support.

CHAIRPERSON BUITEWEG: Is there discussion on the motion?

MR. ANDREE: Point of order. May I address that again, or am I precluded from addressing that again? I thought my amendment already covered that.

CHAIRPERSON BUITEWEG: Yes, it's new items. I have been asked to restate the motion, because for some reason our technical information isn't working. It is more than five words. It needs to be in writing. Can you please bring it to the chair.

The motion is to add to the end of the Court Rule, "If the court determines that one or more parties are indigent, a notebook or reference document shall not be provided to the jury unless all parties consent." One moment.

And that has been seconded. Mr. Reiser, I think you were next in line.

MR. REISER: John Reiser, 22nd circuit. I rise in opposition of the proposed amendment. I am an assistant prosecuting attorney, and I can't imagine the expense that it's going to be for these trial notebooks. It's going to be 12 plastic notebooks that you reuse for your trials. It's going to be, in a
drunk driving case, the data master ticket or the breath result, maybe the jury instructions related to drunk driving. In an assault case it's going to be the jury instructions, it's going to be some photographs. I don't think it's going to be that expensive.

Color printers are common nowadays. We provide the defense Bar currently with photographs, color photographs. We provide them with all our documents, so I just don't think that it's going to be that cumbersome of a burden.

I don't want to be enjoined from putting together a short trial notebook if I want to do that for trial strategy purposes, and I would urge others to vote against this. Thank you.

MS. KIRSCH-SATAWA: Lisa Kirsch-Satawa, 6th circuit. I would be in support of this language with a friendly amendment to it, and that would be that it's added that the expense of the notebook will become -- actually strike that. That the notebook will be provided by the court and at public expense.

In a criminal case we are required to file a motion for an investigator or for an expert to be paid at public expense, and I think that to avoid the discretionary component that could be prejudicial, it should be right in the rule that it would be, in an indigent situation, it would be provided by the court and at public expense.

CHAIRPERSON BUITEWEG: Is the friendly amendment accepted by the moving party?
MR. CRAMPTON: If the friendly amendment, if I understand it right, is that it will not be provided to the jurors unless all parties consent or a notebook will be provided by the court or at public expense, then it's accepted.

JUDGE KENT: Wally Kent, 54th judicial circuit. I object to the proposed amendment on the basis I believe it's well covered by allowing the court the discretion already to allow or disallow the use of the notebook in any given case, which, therefore, would allow the court to protect indigents from being unduly burdened by the preparation of a notebook.

CHAIRPERSON BUIEWECH: Further discussion?

Yes, sir.

MR. POULSON: Barry Poulson, 1st circuit. The budget in our county for indigent defense is 105,000. It's going to be that next year, because it's always been that. The county commissioners have provided that much money. The three attorneys slated to carry that burden next year deal with 15 cases a week, and the question -- I haven't seen a color printer in our county yet, and so I suspect that this sort of a refinement should be refined by adding at the expense of the State of Michigan, but I am not making that as an amendment. I don't see how it could possibly be funded.

MS. CARSON: Daryl Carson from 3rd circuit. I work with Wayne County Prosecutor's Office. We have a bifurcated system. We have 28 courtrooms in our
criminal division, and we have one prosecutor for each
one of those courtrooms.

The burden of having these copies made is

going to fall on the prosecutor's office, so not only
is it burdensome for our prosecutors, but it's also
burdensome for our budget, which we have little or
none of.

MS. STANGL: Terri Stangl from the 10th
circuit. I represent indigents in civil cases, and if
my indigent client or I feel that it's the best thing
for us to use a notebook, I would hate to be barred
because the opposing party in a divorce or landlord
tenant case didn't want it, so I oppose it the way
it's written.

CHAIRPERSON BUITEWEG: Further discussion?

Does everybody understand the motion?

The motion is to add to the end of this
exhibit if the court determines -- or this court rule
rather -- if the court determines that one or more
parties are indigent, a notebook or reference document
will not be provided to the jurors unless all parties
consent, unless it is provided by the court at the
public's expense.

Unless it will be provided by the court at
public expense. By the court or at the public's
expense?

Who made the friendly amendment?

MS. KIRSCH-SATAWA: I did.
CHAIRPERSON BUITEWEG: What was the exact wording? It should be in writing.

MS. KIRSCH-SATAWA: I did have it in writing, but I don't know what happened to the piece of paper. It should say "and the notebook," instead of "or," "will be provided by the court or at public expense."

CHAIRPERSON BUITEWEG: Thank you. Could you please bring that to the clerk, the written amendment. Okay. There has been a motion made and seconded. I see no further discussion. Please do not yell your answer.

All those in favor of this amendment, please say yes.

All those opposed please say no.

Okay. The motion is denied, fails.

Yes, sir.

MR. GIGUERE: Gary Giguere, 9th circuit. I had a proposed friendly amendment which would address the previous gentleman's concern regarding the supplement to the notebook, and I would ask the movant if we removed the word "preliminary" with the jury instructions, that would allow any jury instructions, preliminary or final, to be supplemented to the notebook, so I would make that as a friendly amendment to remove "preliminary."
MR. ROMBACH: If that's a friendly amendment, I would accept it.

CHAIRPERSON BUITEWEG: Are there further comments or questions before we take a vote on reference documents? Looks like we have got one more.

VOICE: Call the question.

CHAIRPERSON BUITEWEG: The question has been called, and all those in favor of calling the question say aye.

Any opposed?
Motion carries.
Anybody in favor of adopting the Court Rule reference documents contained in the friendly amendments that have been accepted, please say yes.

Any opposed?
Any abstentions?
Motion carries.
Let us move forward to the next Court Rule.

VOICE: We have a call on that.

VOICE: Division.

CHAIRPERSON BUITEWEG: Division has been called. If you voted yes, please -- if you voted yes, please stand and the tellers will take the count, if you are voting in favor of Rule 2.513(E) with the

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May I have permission to withdraw the division, person who moved for division?

VOICE: Yes.

CHAIRPERSON BUITEWEG: Thank you. Motion passes.
More than one person apparently called for division. You are not withdrawing?

MR. BARTON: I am not withdrawing.

CHAIRPERSON BUITEWEG: Stand up if you said yes. Sorry. Tellers, please take the count. This is if you are voting yes to 2.513(E) with the friendly amendments. I am sorry they are not showing on the screen. Hopefully you have been making notes. We will try to fix that during our break.

(Vote being counted.)

CHAIRPERSON BUITEWEG: Please be seated, and if you are voting no, please stand up.

You may be seated, and the vote was 59 yes, 36 no. The motion carries.

The next Court Rule that is up for consideration is 2.513(A). Mr. Rombach, if you would come forward and read that into the record.

MR. ROMBACH: I would just direct the Assembly's attention to page ten under the subsection

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jury reform.

As we have decided previously, rather than move the issue as outlined in our packet of materials, I am actually going to move the language as proposed by the court seeking our comment, that being on the fourth page of your yellow sheet packet. I am moving for adoption of Rule 2.513, conduct of jury trial, subsection (A) preliminary instructions. After the jury is sworn and before evidence is taken, the court shall provide the jury with pre-trial instructions reasonably likely to assist in its consideration of
the case. Such instructions at a minimum shall communicate the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence. The jury also shall be instructed about the elements of all civil claims or all charged offenses, as well as the legal presumptions and burdens of proof. The court shall provide each juror with a copy of such instructions. MCR 2.512(D)(2) does not apply to such preliminary instructions. Do I have a second?

VOICE: Second.

CHAIRPERSON BUIEWE: All right. It's been moved and seconded. Is there discussion regarding 2.513(A)?

Seeing none, all those in favor of adopting the Court Rule as read into the record by Mr. Rombach, please say yes.

Any opposed?

Abstentions?

Motion carries.

Let's move on to the next Court Rule, which is 2.513(N)(2) final instructions. Mr. Rombach.

MR. ROMBACH: Again, I would direct your attention to page eleven of the materials that were originally sent by mail that has this issue identified, particularly on line two, instead of "is," you put in an "if." That puts the issue in a nutshell.

But at this time, pursuant to our new
procedure, I am moving for adoption of MCR 2.513(N)(2) and (3), final instructions to the jury. That can be found on page seven of the yellow packet, final instructions to the jury, (N)(1). Before closing arguments, the court -- actually that's (1). I am moving (2) and (3).

Subsection (2), solicit questions about final instructions. As part of the final jury instructions, the court shall advise the jury that it may submit in a sealed envelope given to the bailiff any written questions about the jury instructions that arise during deliberations. Upon concluding the final instructions, the court shall invite the jurors to ask any questions in order to clarify the instructions before they retire to deliberate.

If questions arise, the court and the parties shall convene, in the courtroom or by other agreed-upon means. The question shall be read into the record, and the attorneys shall offer comments on an appropriate response. The court may, in its discretion, provide the jury with specific response to the jury's question, but the court shall respond to all questions asked, even if the response consists of a directive for the jury to continue its deliberations.

Subsection (3), copies of final instructions. The court shall provide each juror with a written copy of the final jury instructions to take to the jury room for deliberation. The court, in its discretion, may provide the jury with a copy of electronically
recorded instructions.

Madam Chair, I move that for adoption. I seek support.

Is there support?

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VOICE:  Support.

CHAIRPERSON BUIEVEG: Discussion?

VOICE:  Is it just (2) and (3) that we are talking about right now?

CHAIRPERSON BUIEVEG: That is what the motion is at this time.

MR. LOOMIS:  Daniel Loomis, 35th circuit. I propose a friendly amendment in paragraph two that we delete the words "in a sealed envelope given."

CHAIRPERSON BUIEVEG:  Mr. Rombach.

MR. ROMBACH:  At this time I am going to oppose the friendly amendment, more for logistical purposes, simply because I think the court is seeking our comment on the proposals as delivered to us, and rather than getting into drafting on the floor on the minutia, I prefer we move issue forward, so I am not going to accept this as a friendly amendment.

MR. LOOMIS:  Comment. I think that was pointed out by the judges in their fax to the Assembly just recently, their concern about that.

JUDGE CAPRATHE:  Can we speak to any of these issues or not, as a point of order?

CHAIRPERSON BUIEVEG:  You do have floor privileges, so, yes, you may.

JUDGE CAPRATHE:  I would like to ask the
Assembly to consider making that discretionary.

Recorder's Court, for example, judges there tell me that they have one-day trials and it would just be impossible if they had to make written copies of all the instructions. They just don't have the ability to do it. So I would say if we could make it discretionary, it would depend on the court, the final instructions.

CHAIRPERSON BUITEWEG: Is that regarding number (2) and/or (3)?

JUDGE CAPRATHE: Number (2) and (3), I am sorry.

CHAIRPERSON BUITEWEG: (2) and (3).

Mr. Rombach.

JUDGE CAPRATHE: If I do have floor privileges, I can make a motion, that would be my motion.

MR. ROMBACH: We are just seeking clarity from the parliamentarian here.

So, Judge, you are suggesting that we switch the "shall" in subsection (2) on the second line to "may," the "shall" in line five, "the court may invite the jury to ask questions," you want that to read as permissive language as well?

JUDGE CAPRATHE: Yes.
MR. ROMBACH: In sub (3) you are asking in the first line "the court may provide each juror," instead of "shall?"

JUDGE CAPRATHE: Yes.

MR. ROMBACH: I will accept as a friendly amendment.

CHAIRPERSON BUITEWEG: Is there further discussion regarding N(2) and/or (3).

MR. HERRINGTON: David Herrington, 52nd circuit. I am opposed to the entire section (2). I think it basically preempts part of the deliberative process on the part of the juries. When juries get their final instructions, they really haven't had a chance to digest it. If they get written copies, that's fine, but to ask the jury at the close of the instructions do you have any questions about the final instructions I think is premature, and also I think that it detracts from the deliberative process once they go to the jury room, because if they are talking about an instruction involving specific intent or wanton and willful or things like that, I think that's open to discussion, and I am not sure the judge can answer right off the bat without side bar with counsel and so on, so forth. So I think there is actually some judicial economy that's at stake there.

So I move to delete section (2) from sub (N).

CHAIRPERSON BUITEWEG: Is there a second to the motion?

VOICE: Support.

JUDGE GIOVAN: Can I make a comment about
that? Actually it's been my practice at the close of every jury instruction I have given in the last 10 or 15 years, I say, just before they leave, I say, "Do any of you have any questions about my instructions, anything that isn't quite clear?" That's exactly the way I say it. And I will say, first of all, I never get a response.

MR. SHAPIRO: You are so clear.

JUDGE GIOVAN: But once in a while, once in a while I do, and it's usually sometimes they say, just a point of clarification -- well, it's not been a problem, but at least I give them the opportunity.

And point of personal privilege. I made, in an excess of optimism, I told my jury trial to come back this afternoon, so if you don't see me here this afternoon, it's not because I don't think this is all very important. It is, but I have to honor that, and it's my second jury trial this week, and the reason I am able to schedule a second jury trial this week is because I didn't have to provide them with a copy of

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CHAIRPERSON BUITEWEG: Is there further discussion regarding the motion to eliminate section (2) from subsection (N)?

Okay. Hearing none, all those in favor of eliminating subsection (2) from section (N), please say yes.

All those opposed say no.

Motion fails.

Is there further discussion regarding (N)(2)
or (3). Yes, Ms. Kirsch.

MS. KIRSCH-SATAWA: I have a friendly amendment to section (2) that language be added at the end that says, "The sealed envelope shall be made part of the record and preserved for appeal."

CHAIRPERSON BUITEWEG: Is there a second?

VOICE: Second.

CHAIRPERSON BUITEWEG: Let me let Mr. Rombach think about that for a moment. Could you please bring it forward in writing.

MS. KIRSCH-SATAWA: My colleagues in the 17th circuit have pointed out a friendly amendment to my friendly amendment, so I would like to change it.

CHAIRPERSON BUITEWEG: Would you like to restate your request for a friendly amendment?

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MS. KIRSCH-SATAWA: You have my piece of paper now, but I would like it to say that the sealed envelope and its contents be preserved, become part of the record and be preserved for appeal.

CHAIRPERSON BUITEWEG: One moment, please.

MR. ROMBACH: Although I think if there is questions arise, they shall be read into the record, so it would be preserved under those circumstances. I would accept this as a friendly amendment.

VOICE: Support.

CHAIRPERSON BUITEWEG: It's been accepted.

Is there any further discussion regarding 2.513(N)(2) and/or (3)?

VOICE: Call the question.

CHAIRPERSON BUITEWEG: All those in favor say
yes.
All those opposed say no.
Motion carries. And that completes cluster number one.

At this point it's 11:20. We have two panelists who are unable to be here this afternoon after the lunch, and we have to take the proposal regarding trust overdraft accounts at 11:30. I am going to exercise privileges of the chair and ask those two panelists if there is anything further they would like to comment or discuss upon at this time before we take the next issue. And we may have time to resume more on the jury reforms before lunch, but we will take it as it comes.

Judge Caprathe, Judge Giovan.

JUDGE CAPRATHE: There is one very controversial proposal, and I would just like to speak on behalf of it, because I may be one of the very few that would so, and it is on juries discussing the evidence during recesses. And I just want to read a short paragraph from the principles, commentary that might help in considering that.

The rule or the principle is that jurors in civil cases may be instructed that they will be permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present as long as they reserve judgment about the outcome of the case until deliberations.

And the commentary indicates, "In exercising its discretion to limit or prohibit jurors' permission
to discuss the evidence among themselves during recesses, the court should consider the length of the trial, the nature and complexity of the issues, and the makeup of the jury and other factors that may be relevant on a case-by-case basis," and that quotes the

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Arizona rule, because there is actually an Arizona rule that allows that. It cites the Arizona rule. And this also is in the commentary. Recent empirical studies or structured jurors, of structured jurors' discussions on the evidence during actual trials of civil cases found that allowing discussions did not lead to premature judgments in cases by jurors, enhanced juror understanding of the evidence, and in more complex cases served to decrease the incidence of fugitive discussions of the trial by juries with family and co-workers and met with high levels of acceptance by jurors, judges, and trial counsel. See Sherry Diamond, et al, jury discussions during civil trials, 45 Arizona Law Review 1 2003, and there are other citations, and you can find those in the commentary of the principles.

And that's -- I just wanted to make sure I had a chance to share that with you, and I have a plane to catch at 3:00 to go to Chicago for the ABA officers conference this afternoon.

JUDGE KENT: Judge Giovan, you also have to leave before we reconvene. Do you have any further comments that you would like call to the attention of the Assembly?

JUDGE GIOVAN: This morning I was told I
should comment on two sections, and so I will address those. One of them is 2.513(j) which is about a jury view, and it's like our present rule, except that it -- well, what it says, "On motion of either party or on its own initiative," then it adds the language "or at the request of the jury, the court may order a jury view."

I hear a lot of people being scared by this provision that, you know, the jury might be requesting a jury view, but actually I think this doesn't change the present practice.

Suppose you are in a case and a juror writes a note now and says, Judge, you think we could go out and look at the scene, or they might raise their hand and say, Could we go look at the scene? It's possible right now.

What's the judge going to say? Well, I can't allow it. Of course the judge, that could be the trigger right now under our present practice, a signal to the judge that maybe it's appropriate for the jury to go out and take a view.

I think that adding that really doesn't change anything, all it does -- now, see the rule doesn't say you have got to tell them that they may request a view. I would probably not want to do that
in my preliminary instructions, and I don't think my committee on standard civil instructions will add that. They will do it over my dead body, I will tell you that.

But I would like to point out one other thing. Something came to my attention in here. The present rule says that the only person that can talk at the scene is an officer appointed by the court. That isn't the way it works. I have taken jurors on views a number of times, and in every case the lawyers or a witness will want to say, That's the hole I was talking about or this is where I was standing, and of course the whole purpose of going there is to assist the jury to understand the testimony that was in court.

Our criminal rule actually provides for that. It says that when you go out to the scene somebody may comment on the scene, and of course a record is made of that, and so one of the groups that I chaired a discussion has recommended that we simply adopt the rule in criminal cases. And I think that's the actual practice in any event.

Then the only other thing -- oh, the judge commenting on the evidence. Would you believe it's in our rules already? It's actually in MCR 2.516(B)(3).
judge has ever commented -- used that provision. I have always wondered why it's in there. I suspect it's a holdover from the common law.

I was in Old Bailey once, and I heard the judge say, well, you heard Mr. Jones say this, that, and the other. Such evidence should be received with some skepticism. You know, I think that if the judge did that, it seems to me it would be instant reversal.

There is also an inherent contradiction. It says that the judge may -- on the proposal -- the judge may comment on the weight of the evidence, but it says it also has to be fair and impartial. The judge is either going to make a comment that's influential or not, which has not been our custom, because the jurors are, supposed to be up to the jurors, or it's going to be perfectly impartial. Well, if it's a perfectly impartial summary of the evidence, why do it? You know, we usually leave that to the attorneys.

So you might -- I think it shouldn't be adopted, and I think we might even recommend that the Supreme Court take it out of the present rule.

MR. DIMOS: If I may, because I may have problems as well, depending on the pace of the deliberations.

First of all, I wanted to thank Lori and everyone here at the State Bar of Michigan for allowing myself and my fellow Hoosiers to participate. We hope that we have provided some insight and benefit as to our experience.
I did want to comment. I have some thoughts, but one particular one which I think would be unique, and that is the proposal regarding reading of deposition summaries to the jury.

While it's not provided for in the Indiana rules, we had a federal judge in the Southern District of Indiana, who sits primarily in Indianapolis, who had this practice for years. Where it works in practice is on evidence, for instance medical testimony, where a treating physician, even investigating police officers at times. It's not going to be for perhaps a key witness, but for witnesses that at one time we would bring in, even if it was to lay evidentiary foundations, this is before the courts were more forceful in getting stipulations out, that kind of summary would work.

The practical effect is that we have got two weeks out you have to submit all your deposition summaries, settlement discussions seem to intensify at that point and cases were resolved.

JUDGE KENT: Thank you. It's now 11:30, and I suggest perhaps we should suspend this discussion on jury amendments until we deal with the 11:30 schedule and then resume our discussion until lunch.

CHAIRPERSON BUITEWEG: That is exactly what we are going to do. Thank you, Judge Kent and panelists. Panelists, if you wouldn't mind staying where you are, I don't know how long the next proposal will take, and we may be able to get back to these issues.
I would like to call forward at this time

Mr. Timothy O'Sullivan from the Client Protection Fund Standing Committee to introduce the next proposal. I need a motion, however, from the floor to grant floor privileges to the following non-Assembly members:

Mr. Fallasha Erwin, Mr. Daniel Dalton, Mr. Joseph Garin, Mr. John VanBolt, Mr. Robert Agacinski, and Ms. Linda Rexer. Is there a motion?

JUDGE KENT: Wally Kent, 54th circuit. I so move.

VOICE: Support.

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Chairperson Buiteweg: Any discussion?

All those in favor.

Any opposed.

Motion carries. Thank you very much.

Mr. O'Sullivan, would you like to come forward and introduce your contingency and your proposal.

Mr. Dalton: Good morning. My name is Dan Dalton. Mr. O'Sullivan will be speaking as part of the presentation today.

I am here on behalf of the Client Protection Fund. We are here to present a proposal that was provided to this Assembly earlier this spring on trust overdraft notification.

The drafters of this proposal include a committee from the fund, including Fallasha Erwin, who is the chair of our fund; Roshunda Price from the University of Michigan Legal Clinic, who can't be here today; Joe Garin of Lipson Neilson in Bloomfield
Hills; myself from Tomkiw Dalton of Royal Oak, a small firm in Royal Oak, Michigan.

We also have Linda Rexer, Executive Director of the State Bar Foundation, who has managed the IOLTA since 1990; Rick Winder, the Deputy Director for the State Bar Foundation; John VanBolt, Attorney Discipline Board; and Mark Armitage from the Attorney Discipline Board as well, who are here to answer questions, and they are also part of the Drafting Committee.

The other drafter is Patrick McGlinn from the Attorney Grievance Commission, and he could not be here today.

Your speakers today include myself, Joe Garin, Robert Agacinski of the Attorney Grievance Commission, and Tim O'Sullivan of the New York Client Protection Fund.

Why are we here today? As members of the Client Protection Fund, we have learned there has been a pattern of individuals that individuals take when they start stealing money from clients. They usually start with something small, and then funds are taken, paid back, and then more monies taken, and eventually it's not paid back. This is a way that we believe that other states have used to intercept those problems, and this is through the client overdraft issue. Joe Garin will talk about this in greater detail.

MR. GARIN: Good morning. Thank you. I am Joe Garin, and I am an attorney. I practice in
unique practice. I represent lawyers in malpractice cases and ethics disputes. I have been on the Client Protection Fund for about three years, and we have been working with a lot of different people over the last several months to come up with a proposal for trust account overdraft notification rules.

It's a rule that's been adopted in many other states. You will see a slide in moments where it's been adapted in 36 states, and Michigan is one of the few states that has not adopted the rule yet. It's a rule that's long overdue.

The rule that we are considering today is the result of the collaboration of the Client Protection Fund Standing Committee, the State Bar Foundation, the Attorney Grievance Commission staff and Attorney Discipline Board.

We have looked at rules from other states. We have looked at various drafts of this rule. It has gone through several iterations and redrafts, and what we are presenting to you today is the result of many hours of work by our committee and the subcommittee.

The reason that we think this rule is important is because lawyers are self-regulating. We don't have the Legislature interfering or getting involved in the way that we run our businesses and our
practices. And in order to maintain this autonomy we
think it's important that we are proactive in the
regulation of lawyers in adopting a rule that prevents
lawyers from bouncing checks on their trust accounts
or borrowing clients' money so that they can live
their lives and go on with other things other than
taking care of business for their clients.

It's important to understand that since 2002
the Client Protection Fund has paid out in excess of a
million dollars for claims filed against the Client
Protection Fund, and of those payments $705,000 was
attributable to nine lawyers in nine different
counties. It's not an isolated problem in southeast
Michigan, the Upper Peninsula, in Lansing. It's all
over the state we see claims coming in.

And the trust account overdraft notification
rule is a risk management tool that allows us as a
self-regulated profession to identify lawyers who are
likely to have problems. This is not a situation
where we are giving the Attorney Grievance Commission
or the Attorney Discipline Board carte blanche to come
in and investigate and interrupt lawyers' practices.

Instead, what happens is, if a lawyer bounces
a check on their trust account, the financial
institution that has the account will send the notice
to the Attorney Grievance Commission and the lawyer.
The lawyer is given an opportunity to explain why the
check was bounced.
I represent a firm in Colorado who recently had this kind of problem, and it was something that we were able to clear up in about an hour. What had happened was they had a client come in on a personal injury settlement, and the client endorsed the settlement check, and they were given a check from the trust account to pay the client their portion of the settlement, and they asked the client to hold the check for a couple days so that the settlement check could clear in the trust account. And what happened is the client immediately went to the bank and presented it, and it was stamped not sufficient. And a notice was sent to the law firm by the Grievance Commission out there, and what we had to do was get a letter from the bank manager explaining that the funds had been deposited but they hadn't cleared and produced copies of the receipts. We sent it to them and they closed the file, that was the end of it. It wasn't a situation where they said, well, we are going to come and we want to see all your trust account records. It was very isolated and resolved very quickly.

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We have got some highlights here or headlines here I want you to look at. We see lawyers in lots of states who do bad things with their clients' money. There is the case out of New Jersey where the lawyer was suspended amid a probe of gambling where he was using client funds to sustain his gambling habit, and the next one talks about another lawyer misappropriated $800,000 in client funds.
The next one is a Lansing State Journal $630,000. This is a lot of money. It's the kind of thing if you catch it at the front end with the first bounced checks and someone can come and investigate, then you can slow it down or at least stop it.

I am going to pass the podium to Robert Agacinski, who is going to give us some more input on this, but before I do, the committee would like to thank Lori Buiteweg for her help in putting this together, for her hard work. I know she has worked very hard in the last year for everything she has done, so we would like to thank her for that. Thank you.

MR. AGACINSKI: Good morning. I am Bob Agacinski, the Grievance Administrator, and I was asked to talk about two or three minutes.

My main function, I think, is to reassure the Bar that this rule is not creating a new Rule of Professional Conduct that should change the way the attorneys have to behave or to give us another insight into the attorney's practice or another way to threaten the attorneys.

We are not also being commissioned to prosecute individuals for overdrafting their account, the theory being though that overdrafting an account is sometimes an indication that there may be misappropriation going on and gives us an insight into it, an inroad into it before it becomes too large and maybe can stop it in the bud.

Sometimes it is also an indication that the
attorney doesn't know how to run a trust account and
will provide us with a method of educating the
attorney through ethics school or other methods as to
how to actually run a lawyer trust account, and
sometimes it might simply be an indication for bank
records that are wrong, and it will give everybody an
opportunity to correct the bank records.

The process is going to be quite simple with
our office. When you are notified of an overdraft, it
is the attorney's obligation to contact us with the
explanation as to what caused the overdraft. We will
be given a copy of that overdraft letter. We will be

waiting diligently for the answer. And after some
time goes by, if we do not get an answer, we will
prompt an answer and perhaps have to begin an
investigation.

But if we do get an answer, it will be
directed toward a specialist in our office to maintain
uniformity and consistency in our practice. We will
review the answer, look at the records that are
provided, and in many instances I am told from other
states' history realize it's bank error, mathematical
error and involves no suspect behavior at all.

In those cases we simply close the case, and
we send out a letter indicating that there is nothing
here that interests us at all, and we do that in other
areas as well.

In some indications there may be something
suspect about the explanation and we may want further
bank records and we may indeed involve an
investigation as we do whenever we are presented with a case that has some suspect behavior.

That investigation itself may lead us to one or two conclusions. Again there is some lack of education on the part of the attorney. It doesn't need prosecution, doesn't need a disciplinary action. It may indeed involve a reference to an educational source, such as ethics school or some other ICLE institution. In those rare cases where we do have misconduct, there will be an investigation.

One example has come to our attention recently in which an individual attorney died, and when we reviewed his files as a result of a receivership found that he was misappropriating client funds and replacing those client funds with future client funds, sort of the way Social Security works.

But eventually he died, and he wasn't able to replace the last set of client funds, and there was a loss of about $135,000 to clients, which would have been caught had we been earlier involved in the process, caught this pattern of behavior, seen some of the overdrafts he was receiving, and, again, stopped the behavior before it led to the large loss.

So that is a very brief synopsis of the kind of procedure we would apply. Again, it is not one that should be threatening to the Bar. It does not call for a change in practice. It just calls for preventing overdrafts on the account for whatever reason they occur. Thank you.

MR. O'SULLIVAN: My name is Tim O'Sullivan.
I am the Executive Director of the New York State Lawyers Fund for Client Protection, also a member of the ABA Standing Committee on Client Protection.

I just want to briefly give you some experience of other jurisdictions that have implemented this rule and the wide success that those jurisdictions have enjoyed.

The trust account overdraft notification rule, it's a model rule of the American Bar Association. The ABA has, in the field of client protection, a half a dozen model rules, and the trust account overdraft notification is the most widely adopted rule in our nation.

The first slide will show in the United States there are now 36 jurisdictions that have implemented this rule or some version of it, and that rule has had many benefits, some of which have already been mentioned, but I will briefly cover.

Number one is obviously protection for law clients. Number two, it protects and prevents losses by enabling early intervention by grievance offices where money is being misused. And then, and this is very important, because in New York it's been our experience it serves a very important educational value where there has been innocent mistakes by honest lawyers in handling client money that allows the grievance offices to bring those lawyers in and really
educate them regarding their fiduciary responsibilities in properly handling client money.

Another benefit which many funds have enjoyed, it not only conserves and protects the assets of the law clients but also of lawyer fund programs in that jurisdiction that adopts the rules. The lawyer funds, they operate with limited resources, so that's certainly a very important benefit that does result.

By all accounts, the overdraft notification rule has been very successful and well received wherever it has been adopted.

I will just give you a few examples. In New Jersey that rule has been in effect since 1985, and they average 325 overdraft notices, and in that period of time the rule has put 85 lawyers who were misusing client funds.

Pennsylvania, which has also adopted the overdraft rule, last year they received 225 overdraft notices, and 26 of those resulted in referrals to disciplinary authorities. It further emphasizes the point that was made that not every lawyer subject to one of those notices is being thrown in court or such severe discipline. It's a chance to bring those lawyers in, and they are honest, majority of these notices are the result of an honest mistakes, and the authorities really view it as an opportunity to educate those lawyers and prevent further losses -- or
prevent further problems down the line if those aren't caught early.

Minnesota, the rule has been in effect in Minnesota for 15 years now. They have received -- there has been 150 disciplinary actions taken in that period of time, only 50 of which were really serious discipline, any public discipline. The rest of those were minor actions that were taken really, again, through the educational aspect of the rule.

And Minnesota is interesting. They report that they have actually had a fewer number of discipline files have been opened since that rule has been in effect, that more and more of these files are closed after the attorney is given the education and the instruction on proper record keeping with respect to their client funds.

Our next slide. Just to tell you briefly about the New York experience, which I am most familiar with. Our dishonored check notification rule has been in effect since January 1, 1983, and it's really been successful beyond our expectations.

We have received over 6,800 notices in that time of checks that have bounced on lawyer trust accounts. And those notices involved 4,500 lawyers, face amount of money of $195 million. Why those numbers are so much staggering, of that 4,500 lawyers, of that number only 145 were lawyers that were dishonest, were misusing the client funds. So those 145 lawyers have now been removed from practice.

Now, if we had not caught those 145 lawyers
as a result of the rule in New York, I am scared to think of what client losses they would have lead to, but the rule, again, has detected those lawyers and removed them from practice. And the vast majority of those notices were lawyers that were, again, had the opportunity to be educated and given instruction with respect to their fiduciary obligations.

Next week my board of trustees who review claims on a quarterly basis involving client money that's being misused, we meet next week, and at that time there is 40 claims that will be before my board involving 27 lawyers who had allegedly stolen client funds. Four of those 27 lawyers were caught by our bounce check rule in New York state.

And in the 13 years that our rule has been in operation in New York, of awards made by our fund, 49 of the lawyers that were the subject of those awards again were caught by the bounce check rule in New York state. So it's a proven loss detection device in New York, as well as other jurisdictions I cover.

I just want to briefly emphasize the point that the rule is not really harmful or a threat to the honest lawyers, the lawyers making the innocent mistakes.

We periodically in New York, we survey our grievance committees who, with the lawyers fund in New York, administer this rule, and they report, you know, consistently that the biggest benefit that they see out of the rule, in addition to detecting dishonest lawyers, is really the educational value
that the rule provides.

Now, in New York the rule is structured very similar to the proposed rule here in Michigan. You have to use an approved bank. The bank has to provide that notice. We have had very little problem in New York with bank compliance. In the very early days of the rule there were some notices that were generated due to bank error, but again built into the mechanism of our rule, as well as the proposed rule here, there is an opportunity for those notices to be withdrawn.

We found over time that the banks in New York state, they have been very efficient at complying with the rule, and we receive a much, much smaller number of notices now that really result in bank error, and, you know, in this day and age of banks crossing state lines, I am sure the vast majority of banks here in Michigan do business in other jurisdictions that already have such a rule in place, and I am not sure that there has been much of a problem with bank compliance with the rule.

New York lawyers sometimes are thin skinned, but probably much more so than here in Michigan. In 13 years the rule has been in place in New York we have never once had a complaint from a lawyer, a law firm, a Bar association of any kind about the operation of the rule. Because, again, just to drive home the same point, the rule is catching the dishonest lawyers, and the innocent or the honest lawyers that are making mistakes that get detected by
the rule, they are really being assisted in complying
with their fiduciary obligations.

So just to conclude, the trust account
overdraft rule in New York, as well as other
jurisdictions, 36 which now adopted it, it's a proven
loss prevention and detection device, a client
protection device, and it is really a helpmate to the
members of the Bar in educating them regarding

MR. DALTON: Thank you, Tim, and members of
the panel.

We have taken quite a long time drafting this
rule and thinking things through, especially to the
point that banks already do this from a national
scale. This has already been -- because it's
nationwide, we have a nationwide system of banks.
Banks are already taking those steps of providing
trust overdraft. It's nothing new to the banking
community.

We have adopted the rule in small firms. We
have a small firm of six attorneys. You know, I am
the one that looks at the books, I am the one that
checks it. It's not a burdensome thing at all from
that perspective.

With that, we will open the floor to a
motion.

VOICE: So moved.

VOICE: Support.

CHAIRPERSON BUITEWEG: We have a motion and a
second. Is there any discussion? I see at least one
Assembly member coming forward.

MR. BLAU: Michael Blau from the 22nd circuit. Just a quick question. In the event an attorney did not give a written --

VOICE: Turn the microphone on, please.

VOICE: Or speak into it.

MR. BLAU: In the event an attorney did not respond within 21 days to the Attorney Grievance Commission, what would be the mechanism? Would a request for investigation automatically be sent out by the commission? What would be the mechanics?

MR. AGACINSKI: A general rule is if we do not get the answer within the first amount of time is we send out a reminder notice, make some phone call attempts. So it really is several efforts made before we may begin a real investigation. So the deadline is simply a goal, not necessarily a rigid deadline.

MR. BLAU: Thank you.

CHAIRPERSON BUITEWEG: Is there any further questions?

CLERK GARDELLA: Bob Gardella from the 44th circuit, also Assembly Clerk. I rise in support of this motion. Years ago I used to be the attorney for the State Bar doing the client protection fund matters, filing suit against the disbarred or disciplined attorneys in the state who basically have stolen money from their clients over the years.

This is a rule that's already in place in 36
states, and most, if not all, of the banks when
something happens like this, they call the State Bar
in Michigan anyway to let us know that there is a
problem and that there is an overdraft.

It's pretty rare for this to happen, and
someone has to be very, very desperate to let their
client trust account go down to something then write a
bad check on it. But I think that this rule will help
prevent a bad situation from getting worse and
preventing attorneys who have a gambling problem, who
have an alcohol addiction problem or other drug
problem from getting in the hole even more, and I
think that this rule is basically putting down on
paper what's already in place anyway, because the
banks, the national banks already call the State Bar
of Michigan or the Attorney Grievance Commission and
let them know that there is a problem here. I ask
that the members support this.

CHAIRPERSON BUITEWEG: Is there further
discussion?

It's been moved and seconded that the
Representative Assembly approve the proposed trust
account overdraft notification rule, MRPC 1.15(A), and
authorize the State Bar of Michigan to make any
subsequent editorial, clerical, or technical language

changes to the proposed rule and comments that may
assist in effecting the intent of the proposal after discussion with Michigan financial institutions and others and prior to submitting the rule to the Michigan Supreme Court.

All those in favor of this motion please say yes.

Any opposed?

Any abstentions?

Motion carries. Thank you very much. Thank you for coming today.

(Appraise.)

CHAIRPERSON BUIETEWE: We do have five minutes, and I am not one to squander time given our time constraints, but I think everybody probably needs a five-minute bathroom break before lunch. I don't want anybody to be late from lunch.

Just one moment. I would like to, if you could, just one moment, please, I am sorry. It's come to my attention that the chair of our Awards and Nominations Committee won't be here this afternoon, so I would like to recognize Carl Chioini, thank him for his service to the Assembly and have him come forward and receive his plaque. Mr. Chioini.

(Appraise.)
lunch, they can take their seats. I don't want to waste any further time.

As you can see, we lost a few of the panelists. Magically we have had replacements appear in their stead, and so we are very thankful to Judge Hammer from the Michigan District Judges Association from Garden City's District Court for joining us. He was given floor privileges this morning when we voted in our special rules, and Judge Kent has now been transferred -- I won't say demoted or promoted -- from moderator to panelist from Tuscola County. I will do the best I can with the moderating.

I would like to go ahead and continue. I have been asked if we could continue with cluster (E) of the proposed jury reforms, and starting with 2.513(F), deposition summaries, and 2.513(G), scheduled experts.

In keeping with the special rule, I would like to invite Judge Heath from Indiana to comment if he has got any experience with these two particular court rules. Judge Heath.

JUDGE HEATH: I will make this one real short. No, I don't. I have not done deposition summaries, and I have not scheduled experts. We have a rule, trial rule for Indiana where if the request for separation is made, it must be honored. I have no discretion. So separating witnesses would, I assume, run afoul of the scheduling of the experts, or could, and that would have to be somehow reconciled.

But just a comment generally, and I think
scheduling experts could assist in some cases, and I
could see where that would be helpful in some cases,
perhaps the discretion might be helpful.

I certainly personally am opposed. This is
just me. I am not speaking perhaps on behalf of the
whole Indiana Bar, but I don't like the idea of
deposition summaries. I believe that invades the
province of the fine work that the jury can do. I
would instruct them to treat depositions and video
depositions of the witnesses like any other witness.

So I am not real keen on it, but that's the only
insight I can give you.

CHAIRPERSON BUITEWEG: I know that the trial
lawyers have something to say about this. Terry and

Doug, have you chosen amongst yourselves?

MR. SHAPIRO: I think we are both going to
have something to say.

CHAIRPERSON BUITEWEG: Go ahead.

MR. MIGLIO: I think it's fair to say that a
significant amount of time spent as a trial lawyer
working to elicit testimony, whether it be in a
debene esse deposition or a discovery deposition from
witnesses, so much so that I think --

VOICE: I am having a hard time hearing you
in the back.

MR. MIGLIO: I was saying, a significant
amount of trial preparation and trial work involves
preparing to examine witnesses and eliciting what may
be de bene esse testimony from those witnesses, which
oftentimes can be interpreted a number of different
ways by the jury. It's not an uncommon practice to have blowups of deposition testimony because you want to make a point with the jury about the exact wording of a witness' answer that's critical to your case or the defense of a case.

Deposition summaries merely would purport to gloss over what the witness has actually testified to. I can't imagine in an instance that we are going to summarize testimony as opposed to engage in a stipulation in open court about what somebody would say or what fact was agreed upon would, in fact, advance the fact finding procedure for the jury.

And so I cannot see how deposition summaries in any way, shape, or form, except those that possibly may be stipulated to by counsel to get in the record a specific fact or a specific finding, would otherwise be appropriate for a jury trial.

MR. SHAPIRO: I am going to go ahead and talk about the deposition summaries and then also comment on the expert witness. Can I be heard in the back?

First on the dep summaries, to amplify just a little what Terry had to say, judging the credibility of witnesses is pretty central to our system, and the notion that somehow in a short, kind of clean summary a jury is going to be able to determine how credible that witness was in terms of the language that they used, the nuances, the pace of cross-examination is essentially impossible.

You are also in a situation where if someone wants, under this rule if someone brings in a live
witness, they get to present that live witness for as long as they want and elicit all the testimony they want, but if for reasons of convenience or difficulty with the expert coming to town or whatever you have to do a de bene esse dep, now you are already at a disadvantage because you have to show a video or read a transcript. Now you are going to be at a second layer of disadvantage because the other side is bringing in a live witness and you are going to be reading a summary that the other side has approved.

It's really -- I think this is a very, very bad rule, and I would note my understanding is that it isn't being used in Indiana, it isn't being used in any state anywhere in the country.

Also, who resolves the disagreements? I say this is what the summary should say; defense counsel says this is what the summary should say. The judge has to make a ruling. There is no rule of evidence for him to base his ruling on. He is not saying here is the questions that can be asked or not. He is saying this is an accurate reading of the deposition transcript, and so you are also making the judge be a determiner of facts, and she has to read the deposition with a level of care that judges are not required to do on a routine basis right now to make rulings. They get to see the question and the answer and say that's a good question, that's a bad answer -- that's a bad question. Now they are going to be the arbiters of what is an accurate description.
It surely is going to lead to lots and lots of appeals. I mean, it's hard to imagine how any time you lose with a deposition summary where you didn't get what you wanted that you wouldn't raise that as an appellate issue.

I am not quite sure what the upside of this proposal is. I mean, I guess I agree with Terry, if there is something so fundamental that the parties could stipulate in evidence, we don't need this rule for that. We could just stipulate that this is the amount of money or this is the foundation for this and so on.

Let me turn then to the expert witness. Many of you here, I think, do do trial work, and some of you probably with multiple experts, and you will know what I am talking about. Some of you may not. The coordination of experts in a medical malpractice trial or even in another type of civil case where you have multiple experts is an unbelievably difficult logistical headache.

If you are bringing in a physician from Harvard University who has to teach, who has clinical responsibilities, who has administrative responsibilities, and you want her to come in during these three hours of the day, you may be lucky enough
to set that up, or it may be that you can't do it. If you want to have experts in a certain order, you may be fortunate to set that up, but it's going to take an enormous amount of effort.

This is a job, even though it has nothing to do with practicing law, that I do myself in my office. I can't have anyone else talking to experts, setting up deposition times, because nobody is there prepared really to juggle when every doctor says I can't come that day, I can't come that day.

Now, imagine if on top of that I have to coordinate with the defense experts to make sure that they can come in right after my experts, and then if the purpose of this whole thing is to allow substantive, discrete areas of the case to be tried at one time, then I have to get my expert back for their rebuttal, because if they come in after the defendant's case, that makes no sense. The idea was to put all the evidence together on that issue.

So now we are looking at having doctors come in for at least a day, maybe multiple days, at a cost, you know, to take a medical malpractice case to trial with several experts, $50,000 is a pretty base figure, and you can get a lot higher than that. Imagine if you take those same experts and tell them I need you for three days. The practice simply becomes impossible, but it will be done, because both sides will have to meet each other -- you know, one guy ups the ante, then the other has to meet them. We are talking about a grossly inefficient system both
logistically and financially.
   Again, I am not quite sure what the upside
is. I mean, Terry sits on the defense side, and I
don't think he disagrees with me, that this is just
logistically impossible.
   In addition, you know, there is a fundamental
principle about the side with the burden of proof and
burden of persuasion going first. That's how it's
always been done. We don't present evidence during
the other side's case, and that's a real principle.
It's not just, you know, kind of a practical solution.
That's how we present evidence. If you have got to
prove the case, you go first. Person who wants to
disprove the case goes second.
   Say for prosecutors, I mean I doubt -- there
is no prosecutor on this panel, but I can't imagine
they would want defense experts in the middle of their
cases when they are seeking a conviction.
   Also, evidentiary problems. What if my
expert, I have a neurologist, and he is going to
testify about my client's headaches but not about my
client's traumatic brain injury. I have got a
rehabilitation doc later in my case to talk about
that, but the defendant is using a neurologist on both
issues. So I have somebody who comes in and testifies
on headaches. Now his expert, who is supposed to
testify also about TBI, comes in, traumatic brain
injury, but it hasn't been raised yet. It's not in
evidence, he can't talk about it. So does he come
back a second time, and so on.
Plaintiffs actually, I hope it wouldn't come
to this in terms of the rule coming into effect, but I
am sure that plaintiffs would become pretty conscious
about introducing their evidence in such a way so as
to make life difficult for the defense expert who gets
up in the middle of their case, because under the new
rules experts can only talk about things that are in
evidence, so you would be pretty careful about what
got in evidence before that defense expert got up.

So I do think it's, in all honesty, it's
throwing -- oh, and the panel, the idea of having
these judges sit around and have a panel -- I will be
brief. I know I have gone on. One, you know, the
Rules of Evidence are out the window, completely out
the window. What are you going to say, Here is the

The idea that you are going to have a neutral
doctor or neutral expert be the officiating person,
doctors did not want to sit on medical malpractice
case evaluation panels. They don't have the time to
do that sort of thing, and to find a neutral one would
be difficult. I mean, I have never had a doctor from
Michigan testify in favor of a plaintiff. I am not
sure where we are going to find those neutral doctors
to host these panels.

I guess I have said enough. I think the rule
is a very, very poor rule. It has no precedent in any
state. I don't know where it came from, and I think
it should be voted down in total.

JUDGE KENT: Lori, may I?
CHAIRPERSON BUITEWEG: Yes, you may.

JUDGE KENT: The only other thing that I would suggest in terms of scheduling of experts is that I think a mechanism already exists. It's not unheard of for counsel to come to me for one reason or another to ask to schedule a witness of any description out of order due to scheduling reasons, and we have a fairly collegial Bar in a small community such as ours, but it's not at all unusual, given the right set of circumstances, that counsel will stipulate to taking witnesses out of order if the circumstances exist which would justify it, and I respect the comments of the two speakers before me. It would be very rare times when it should be done, but if the circumstances exist, we can already do it.

CHAIRPERSON BUITEWEG: With that, Mr. Rombach, do you want to go ahead and move for 2.513(F) so we can start the debate from the Assembly.

MR. ROMBACH: Yes, for purposes of the discussion, I would propose that the Assembly adopt 2.513(F). That's going to be discussed on page eight of the packet, and it will be on the yellow sheets on page five. Deposition summaries. Where it appears likely that the contents of the deposition will be read to the jury, the court should encourage the parties to prepare concise, written summaries of depositions for reading at trial in lieu of the full deposition. Where a summary is prepared, the opposing party shall have the opportunity to object to its contents. Copies of the summaries should be provided
to the jurors before they are read.

Before I seek support, I would like to mention I did have some discussions at lunch with representatives from the Supreme Court. They were monitoring our debate this morning, and the parts that they liked the most were the insightful commentary, particularly, for instance, how indigency affected the rules, and the parts that they disliked, as a lot of other Assembly members have voiced over lunch to me in particular, is the parts of the technical amendments on the wording. So perhaps we would be most useful as a resource if we were to confine most of our comments to the principles underlying these as we have had in the past with the Rules of Professional Responsibility.

So I seek in that light a second for this proposal.

CHAIRPERSON BUITEWEG: Is there a second so we can start discussions?

VOICE: Support.

CHAIRPERSON BUITEWEG: And discussion, Mr. Miller.

MR. MILLER: Randall Miller, 6th circuit. Let me start by keeping this short. I don't know if the mike is working, but I am loud enough anyway.

To keep this short, I want to completely mirror what Doug and Terry said, and I am just going to add a few comments on top of that.

With regard to deposition summaries, has anybody in this room ever taken the deposition of an
expert and wasted time asking irrelevant questions
like how their family is doing? What are you going to
summarize? You are asking a question about their
background. Their background is very important to
establish how important their testimony is and how it
should be weighed by a jury. That is no an irrelevant
issue. You can't summarize that.

Then you start asking about how they treated
this person and what they found. That is not
irrelevant. It can't be summarized. What are the
potential issues for the patient down the road? How
are you going to summarize that? Deposition summaries
make no sense whatsoever.

As far as the scheduling of experts, let's
talk about any injury case, because if you are dealing
with a doctor who is treating patients that are
injured in one way, shape, or form all the time, they
are going to spend their --

CHAIRPERSON BUIJTEWEG: You can save your
comments for (G). We just have (F) in front of us.
You can save your comment for (G).

Any other comments for discussion, questions?

It's been moved and seconded that we adopt
2.513(F), the language that Mr. Rombach read into the
record, which is on page five of your yellow sheet. I
am not going to read it again in the interest of time since he just read it and there are no amendments or anything like that.

So everybody in favor say yes.

All opposed say no.

Motion fails. I will have the record reflect that that was unanimous. Thank you, Judge Stephens, for reminding me.

2.513(G), scheduling of expert testimony.

MR. ROMBACH: To facilitate Mr. Miller's discussion on the next topic, I would like to propose for discussion 2.513(G), scheduling expert testimony. The court may, in its discretion, craft a procedure for the presentation of all expert testimony to assist the jurors in performing their duties. Such procedures may include, but are not limited to:

(1) scheduling the presentation of a party's expert witnesses sequentially; or

(2) allowing the opposing experts to be present during the other's testimony and to aid counsel in formulating questions be asked of the testifying expert on cross-examination; or

(3) providing for a panel discussion by all experts on a subject after or in lieu of testifying. The panel discussion, moderated by a neutral expert or
VOICE: Support.

CHAIRPERSON BUIEDEG: All right. It's been moved and seconded to adopt 2.513(G). Are there any comments, Mr. Miller?

MR. MILLER: Thank you, Madam Chair, and once again, I adopt the comments of both Terry and Doug, try to keep this short, and based on the resounding statement made by this committee a moment ago, in fact it was really short, but just point this out, just in case anybody is waffling.

Some doctors treat a lot of people who are involved in an accident in one way, shape, or form. Under this rule you are going to force them into courtrooms when they don't have time to go. Their entire job would be testifying, theoretically, or waiting out in the hallway to testify. And under our rules to qualify an expert, they may no longer qualify as an expert because they have spent the last year sitting in courtrooms. This is absolutely preposterous. Therefore, I move to strike it down like last time.

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VOICE: Call the question.

CHAIRPERSON BUIEDEG: The question has been called. All those favor of adopting 2.513(G), scheduling expert testimony, say yes.

All those opposed say no.

Any abstentions?

The motion fails unanimously.

We will now move on to the next cluster that I have been asked to deal with in this order is
2.513(M), comment by the judge. This is not really a cluster. It's all by itself. Let me direct the commentary regarding this proposal, 2.513(M), comment by the judge, to the panel, and I have lost my sheet as to who volunteered, so if you could just talk about it. Judge Heath, do you have anything on this one?

JUDGE HEATH: Yes. I looked over your proposed rule, and I must say that I would not want the responsibility of making such comment. I would not do so unless the comment itself was stipulated to by the attorneys, opposing counsel.

Again, I don't believe we have a rule that covers this, so I am just speaking on my own behalf here, but I don't think it's appropriate. I think it, again, invades the province of the jury to do its fact-finding function, so I would, at least from my perspective, I couldn't imagine doing it.

I have less qualms about attorneys making those statements, because I think the adversarial process might take care of any potential problems there, but I would not want that function as a judge.

CHAIRPERSON BUITEWEG: Judge Kent.

JUDGE KENT: I totally agree with Judge Heath. In my bio I mentioned I do some community theater. I have to discipline myself in the course of giving instructions and so forth not to tip my hand as to what I feel the merits of the case may be. I am sincere when I say that. I catch myself sometimes stating something with certain emphasis that would suggest favoring or disfavoring one side or the
other.

That's bad enough, but if I were to comment, I am sorry, what I say would be taken as gospel. I don't want to be the 13th juror or I don't want to be the super juror. That is not my role in the jury case, nor should it become that role. It is up to the jury to make the decision. It is up to the litigators to make the comments on the evidence and let the chips fall where they may.

CHAIRPERSON BUITEWEG: Judge Hammer.

JUDGE HAMMER: We have always had the authority to do this, but I have never done it. I have never seen it done. The only thing I can bring to the table in terms of discussion, I handled a matter where I bound over to circuit court for trial. As a district judge, I handle the preliminary examination, and, quite frankly, when I heard the verdict I was rather stunned at it. I mentioned it to the newspaper reporter at the trial, and then she went on telling me how the judge had commented on the witnesses and their credibility, and it was sort of an insight as to how that may have affected the outcome.

Like I say, I was stunned at the verdict based upon the information I knew from looking at the investigation reports, hearing the preliminary exam, and I have to believe that had something to do with it.

Whether it was fair or not, whether the result was right or not, I don't know. But that's the only time I have heard of it being done in recent
history, in my present experience, but, like I say, it did seem to affect the outcome in a way that from the distance that I viewed it didn't seem quite fair, but, having said that, that's the only really insight I can give you from my personal experience on this rule.

Like I said, we have had the authority. I would not want to use it. I have never used it, and I think it should be used very sparingly under very limited circumstances.

CHAIRPERSON BUITEWEG: Mr. Rombach, would you move for the adoption of this 2.513(M), please.

MR. ROMBACH: At the risk of submitting another dead letter, I will propose 2.513(M), comment on the evidence. After the close of the evidence and arguments of counsel, the court may fairly and impartially sum up the evidence and comment to the jury about the weight of the evidence, if it also instructs the jury that it is to determine for itself the weight of the evidence and the credit to be given to the witnesses and that jurors are not bound by the court's summation or comment. The court shall not comment on the credibility of witnesses or state a conclusion on the ultimate issue of fact before the jury. And I seek support for the purpose of our discussion.

VOICE: Support.

CHAIRPERSON BUITEWEG: Is there a second?
Okay. I heard a second. Any discussion?

All those in favor of 2.513(M) say yes.

There was discussion. I am so sorry.
circuit. I don't know if my motion is proper, but because there has been no information provided as to the genesis of this proposal or the last proposal and the Supreme Court is interested in our insightful discussions, I am wondering if it would be proper to request that the Supreme Court or the drafters provide the Representative Assembly with where these proposals came from and why we are being presented with them, because I am not aware of any ABA study or any empirical studies or studies or evidence or anything that would cause these to be drafted. So my motion is to request the Supreme Court of Michigan through the chair of the Representative Assembly provide us with information as to why we are looking at this issue.

CHAIRPERSON BUIEWEG: That is out of order just because there is a motion on the table right now. We can vote on this motion and then you can -- Mr. Rombach would like to answer the question.

MR. ROMBACH: We have had discussion on where this came from. Unbeknownst to me and perhaps others, there is actually a Court Rule that allowed this emanating from a criminal statute, so the judges do have some latitude already, and this would just aggrandize that, but no one could provide any anecdotal evidence of this going through successfully,
and, therefore, the judges have chosen not to exercise this, but that's, again, why it's being presented in this package of materials.

CHAIRPERSON BUITEWEG: With that, is there a motion to withdraw?

MR. HERRINGTON: Actually it's not. I still don't understand.

CHAIRPERSON BUITEWEG: I am sorry, you are out of order. I am going to have to take a vote on the motion on the floor.

MR. HERRINGTON: Understood.

CHAIRPERSON BUITEWEG: If you want to make a motion after.

All those in favor of 2.513(M) say yes.

All those opposed say no.

Any abstentions?

The motion unanimously fails.

MR. HERRINGTON: Well, I would like to repeat my earlier motion.

VOICE: Point of order, Madam Chairman.

MR. HERRINGTON: Can you hear me? I would like to move that the Representative Assembly, through the Chairperson, request that the Supreme Court of Michigan provide the Representative Assembly with information regarding the genesis, background, and beginnings or other information regarding this proposal, why we are reviewing it.

CHAIRPERSON BUITEWEG: Is there a second to
the motion?

VOICE: Support.

CHAIRPERSON BUITEWEG: I hear support. Is there discussion?

MR. ROMBACH: If I may, Tom Rombach, 16th circuit. I believe that the court has directed us to follow a rather strict time line; that public comment is going to close for November 1st, and we are not going to be able to even provide any discussion or feedback on any direction the Supreme Court may offer to us at this time. Oftentimes by the time an administrative hearing would be scheduled in January, that it would not be possible then for us to provide meaningful input, and oftentimes the court has already had internal discussions. So at that point I would be very strong in my opposition for asking for any further material. I believe the Assembly has spoken unanimously in opposition to this initiative, and, therefore, we should let our votes stand as they are.

VICE CHAIR HAROUTUNIAN: Ms. Buiteweg.

CHAIRPERSON BUITEWEG: Lori Buiteweg, 22nd circuit. I rise in opposition to the motion, and the reason is because we heard from Justice Markman this morning that the genesis of these proposals are from many different sources and that the Supreme Court is not necessarily in favor of all of them, that they are looking for feedback and discussion from us, and I feel that it's irrelevant where the proposal came from. What we are charged with doing is letting the Supreme Court know what we think about them, and I
don't think finding out where it came from makes any
difference.

Good job, Ed.

All those in favor of the motion say yes.

All those opposed say no.

Any abstentions?

Motion fails.

I am going to proceed in order at this point
with the 2.513(J) the cluster of proposals affecting
juror participation. Judge Heath from Indiana has
experience with a number of these: The jury view, the
questions from the jurors, note taking by the jurors,
and discussing the case before it goes to deliberation
amongst the jurors. So I am really grateful that he
has stayed this afternoon to discuss these particular
proposals with us.

Judge Heath, I am going to turn it over to

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you.

JUDGE HEATH: I thank you very much, Lori. I
will share with you that when I first took the bench
and conducted jury trials almost ten years ago, this
is what it was like. I read the instructions to the
jurors. They never saw the instructions. I didn't
let them take notes. They didn't take the exhibits
back to the jury room and so forth, and that's what my
mentor, a very good judge, taught me, and he gave me
the reasons. At the time I followed that. And I
would submit to you that they were still good jury
trials. I don't regret any of those trials.

But along about the second or third year and
going to conferences and talking to other judges and so forth, I began to think that perhaps it's time to move along a bit in some ways that accommodate the jury, and so I began to allow, I think about my second or third year, jury note taking. In fact, the bailiff was instructed to supply the jurors with note pads and pencils. I began to project at least on some kind of screen or something the jury instructions so they could read along with me, and ultimately I started giving them the instructions.

Along came some more reforms, and one of them was jury questions, and I had not been doing that, and

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I had some misgivings about it. I thought questions would arise from the jury that would be awkward for us. For example, it would be questions about insurance and so forth, and so I had my reservations about it. But, nonetheless, that particular one was passed, and we now do that in Indiana.

I will share with you that I have been pleasantly surprised by the jury questions. I have conducted I guess probably around 15 trials, jury trials, with jury questions involved now. And what I have found is that it really raises the jurors' attention to the trial as a very good benefit. No longer do I see jurors falling asleep. They have got their note pads, they have got their question forms with them, and we control it I think pretty carefully.

In the preliminary instructions we advise them as to the methodology for asking questions. It occurs after the lawyers are done. They write out the
question. They are directed to give it to the
bailiff. I have the bailiff bring it to me. I review
it carefully. I call counsel to the bench. We look
over the question, and in a good many of the cases the
questions are insightful.

I have had, I can't tell you how many
accident cases I have had where the attorneys would

forget to ask whether or not, for example, the airbag
deployed. The jurors always ask that. I instruct
them in my preliminary instructions that insurance is
not to be considered, and so they don't ask that
awkward question.

So the questions that I get are good. They
are insightful, and the process we use has been
successful, and it's elevated the amount of juror
participation, so I have been very pleasantly
surprised at the insightful questions, the increased
participation on behalf of the jurors. They feel a
sense of ownership in the trial. When you talk to
them later after the trial, I ask them did you
appreciate the chance to take notes and ask questions
and so forth, and they invariably say yes. So I
think, although I had reservations about the jury
questions, I appreciated those.

Was another the note taking? Note taking, I
have been doing that now for almost nine years, and I
can't imagine not giving jurors the chance to take
notes. I know lawyers tell me they watch for what
notes the jurors are taking.

Well, you know, if they don't have the note
pads, they are going to make that mental impression anyway. Does it get in their way? Well, we have

preliminary instructions again that deal with what we tell our jurors. Let me read just part of one to you. Here is my patterned instruction 1.01.

You may take notes during the trial if you wish. Do not become so involved in note taking that you fail carefully to listen to the evidence or observe the witnesses as they testify.

Notes are not evidence in the case and must not take precedence over your independent recollection of the evidence. They are only an aid to recollection and are not entitled to any greater weight than your recollection or impression as to the actual evidence.

Your notes should not be disclosed to anyone other than a fellow juror during deliberations. Do not take your notes outside the courtroom or the jury room. The court will furnish you with paper and pencil. Later on I tell them I am going to collect their notes and no one is going to see them. That's in my final instructions.

So I think the instruction aids greatly, and the note taking, I have never seen a juror just take notes hour after hour. They don't do that. They will watch things. They will take notes on exhibits that they get. They will be sitting there with an exhibit from the trial notebook. They will see something
interesting. There will be a note they take. Or they will go for an hour without taking any notes, then suddenly some witness will say something interesting that interests them and they take a note. So I don't find it getting in the way of them listening to witnesses. I think it has worked out fairly well.

What's another one?

CHAIRPERSON BUITEWEG: Discussion prior to deliberations.

JUDGE HEATH: I was asked by Attorney Bell from Indiana to pass this along to you, and it's interesting. He just conducted, as you know from his earlier meeting this morning with you that he had a lengthy criminal trial, and in talking to some of the jurors post trial he has learned that during the course of that process, of that trial process where they were able to discuss, that cliques were formed and made it difficult for the state's case, he feels, because of the cliques that were formed by virtue of their ability to discuss the case. So he has great reservations and apparently with good reason.

Now I will share my situation with you. I have only had one two-week trial. Most of my trials are shorter than a week, the vast preponderance of them. I haven't found that to be the case in the shorter trials. They seem to appreciate the ability to discuss things under controlled circumstances, and
we do control it as much as we can. Let me read you
the part of our patterned instruction that deals with
jurors discussing things, and here it is. This is
just part of our first instruction to them.

When you are in the jury room, you may
discuss the evidence with your fellow jurors only when
all of you are present, so long as you reserve
judgment about the outcome of the case until
deliberations begin. When you are not in the jury
room you must discuss the case -- I am sorry. When
you are not in the jury room you must not discuss the
case among yourself or with anyone else. And in each
admonition I give them before recess, I discuss that
with them again. I read that same admonition to them,
along with other things.

So it's kind of a drumbeat construction
throughout the trial. You can discuss it if you are
all present, but keep an open mind. That's the
drumbeat that gets to them.

So I think in short trials I didn't find that
clique process going on that Mr. Bell had, but I
wanted to pass that on to you in fairness, because
there could be that concern. In talking to my jurors

afterwards, they do appreciate the ability to talk
about it.

The rule is a recognition of the fact that
your jurors are discussing the case whether you like
it or not and whether instructed to or not. Usually
if they are not sequestered they go off to lunch in
twos or threes here and there. They are going to
discuss some aspect of the case.

Now, some juror might say, Don't do that, we can't do that, you know, and you might be successful in stopping them, but I think more it's the recognition that there is discussion going on. And so we are trying to control it rather than let it go on without some controls, and I think by and large it's successful, but there is the danger pointed out by Mr. Bell.

CHAIRPERSON BUITEWEG: The last one is jury view.

JUDGE HEATH: I have never taken or had a jury go out on a jury view. I think the ability to do so, the discretion by a court to be able to do so would be important. I have been out on views myself as requested by attorneys in a bench trial, and I think I can see where it can be very important.

Our rule does not allow the attorneys to discuss the matter with -- they can accompany the jury, the jury can view, but they cannot make discussion whatsoever with the jury during that view. There was someone else here this morning talking about, well, of course attorneys point things out about the view, jurors have questions. Our rule does not permit that.

CHAIRPERSON BUITEWEG: And I know that the trial lawyers wanted to comment in particular on the issue of jurors asking questions of the witnesses, so if you would pass the mike down to them.

MR. SHAPIRO: I have spoken to a lot of
lawyers on both sides about these four particular proposals, because I thought that these were the ones that really went to the heart of the notion of jury reform or empowering the jury, and I have heard differing opinions certainly on the issue of discussion and somewhat on questions. I would say that overall, although, of course, always the devil is in the details, the lawyers that I work with and the organization that I am here to speak for in terms of our preliminary views, no final views have been reached yet, is that on balance all of these are designed to empower and engage the jury and that that's the heart of this proposal and that that's a good thing.

I can say from personal experience that the degree -- of course, when we do mock trials before cases, before actual trials, they are much shorter, and that's part of the formula for keeping people engaged, but we always allow note taking, questioning, and discussion at various points during our mock trials, and what we find there is that we are much, much better informed lawyers about what's important in the case to these people who are going to be deciding it than we are when they are a black box.

And I did mention to Terry that I recently lost a case where the jurors found something that they were concerned about in the medical records that no one had addressed. And at that point of course it was too late to address it. They found it in the jury room. I would much have preferred that they...
challenged me on this item that they thought was
detrimental to my case than finding out only through
the verdict. So I think these are good and helpful
proposals on getting the juries more involved.

CHAIRPERSON BUITEWEG: Terry.

MR. MIGLIO: I think most of the judges that
I have had trials with in the last five to seven years
have allowed jury questions over objections of one or
going to keep an open mind until they have heard all
of the evidence. And if jurors are allowed to
deliberate before that, I feel, even though they do
for it, and, quite frankly, it always worked well for me. They would write the question down. Typically I would rephrase it but ask it in substance, unless I couldn't. A lot of questions had to do with either insurance or prior convictions in a criminal case, such as drunk driving. I see it worked well with one exception. I traditionally would ask, well, whose question is this? Am I phrasing it correctly? Invariably the response would be, well, all of ours. We were discussing it. You know, typically we got the questions after they had a break, and they discussed it either at lunch or during the break.

So for that reason and that reason alone I don't do it anymore because I feel like I am telling them they can't discuss it but then inviting them to discuss it and setting myself up for possibly a mistrial, but except for that aspect of it I thought the procedure of jury questions always worked well.

If we change our philosophy and allow jury discussions, that takes care of that objection, but I found in practice, except for that problem, it worked pretty well. There weren't that many questions, and usually the questions were pretty good and jurors understood when I told them, I understand your question may be a good question, but for evidentiary reasons I can't ask it, and they always accepted that
explanation, and I spoke with them afterwards, they
always understood why, and I explained that to them.

With respect to jury views, I have done it a
handful of times. It's always worked well. I have
said no a number of times. Afterwards I spoke with
the jurors, and they would agree it wouldn't have
helped at all anyway. The only change in this rule is
to allow the jurors rather than just the parties to
request a view. I don't see any problem with that.
We are just treating jurors as adults. They
understand when you say no. All you just need is the
ability and guts to say no, I don't think it's a good
idea. If I think it's a good idea, then we will do
it. The only change in this rule is to allow the
jurors rather than the parties to request it. In
those cases where it might be helpful, I have found it
works well, and I have never had a problem with the
court officer enforcing my rule that attorneys aren't
to discuss it with the jurors.

CHAIRPERSON BUITEWEG: Judge Kent, do you
have anything on this?

JUDGE KENT: Only on the question of jury
discussion. I would agree with the other comments
about the other issues. I agree with the comments, I
believe it was Terry and Mr. Bell made about the
concern of prejudging a case before all of the
evidence is in and before the instructions have been
provided to the jury which give them the structure
whereby they are to continue their discussions.

I acknowledge and I have had comments from
both Judge Caprathe and from Judge Giovan, instances
where they have discovered that such discussions were
taking place. I don't doubt it. There are holes in the
dike. Rather than tearing down the dike and letting the flood in, we should continue to plug the
holes as we can.

I am reminded when I was growing up and then later when I was raising my kids the standard comment was just because everyone else is doing it is no reason to let you do it, it's not right. And that's the way I feel about jury discussions during the course of the trial.

CHAIRPERSON BUITEWEG: Mr. Rombach, if you could move the for the adoption of 2.513(J), the jury view, so we can get this discussion started, that would be great.

MR. ROMBACH: Again, we are going to break this down into all four proposals, so if you have comments try to direct them to the proposal on the

This first is going to be 2.513(J), jury view. On motion by the party, on its own initiative, or at request to the jury, the court may order a jury view of property or of a place where a material event occurred. The parties are entitled to be present at the jury view. During the view no person other than an officer designated by the court may speak to the jury concerning the subject connected with the trial. Any such communication must be recorded in some fashion. I move for adoption of this proposal.
VOICE: Support.

CHAIRPERSON BUITEWEG: I hear a second on that. Is there discussion?

MR. GREEN: Good afternoon. I am Robert Green from the 3rd circuit. I have no objection to the proposal except as it relates to the prohibition of allowing someone to speak. I can recall that I had a case many years ago in which the court did allow us to actually go to the scene, and I think that the rule, the whole purpose for the rule is to help us help the jury to expand their understanding of the factual situation, and in that situation the court allowed the witness to testify as to the jury scene, to the scene of the incident and how it impacted on the case. If you restrict a witness from testifying about the scene and its importance to the case, then it kind of defeats the whole purpose of the rule. So I have no objection to the rule except for the part that prohibits the witness from testifying and expanding on the importance of the jury scene, I am sorry, the jury view. Thank you.

CHAIRPERSON BUITEWEG: Okay. Further discussion?

MR. CHADWICK: Thomas Chadwick from the 8th circuit. I would make a motion to sever this proposal. The first half beginning with the words "jury view," the second half beginning with the words "during the view." The reason for that proposal is so that we can vote on the motion regarding jury view
separately from the issue of communication.

CHAIRPERSON BUITEWEG: Is their a second to that motion?

VOICE: Support.

CHAIRPERSON BUITEWEG: I have heard a motion and a second. Is there discussion on that motion?

All those in favor of the motion say yes.

JUDGE KENT: A comment on that. To sever -- if we are going to allow jury discussion at the view,

...
a very strong yes vote, although not unanimous.

On the second part of the (J), during the view, no person, other than an officer designated by the court, may speak to the jury concerning the

subject connected with the trial. Any such communication must be recorded in some fashion.

There has been a motion and a second to adopt that language. All those in favor of adopting this language say yes.

VOICE: You haven't had discussion.

CHAIRPERSON BUITEWEG: Well, we already had discussion. All right. I have been corrected by the parliamentarian. I need to call for a discussion on that. Is there any discussion on that? Okay.

All those in favor of adopting the rule as stated, the second half of it, say yes.

And all those opposed to adopting that segment of rule (J) say no.

Any abstentions?

That motion fails, and the Assembly is not adopting the second half of (J).

Next is (K), juror discussion.

MR. ROMBACH: Actually I am going to do (I). I am going to try to do it in the order in which it has been prescribed by the our interim rule here, so I am moving for adoption of 2.513(I), that having to do with jury questions.

The court may permit the jurors to ask questions of witnesses. If the court permits jurors
to ask questions, it must employ a procedure that
ensures that such questions are addressed to the
witnesses by the court itself, that inappropriate
questions are not asked, and that the parties have an
opportunity outside the hearing of the jury to object
to the questions. The court shall inform the jurors
of the procedures to be followed for submitting
questions to witnesses. I move for its adoption.

VOICE: Support.

CHAIRPERSON BUITEWEG: Any discussion on this
motion?

MS. KLIDA: Dawn Klida, 18th judicial
circuit. It is more a comment as to procedure on
this. If this is something the Assembly is going to
support, I have recently seen what can happen when the
procedures are not carefully monitored I guess is the
best way to say it. I have actually seen witnesses
excused but for whatever reason remain in the
courtroom after their testimony has been completed and
then a jury question was brought into play and the
witness had to take the stand again, and I actually
saw two witnesses take the stand three different times
for jury questions.

So I guess my concern is is that along with
this rule there should be some very specific
procedures so that you don't have that. I mean, that's, you know, that's a lot of stress on the witness, not to mention the attorneys themselves having to scurry and go back and forth for that. So that's my comment.

CHAIRPERSON BUITEWEG: Is there other discussion regarding questions from the jury? Judge Heath.

JUDGE HEATH: I share your concern. Our pattern, I think, addresses it. Did I read the pattern for asking questions to jurors before?

CHAIRPERSON BUITEWEG: The parliamentarian says yes.

JUDGE HEATH: We tell them after the examination by attorneys, as it's concluded, that's the time for them to ask the questions. So I think that our jurors are made to know right upfront when the appropriate time for asking is. And I tell you what happens in practice is sometimes the judge forgets, you know. The witness is done, the attorneys are done, and you have been practicing law for umpteen years, you are not used to jurors asking questions, you are excused. Then all of a sudden some juror's hand will go up, oh, yeah, and then the judge is red faced, I am sorry, I forgot. Please.

So that's as bad as it gets for me anyways when a juror is about halfway out of the chair. So we get them back in, the jurors ask the questions. And then one thing I forgot to mention to you that really happens too in practice is I make sure in my court,
although this is not addressed in the pattern, that if
the attorneys want follow-up questions after the juror
questions, I permit that, and then I ask one more time
of the jurors, Do you have any further questions?

So that's how the process, when you really
get going and into it, really takes form.

CHAIRPERSON BUITEWEG: Judge Hammer.

JUDGE HAMMER: One quick observation. I
think the concern of the speaker was very well placed.
This rule seems just to empower us to do this. The
procedures we follow are pretty much incorporated in
the standard jury instruction we already have, which
says at the end of the witness' testimony.

It seems like it would be very unusual to
call a witness back from the courtroom. Again, that's
always at the discretion of the judge. Taking
witnesses out of order, I suppose witnesses could
always be called back. If it was a compelling
question, you could call a witness back just as you
would an attorney thought of a question later on.
happen, but just because it could happen doesn't mean that this is a bad idea.

MR. CROSS: Cecil Cross, 6th circuit. I rise in opposition to this motion. Jury questions open the door for information that either the adversary did not bring up and maybe should have, opens the door for them to strengthen their case, and it also ignores the fact that the attorney, the opposition attorney who didn't want this question asked and didn't ask it him or herself now has the door opened for the jury to ask this question and have that information presented to them.

We have an adversary system. This does not increase the possibility of that adversary system for each attorney to fulfill their responsibility to present evidence. The jury is to decide the case on the evidence presented, not on the evidence that they would like to have had presented but on what is actually presented.

This ignores that procedure, and I ask you not to vote for this motion.

CHAIRPERSON BUITEWEG: Is there any other further discussion?

It has been moved and seconded that we have MCR 2.513(I) regarding jury questions. All those in favor of adopting this court rule please say yes.

All those opposed say no.

Any abstentions?

All right. I could not tell. I am sorry. I am going to have to have yeses please stand and
tellers take a vote. I am very sorry. You were all  
good about not yelling, but I still couldn't tell.  

(Vote being taken.)  

You can sit down, and if you voted no, please  
stand up.  

The motion carries 60 to 40. You may be  
seated. Thank you, tellers.  

Mr. Rombach, now I would like you to take  
over.  

MR. ROMBACH: I would next like to move for
CHAIRPERSON BUITEWEG: I have to take vote on calling the question. All those in favor of calling the question say yes.

MS. KIRSCH-SATAWA: I couldn't get here fast enough. Lori.

CHAIRPERSON BUITEWEG: The question has been called, and the motion to call the question passed. All those opposed say no to calling the question.

VOICE: No.

CHAIRPERSON BUITEWEG: Okay. Well, now I can't tell. I am sorry. It had to be a two-thirds vote, you are right, so motion fails. Let's have the discussion.


VOICE: Can't hear you.

MS. KIRSCH-SATAWA: Lisa Kirsch-Satawa, 6th circuit. I would make a friendly amendment to strike -- wait a minute -- the portion of the proposal that says that the notes will be destroyed. I would ask that that be amended to have language that they would be preserved for purposes of appeal.

CHAIRPERSON BUITEWEG: Is there a second to the motion? Is there a second?

VOICE: It was a friendly.

CHAIRPERSON BUITEWEG: I know it was a friendly amendment. Judge Stephens and I had a conversation at lunch. According to our parliamentarian, there really is no such thing as a
friendly amendment. I am going to ask that if you want to change the court rule that you make a motion to change it so that I can tell, not have it be in Mr. Rombach's hands whether or not the language gets changed. If you want to make a motion, you can make a motion, but as the chair I am not going to have any more friendly amendments. It's just too difficult to deal with.

So, Ms. Kirsch, would you like to make that motion?

MS. KIRSCH-SATAWA: Sure. I would move that section (H) be amended in the last sentence to read, "The court shall ensure that all juror notes are collected and preserved for purposes of appeal when the trial is concluded," which in essence just strikes "destroyed" and adds that other phrase.

CHAIRPERSON BUIEVEG: Okay. So do all of you have your yellow piece of paper in front of you, because you have got to get your pen out. You have to be scribners and you have to cross out the word "destroyed" and you have to insert "preserved for purposes of appeal." Could I have it quiet, please.

MR. ANDREE: Point of order. You don't cross it out until the motion.

CHAIRPERSON BUIEVEG: Just for your own
edification. You don’t have to cross it out.

That is the motion. Is there a second to the

motion?

VOICE: Second.

CHAIRPERSON BUITEWEG: Is there any
discussion on the motion?

All those in favor of the motion say yes.

JUDGE KENT: I withdraw. No comment.

CHAIRPERSON BUITEWEG: All those in favor of
amending sub (H) as indicated say yes.

All those opposed say no.

Any abstentions?

Okay. The motion fails.

Now back to sub (H) without the amendment, so
erase what you crossed out. Hopefully you were using
a pencil.

Is there any, is there any further
discussion?

All those in favor of adopting MCR 2.513(H)
say yes.

Any opposed.

Abstentions?

That passed unanimously. The last one in the
cluster.

MR. ROMBACH: I now move for adoption of

2.513(K), juror discussion. After informing the

jurors that they are not to decide the case until they

have heard all the evidence, instructions of law, and

arguments of counsel, the court may instruct the
That as sarcasm.

MR. POULSON: Well, in that case it's withdrawn.

CHAIRPERSON BUITEWEG: Any additional comment or questions?

MR. BARTON: Bruce Barton, 4th circuit. I had an experience of serving on a jury, and based on that experience I am opposed to this motion. The other jurors knew I was an attorney. That came out in
voir dire and couldn't be avoided.

I pretty much had my mind made up, without expressing it, after the first witness. I am sure that if we had discussed it in the jury room I would have influenced the other jurors and probably the following witnesses would not get as much credence.

The other thing about that I am opposed, but I should also tell you something else about that experience. It was a civil case, damage case. First thing the jurors asked me when we started deliberations was, How much money do we have to give the plaintiff so the lawyer won't get it all?

CHAIRPERSON BUITEWEG: Is there any further discussion? All right.

All those in favor of adopting MCR 2.513(K) say yes.

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All those opposed say no.

Any abstentions?

That was unanimously failed.

We are almost done, and at this point I think Judge Heath needs to leave. Is there anything, Judge Heath, that you would like to talk about the interim commentary or opening statements before you leave?

JUDGE HEATH: Now, this is interim commentary by the attorneys?

CHAIRPERSON BUITEWEG: That's correct.

JUDGE HEATH: As you know from previous comments, I was pretty much opposed to a judge doing that. I have less problems with the adversarial process continuing it. To me it's almost like
argument, interim argument.

I think the adversarial process will take care of problems that could arise with it. I realize there will be other objections that people will mention today, but I just want you to know I personally have less problem with this one than I would with the judge commenting.

And what's the last one?

CHAIRPERSON BUITEWEG: Opening statements, which I don't think you have any.

JUDGE HEATH: We have opening statements.

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CHAIRPERSON BUITEWEG: That you don't -- there is no option to defer them?

JUDGE HEATH: There is -- yes, I believe there is. My understanding is, but I have never had a civil trial where opening statements were not made by both sides.

CHAIRPERSON BUITEWEG: Are there other panelists that would like to -- and let me just say, Judge Heath, if you have to leave, please feel free, and thank you. Could we just give a round of applause to thank you, Judge.

(Appplause.)

JUDGE HEATH: I am going to the University of Notre Dame’s campus to the University Club to have dinner tonight with the sports information director, so if there is anything you want me to pass along. I will say, Go blue.

CHAIRPERSON BUITEWEG: My parliamentarian is out of order.
Would any of the other panelists like to comment on the cluster (D) interim commentary by lawyers or opening statements?

JUDGE HAMMER: With respect to the opening statements, I think it would be a good idea to give jurors more information upfront instead of having them guess throughout the trial as to the burdens of proof and some of the elements of the alleged crime. I have no experience with it, obviously none of us do, but I think that might be a good idea and might work, and I would like to see at least it be given a try.

As to the interim commentary, of course I am a district judge. Sort of the nature of my trials are relatively short. I really don't see the need for them. I think they are sort of like an update when you are watching a program to be continued later. You have a long trial and the jury has to be updated as to what they have already heard. I have got no experience with it, none us do here in Michigan.

I would tend to disagree with the judge from Indiana. I think if one was given it should be given by the judge, and that should be something prepared, and counsel be given the opportunity to object, akin to the opening instructions or the preliminary instructions in a jury case where the judge summarizes each side's arguments.

I always try to avoid that. I would rather not do it, but I do give a rather brief summary of what each side's case is, with the attorneys' consent, and see if they object to it, rather than have interim
arguments. Otherwise they are just arguing their case

one more time, and I think the only need would be in a
long trial where the jury sort of loses track of
where they are.

    Once again, I have got no experience with it.
I am a little skeptical. One of my observations
during the course of a number of these proposals are
perhaps we should have a set of rules that are options
in complex litigation and perhaps a long, complex
trial, something like that might be useful. I think
it would be good to have the judge do it with the
understanding that each party could have some input as
to what was said. That's just an observation.

    JUDGE KENT: The longest trial I ever had
with a jury, I think Judge Hammer was counsel for the
Attorney General on that case. I would not have
minded if he had made some comments during the
interim, but his opposing counsel probably would have
used it as the opportunity to become the 13th juror
once again or else the extra witness without
portfolio, and I am afraid that to hear from counsel
or the bench commenting on evidence during the midst
of the trial would unduly delay the trial and possibly
confuse, rather than enlighten, the jurors. I think
we would be far better to maintain our present
practice and to reject this proposal.
MR. MIGLIO: I would agree with the two judges. The interim commentary, the jury trial system is presently set up to have an opening statement which by law is supposed to be a full and fair accounting with what the facts are. I really don't understand what a judge might construe or opposing counsel might construe as being his interim commentary, which neither falls in the category of an opening statement or closing argument, and I don't understand why or under what circumstances it would be allowed at appropriate junctures in the trial.

There are plenty of times in longer cases where the judge may give an opportunity for some clarification that's agreed upon through a statement by the judge that both parties have stipulated to, or in some instances -- I mean, we have all tried cases. There is more than enough commentary that goes on between the two counsel during the course of the case to make their case to the jury, and allowing this kind of discretion for something that's called interim commentary, which really has no connection to opening and closing arguments, I think is a serious source of danger for extending the trial and getting into arguments and so forth.

And aside from that, the first instruction out of the judge's mouth usually is that whatever the lawyers say isn't evidence anyway, so it's of no consequence to pause to listen to what the interim
Mr. Shapiro: I have one very brief comment. My only comment would be that the rule as drafted doesn't really tell us what it is, and so it's difficult to support it, even if in theory there might be appropriate times or at least with stipulation of the parties perhaps, but the rule does seem to be a bit sparse for introducing a new concept.

Chairperson Buiteweg: Okay. Mr. Rombach, if it's okay with you, I am going to appoint you as a very temporary parliamentarian so our parliamentarian can speak on this issue, unless there is any objection by the Assembly. She asked to speak. Is there any objection?

Judge Stephens: Just very briefly. I have actually had what might be described as interim commentary in a case which lasted for two months. About one month in half the case went away. At that point permission was given for very brief opening statement-like commentary on the case that was left for the jurors to consider so they didn't have to think about the other five counts that were gone.

At this point when we do a bifurcated trial where issues of damages, liability and damages are separated or a case where it is a complex case and a portion or substantial portion of the case goes away at some point during the course of the trial, there is no explicit authority for the court to allow lawyers to address the jury. This is loosey goosey, I agree, but it does begin to speak to the issue of giving the
court the discretion based upon the exposition of the
case as it has been presented to the triers of fact to
allow for some interim argument and/or opening
statement.

CHAIRPERSON BUITEWEG:  Thank you.  Is there
any other further comment or discussion or questions?
Let's have the motion.

MR. ROMBACH:  I am now moving for adoption of
2.513(D) interim commentary.  Each party may, in the
court's discretion, present interim commentary at
appropriate junctures of the trial.  I move for its
adoption, Madam Chair.

CHAIRPERSON BUITEWEG:  Is there second?

VOICE:  Support.

CHAIRPERSON BUITEWEG:  Any discussion?

All those in favor of the motion say yes.

All those opposed no.

Any abstentions?

The motion fails substantially.

Next and last.

MR. ROMBACH:  Finally, Madam Chair, I move
for adoption of Rule 2.513(C), opening statements.
Unless the parties and the court agree otherwise, the
plaintiff or the prosecutor, before presenting
evidence, must make a full and fair statement of the
case and the facts the plaintiff or the prosecutor
intends to prove.  Immediately thereafter or
immediately before presenting evidence the defendant
may make a similar statement.  The court may impose
reasonable time limits on the opening statements.
Move for its adoption.

CHAIRPERSON BUITEWEG: Is there a second?

VOICE: Second.

CHAIRPERSON BUITEWEG: Any discussion?

All those in favor of 2.513(C) say yes.

All those opposed say no.

Any abstentions?

Motion carries.

Okay. That completes our jury reform section of the agenda. We have been asked by the proponents or obtained agreement of the proponents of numbers 11 -- I am sorry, 10 -- oh, I am sorry. Okay. Panel members, you are dismissed, and thank you.

(Applause.)

CHAIRPERSON BUITEWEG: I am so worried about getting you all out of here by 4:00 as the agenda promises. I have got to slow down.

The proponents of numbers 10, the emeritus attorney referral fee, and the Patient Compensation Act, which is 11, and numbers 13 and 14 have all very graciously agreed to defer those proposals to our next meeting, and it will be up to your next chairperson whether he chooses to request a special meeting to deal with the matters that we didn't have time for today.

I am going, because I think it will be extremely brief to take the very last action item that we have on the agenda, and then we are going to elect the clerk and pass the gavel, and we will get out of here as close to 4 as we can.
Does anybody object to deferring those action items that I just brought forth? Okay.

So, Ms. Stangl, if we could have you come up and handle number 12, consideration of the proposed amendments to SCAO forms MC-13 and MC-14, and I would like you to please look for the green sheets at your desk. They are slightly different than the ones in

MS. STANGL: Thank you, Madam Chair, Terri Stangl from the 10th circuit. This pertains to what is the green item in your packet. It is a proposed change in MC-13 and 14, which are the garnishment forms used by the SCAO. This is prompted by the fact that under federal law there are certain kinds of federal benefits, particularly Social Security and SSI, which are exempt from garnishment.

Under the current practice, when a creditor serves the garnishment form on the bank, they may note if there is funds there and they are held pending a determination of what kind of funds are there. What this rule would require of the financial institution to do is check off if the sole deposits are one of those exempt federal funds. That would allow a person who lives only on that money in many cases to be able to use the money to pay their bills. This would not apply in any instance where the funds were commingled, and banks generally have these federal deposits, which have to be deposited in the bank, coded so they can tell at a glance what's the source of those funds.
So this would streamline the process for the bank, it would make it clear upfront to the creditor, and the defendant, if that is their source of income, and they have no choice but to deposit it in the bank, could have access to it as they are required under federal law to pay the bills. So the forms are amended to have that disclosure stated clearly by the bank. So would I move for the adoption of the proposal stated in your green papers.

VOICE: Support.

CHAIRPERSON BUITEWEG: Any discussion?

MR. BIEBERICH: Kent Bieberich of the 37th circuit. My only concern is that, in fact, Social Security funds are not always exempt. They are subject to child support obligations, and while the Friend of the Court will usually do that, it is possible to opt out of that system, and my concern is there is nothing on here that would inform the bank that's what's going on. So, in fact, child support obligations, Social Security is not exempt from those. It's also not exempt from federal tax liens, which I realize is a different issue, but this form just seems to indicate Social Security is exempt, period, and that's just not the case. So my concern would be it doesn't make provisions for collecting child support from Social Security, which is allowed. Thank you.

CHAIRPERSON BUITEWEG: Are there any other
comments or questions? You have the last word, Terri.

    MS. STANGL: I think that's a valid point. I mean, normally Social Security is garnished at the time it's paid out and it comes off the top. I would be happy to include in the recommendation that there should be some accommodation for that, but I think the general, particularly for SSI, still holds.

    We could do it in two parts. Could we vote on SSI first? Since I think that's the clean one for the SSI, do we take that first, and then we vote on Social Security.

    So I would move that the forms be amended to, including the federal funds that are entirely exempted for all purposes, which would include SSI as a first motion.

    VOICE: Support.

    CHAIRPERSON BUITEWEG: Any discussion on that? Understanding another motion will follow. Victoria.

    MS. RADKE: No, I have a comment on something else though. We just got this. I just finished looking at it. There is something else there that doesn't belong there.

    CHAIRPERSON BUITEWEG: Well, if it's pertaining to this motion, then go ahead and make your comment.
benefits are also to be available for child support, so that should be another one that's not exempt.

MS. STANGL: Well, the only ones that we are seeking to exempt by this rule from disclosure is the federal benefits. That was the only ones that we were seeking to do. We are not trying -- every other pot of money is debatable, so that would be under the current process. The only thing this would do is where there is a disclosure on there they would say this is a federal benefit, and they list four kinds -- railroad retirement, Social Security, SSI -- and what I was limiting it to initially on this motion is just SSI. I am not going to anything else.

MS. RADKE: And I understand that, but unemployment compensation benefits specifically references MCR 421.30, and that's state benefits.

MS. STANGL: Right. The list of benefits on there put the defendant on notice of what may be objectionable. That is not a -- the bank would not be releasing those funds. They could still hold those until there is a hearing, which is the current practice now

CHAIRPERSON BUITEWEG: Is there any further discussion?

MR. BARTON: Bruce Barton, 4th circuit. Maybe I missed something, but you are talking banks. Are you talking only nonperiodic garnishment?

MS. STANGL: We are only talking -- yes, garnishment of accounts, we are only talking a straight garnishment of an account, not a periodic
garnishment of wages or income. We are only looking at what sits in the bank account.

MR. BARTON: Have you come up with a new form for that, or are you going to use the generic form?

MS. STANGL: The forms are attached on the green one with some suggested additional language that would simply modify the current one so that the bank could say the source of these funds are only from one, in this case, in this motion right now, SSI. In that case the bank would be free to release the funds because they are entirely SSI. The nonfunds on here would be still held for the amount of the judgment, and then if the defendant objects there would be a hearing, which is what happened in the current process.

MR. BARTON: My question is -- you keep talking about banks. Garnishments apply to a lot of other accounts and/or money other than banks. Is this limited to banks, and, if so, how is it limited on the standard form?

MS. STANGL: It's limited because the only kind of entity where SSI or Social Security are deposited directly, it applies only to direct deposited federal benefits, so the only organizations that would have that would be a bank or a credit union, so that's the only entity, garnishee defendant, who would then honestly disclose that the deposits in the account are solely consisting of the federal benefits.

CHAIRPERSON BUITEWEG: Are there any other
It's been moved and seconded. Why don't you read the language.

MS. STANGL: Should the SCAO garnishment form MC-13 and 14 be revised to include a provision that expressly directs a bank or financial institution to protect SSI from garnishment.

CHAIRPERSON BUITEWEG: All those in favor say yes.

All those opposed say no.

Any abstentions?

Motion carries.

Is there another motion?

MS. STANGL: The other motion would be to cover the other forms of income, which would be the railroad retirement and Social Security benefits and the Veterans black lung, so this one should be SCAO garnishment form M-13 and garnish form M-14 be revised to include a provision that expressly directs a bank or financial institution protect exempted income from garnishment. Excuse me, that would be the other forms, not the exempted income, but the other, I explicitly would list those other three. To protect Social Security, Veteran's black lung, and railroad retirement benefits.

CHAIRPERSON BUITEWEG: Is there any discussion regarding that rule?

All those in favor of the motion say yes.

All those opposed say no.

Any abstentions?
Motion carries.

Okay. You know, I am going to take an opportunity at this moment to make my opening remarks.

JUDGE STEPHENS: Those are called interim commentary.

CHAIRPERSON BUITEWEG: Yes, this late stage in our -- it is 3:50 and I am making my opening remarks. This is a bit strange, but our debate on the

jury proposals needed to occur at the inception of the meeting, thereby causing the opening remarks and other remarks from our State Bar staff to be delayed till this afternoon. I don't think anybody will disagree with me that it was certainly worth accommodating that schedule, as the resulting debate was, without a doubt, very valuable. And I hope that the Supreme Court will find our comments, questions, and positions helpful in making decisions about the future of our jury system here in Michigan.

As you know, these proposals were published less than two months ago. It took a great deal of collaboration and timely efforts to pull together our panel of experts. Our State Bar staff has been very helpful to us all year long, but the efforts to help us pull off this particular meeting were over the top.

So with that in mind, Ed and Bob and I would like to show our gratitude to Anne, who was our go-to person, with a little gift that will come in handy in the future. Anne.

(Applause.)

CHAIRPERSON BUITEWEG: At some point -- All
of you know I am big on follow-up. I would like you
to just, in all of your spare time, take a look at tab
number one, which shows the tracking of our proposals.

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If you recall, that was delivered to you for the first
time at our meeting in April, and we are going to
continue having the chart updated for you.

I was extremely pleased to see that the
adoptions we passed regarding the domestic relations
Court Rules in April have already been assigned an
administrative number by the Supreme Court. So I
think we are definitely seeing an improvement in the
area of follow-up.

We have already seen other incredible results
from our April meeting in terms of the proposal we
passed on the National Conference of Commissioners for
Uniform State Laws. Our State Bar general counsel,
Janet Welch, attended the NCCUSL annual meeting in
July. She is going to report to you regarding this
meeting in a few moments. It will be a very short
report, I promise you, and you can see it in your pink
sheets that you have in front of you.

I have already read the report, and I can
truly say that if we had accomplished nothing else
during this past year, if we hadn't even dealt with
jury reform which we did this morning, that alone
would have made your time and your efforts this year
on the Assembly completely worthwhile, but add to this
the many other things that we have accomplished, and
you will see you can't deny that the Representative
Assembly is invaluable to our membership.

We have certainly proven that -- I just don't
know how our membership could ever do without it. The
Assembly has adopted proposals with great potential
for positive, wide-reaching results for the legal
profession, and I am very confident that our incoming
State Bar, our new State Bar President, Kim Cahill, is
going to continue forging the excellent relationship
that Tom Cranmer has been building with the Supreme
Court over the past year and in that process
heightened awareness of the relevance and helpfulness
of the Assembly to the Court and to the Bar members
across the board.

And, speaking of excellent relationships with
the court, we also owe a great debt gratitude for that
to your departing Executive Director John Berry. He
has such enormous breadth of experience with Bar
associations around the country, and we have grown as
a result of that. We appreciate all the insight he
has brought our way.

At this time I am going to propose the
adoption of a resolution commemorating John's
retirement from the State Bar of Michigan. So, John,
if you would come up here.
State Bar of Michigan expresses its respect and appreciation to John T. Berry for his service to the lawyers, the judiciary, the courts, and the public of Michigan. John T. Berry brought more than 20 years of experience and his reputation as an expert in ethics and professionalism when he arrived at the State Bar of Michigan in 2000. He applied his skills to improve the vision and structure of our association, the engagement of our members, and the institutions that connect us, and the programs we deliver to lawyers and the public we serve.

Most importantly, John T. Berry used his expertise to unite us as an integrated Bar dedicated to the advancement of justice in Michigan.

Be it resolved that many thanks, much appreciation, and repeated well wishes be conferred on John T. Berry for his contributions to the legal profession and the greater public during his tenure as executive director of this Bar association, unanimously adopted by the Representative Assembly of the State Bar of Michigan, September 2006, Lansing, Michigan.

May I have a motion to adopt this resolution?

VOICE: So moved.

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CHAIRPERSON BUITEWEG: And a second?

VOICE: Second.

CHAIRPERSON BUITEWEG: All those in favor.

MR. BERRY: I will be extremely brief, but I want to share for maybe two or three minutes my thoughts about leaving, particularly the Rep Assembly.
It's tough enough to talk about leaving your friends on the staff and on the board that I serve.

I have to first talk about people, and to the left of me, Lori and Ed and Bob, and I don't know if Tom is still here or not, all the leaders of this organization. When I came here, much good had been done by the Rep Assembly, but a great challenge was before the Rep Assembly about your role, your existence, whether or not you were still relevant, and I think Justice Markman today made it very clear that you are very relevant. And during the time I have been here, instead of focusing maybe on the small things, you focused on such things as a dues increase and what it was to be used for, a strategic plan, jury reform, ethics rules which will affect this entire profession and which you know are close to my heart, and you did it in a professional way with hard work.

I have got to share with you, you have no idea -- I think you may think you do -- of the work of the people up here, people like Anne and the staff and Nancy, but particularly people like Lori when they are working night and day, from early morning to late hours to try to formulate a lot of issues into something that is easily digestible that allows you to make major decisions.

I am not going to, because of the length of time that you have had to work today, go over the things about the Bar, where we were, where we are. I just hope this, I hope you think the Bar is better than it was five and a half years ago, and if it was,
it was because of you, it was because of a Board that
made very tough decisions and important decisions, and
I guess always closest to my heart is the staff.

They served me through some very tough times
making tough decisions with a lot of tough changes.
we made changes in staff, and we made changes in the
organization.

I leave you with this. I didn't know much
about rep assemblies. In fact, there aren't many rep
assemblies left. In fact, I was supposedly an
organizational expert when I came here, and I said,
What in the world are we doing with a 120-member
commission, assembly? And I have watched you, I have
watched you work hard, and I have watched you improve
and grow. And from Florida, from the work that I do
there, the good thing about the internet is I can
watch everything you do, and I can't wait to see the
things that you do in the future.

I want to thank you on behalf of my wife Barb
for the kindness you have shown us, for the support
you have shown us, and I am going to miss you a lot.

Final comment. When you think about leaving
from one great challenge to another, I compare it to
when I brought Dawn from Texas here, who is another
wonderful example of new blood in our Bar, it's sort
of like you grab ahold of a tree, not wanting to leave
and not wanting to go, and your feet are running as
fast as you can to new challenges. I guess that's
what I am sort of facing. Thank you. God bless you,
and I look forward to keeping in contact with you in
the future.

(Appplause.)

CHAIRPERSON BUITEWEG: We passed our resolution regarding NCCUSL in April. Part of it was that Janet or the person designated by the Bar would come back and report to us about their annual meeting, and we have Janet Welch here to do that. Janet.

MS. WELCH: Thank you, Lori. I am here at your direction. She has already pointed out to you that you have a pink sheet that is the formal report that you directed me to give to you at your last meeting. It is a synopsis. It is complete, but user friendly, and I direct you to it.

When you made the decision to have the State Bar formally participate in the National Conference of Uniform State Laws, you connected this Bar and the state more firmly to a body of knowledge and an expertise that is part of a national conversation about the development of the law and about how important issues are evolving.

I am going to ask Nancy Brown very quickly as a visual to scroll through three documents that show you already what the State Bar is doing behind the scenes in response to your direction.

We have cataloged all of the Uniform State Laws that have been adopted in Michigan and how that compares to other states. We have cataloged all of the Uniform State Laws that Michigan has not adopted, and more importantly we have identified the sections and the committees that have an interest in the
subject matter of those Uniform State Laws, and we will be facilitating the consideration and the participation of those sections and committees with the substance of those acts.

And, in addition, we have identified the drafting efforts of NCCUSL that are underway that have yet to lead to the consideration of Uniform State Law, the enactment of Uniform State Law, so that Michigan lawyers can be more directly involved in what NCCUSL is producing in the future. So already in just in a few short months we have got boots on the ground and we are making progress on that.

What you have given, I think, to your fellow lawyers and to the Legislature and to the public is a gift, and as a personal recognition of that gift as a lawyer and as general counsel and as a member of the public, I want to thank you, and it is my gift to you to give you back the balance of the ten minutes that I have on the agenda.

(Appplause.)

CHAIRPERSON BUITEWEG: Thank you, Janet. And now that I am on my way out, I can tell you all that it so happens that my husband Tom is a National Uniform Law commissioner. Some of you may know that. I went to the annual meeting with him as a spouse guest. Sometimes he comes to things with me as the spouse guest, sometimes I go to things with him as the spouse guest. This time I was his guest down in South Carolina, and Janet was there. She was there at
every morning when the meeting started, she was there
every night when the meeting ended. They had
committees that met. She worked her tail off, and I
don't even know that her feet hit the beach once the
whole time she was there. So I can attest she worked
very hard, and I think she enjoyed it because she felt
she was with her kind.

And somebody who can give our boots some
traction, we have here, I would like to recognize
Senator Al Cropsey, Chairperson of the Senate
Judiciary Committee, has joined us today. He is
seated in the 29th circuit for Clinton County. I
would like to welcome him. He is going to join our
Assembly at the next meeting. Senator Cropsey.

(Applause.)

CHAIRPERSON BUITEWEG: We are now going to
move along to nomination and election of the Assembly
clerk, number 15 on your agenda. We have received one
application for clerk from Kathy Kakish, and do I have
somebody to move for the nomination of Kathy Kakish?

MS. JOHNSON: Elizabeth Johnson, 3rd circuit.

I move the nomination of Katherine Kakish for the
position of clerk of the Assembly. She is an
assistant attorney general and has been with the
Representative Assembly for three years, and I would,
in keeping with our time sharing initiative here,
direct you to her resume that's in your booklet, and I
move for her nomination.

VOICE: Second.

CHAIRPERSON BUITEWEG: Is there any
discussion? Are there any other nominations from the
floor? All right.

All those in favor of electing Kathy Kakish
for the clerk of the Representative Assembly please
say yes.

Any opposed.

Abstentions.

The motion carries. Congratulations, Kathy.

(Applause.)

CHAIRPERSON BUITEWEG: We now need to
recognize the outgoing chairs of the committees, and,
Ed, if we could have you call them off. We have that
still. I can do it if you want. I will hand out the
plaques, and we'll have you come forward if you
chaired a committee.

VICE CHAIR HAROUTUNIAN: Carl Chioini, who
was the chair of the Nominating and Awards Committee,
was already given his award, but I wanted to mention
his name.

Michael Pope, chair of the Rules and Calendar
VICE CHAIR HAROUTUNIAN: Steve Gobbo, chair of the Hearings Committee.

(Applause.)

VICE CHAIR HAROUTUNIAN: Kathy Kakish, chair of the Drafting Committee.

(Applause.)

VICE CHAIR HAROUTUNIAN: Rob Buchanan, chair of Assembly Review.

(Applause.)

CHAIRPERSON BUITEWEG: Without those committees -- I haven’t spent much time telling you all that they have done for us this year, but suffice it to say that we couldn’t have gotten things done without them. They have had a number of innovative ideas. Kathy responding to drafting request within five, six-hour turnaround time. She has just been amazing, and all the committee chairs have just done such a super job for us this year. So we couldn’t do it without them.

We also have certificates for Representative

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Assembly members who are leaving us because they are term limited. So I am going to read their names, and then if you could, after the meeting is over, come forward and receive your certificate. Brian Ameche, John Dewane, Douglas Hamel, David Haron, David Lady, Gary Peterson, Michael Riordan, Sharon Noll Smith, Tom Rombach, John Stempfle, and Stephen Taratuta, Mark Teicher, and Francisco Villarruel.

Thank you to all of you for your service on the Assembly, and why don’t you stand so we know who
you all are.

(Applause.)

CHAIRPERSON BUITEWEG: All right. I think it is time to turn over the gavel at long last. Is there anything else I forgot, because I am not sure my head is clear right now.

Ed, come forward. We are going to have Judge Zahra, the chief judge pro tem from the Michigan Court of Appeals, is going to swear you in.

VICE CHAIR HAROUTUNIAN: Let me also call on my wife, Susan Licata Haroutunian, who is a member of the Representative Assembly, and also my daughter, Krista Licata Haroutunian, who is also a member of the Representative Assembly, to come forward.

JUDGE ZAHRA: Do you solemnly swear --

MR. HAROUTUNIAN: I do solemnly swear --

JUDGE ZAHRA: -- that I will support the constitution of the United States --

MR. HAROUTUNIAN: -- I will support the Constitution of the United States --

JUDGE ZAHRA: -- Constitution of the State --

MR. HAROUTUNIAN: -- Constitution of the State --

JUDGE ZAHRA: -- and the Supreme Court Rules concerning the State Bar of Michigan --

MR. HAROUTUNIAN: -- and the Supreme Court Rules concerning the State Bar of Michigan --

JUDGE ZAHRA: -- and that I will faithfully discharge --

MR. HAROUTUNIAN: -- and that I will
faithfully discharge --

            JUDGE ZAHRA: -- the duties of chair of the
Representative Assembly --

            MR. HAROUTUNIAN: -- the duties of chair of
the Representative Assembly --

            JUDGE ZAHRA: -- State Bar of Michigan --

            MR. HAROUTUNIAN: -- of the State Bar of
Michigan --

            JUDGE ZAHRA: -- according to the best of my
ability.

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            MR. HAROUTUNIAN: -- according to the best of
my ability.

            (Applause.)

            CHAIRPERSON HAROUTUNIAN: Thank you. I want

to thank Susan, thank Krista, and there is -- as I

think John mentioned, John Berry mentioned, you know,
the officers do a lot of work. Bob Gardella as the
clerk, myself as the vice chair, but this past year
Lori Buiteweg has really done a tremendous job.

            These jury reform issues that have come, they
came pretty fast, pretty hard, and it called upon
someone to really spearhead the organization of
bringing together experts, not only in this state but
in other states, like Indiana, which, of course, I
suspect that you agree with me that their presence is
really invaluable, and that's because of Lori
Buiteweg. And so I would certainly indicate and ask
that we recognize our Past Chair, Lori Buiteweg, with
regard to all of her efforts.

            (Applause.)
CHAIRPERSON HAROUTUNIAN: And I will share with you the obligatory plaque that honors Lori as Representative Assembly Chairperson, in appreciation for distinguished service in the Assembly, the State Bar, and all Michigan lawyers, September 14, 2006.

PAST CHAIRPERSON BUITEWEG: I am going to have to hang this on a stud. It's really heavy. You know, I just, I just want to make just a closing quick comment about how appropriate it is that I think we do this changing of the guard in September. It is a month of change. Children are returning to school, we have bid farewell to summer, we say hello to fall.

In my own life I experienced major change in September when my son Michael was born on September 17th. His birthday is the day after tomorrow. No, three days from now. And the reason I may be seeing a little bit off key right now is because I was up all night because my sister delivered a baby this morning at 3:30, and right here in Ann Arbor, and so, you know, it was just -- it's another thing. It's just a time of change. It wasn't expected to happen until Friday. I thought we would make it through the meeting, but we didn't. I got the call at 12:30 last night that it was time, and I went over to her house and stayed with her four-year-old until we got the call that the baby was here, everything was okay. We are thrilled to have a new little niece, Isabella, and she is seven pounds on the nose and just cute as a
button. My sister is doing great.

So I wasn't going to sleep last night anyway about the agenda we had today, so I figured it didn't matter I was up all night because of the baby. So it is really a big time of change. And I have got to tell you this, this is just amazing. She had her first child during the September 2002 Representative Assembly meeting. Is that -- something is going on there.

But as I reflect upon the past year, I did manage to come up with a couple do's and don'ts for Ed, Bob, and Kathy. I will leave you with these thoughts, although you don't need any help from me. Your new officers are going to make you proud. Ed is attentive and energetic; Bob is thoughtful and kind; Kathy is precise and hard working. You are in excellent hands, but here are my suggestions. Okay.

Do hire a landscaping service, because you won't have time to mow or plow. If you already have such a service, hire an online bill paying company so you don't have to pay your own bills every month. Your time is precious. Spend it on things that matter to you. Spend your time on your family, your profession.

Don't worry about making a fool of yourself.
Have faith that your ideas and your questions are shared by others. Do temper your fervor for positive change with your inner voice of reason, and perhaps most importantly do take care of yourselves. Take the time to exercise, eat right, because you don't have time to get sick if you don't. And that's the mom in me coming out.

Do continue to forge good relationships with the State Bar staff, for your success depends in great part upon them. Don't plan on increasing your billable hour goal for the next 12 months. Ed and Bob, you have been terrific supporters and helpers and I couldn't have done it without you. And, as you know, I have given you each something that I hope you will keep and remember me by forever. So thank you very much for all your support.

CHAIRPERSON HAROUTUNIAN: This is from your firm, your law firm, a dozen roses, and we want to give that to you along with a card.

PAST CHAIRPERSON BUITEWEG: I will tell you what, you can't do something like this without a supporting firm, and the ladies at Nichols, Sacks, Slank, Sendelbach & Buijteweg are incredibly supportive. All of us believe strongly in the importance of doing volunteer Bar association work,
for the Bar association that they don't get penalized, that they don't miss out on a partnership opportunity because of it, because this work is so valuable to the profession and our 38,000 members. So thanks to the partners. Thanks to everybody.

(Applause.)

CHAIRPERSON HAROUTUNIAN: Before we adjourn, just two quick comments. One is I wanted to thank Court of Appeals Judge Brian Zahra for being here to swear me in. Thank you, Brian, I appreciate that.

Secondly, I want it take this opportunity to thank Judge Cynthia Stephens for her assistance in terms, not only of acting as the parliamentarian, but in terms of her assistance in organizing and focusing our attention with regard to these jury rules and how to deal with them. Because I have to tell you, when they all get thrown at you and you don't quite know how to be able to organize them, you do need assistance, and I will tell you that Judge Stephens really did a wonderful job in that regard, and I just want to make sure we thank her.

CHAIRPERSON HAROUTUNIAN: Do I hear a motion to adjourn?

VOICE: So moved.

(Proceeding adjourned at 4:16 p.m.)
REPRESENTATIVE ASSEMBLY 9-14-06

STATE OF MICHIGAN )
COUNTY OF CLINTON )

I certify that this transcript, consisting of 190 pages, is a complete, true, and correct transcript of the proceedings of the Representative Assembly on Thursday, September 14, 2006.

September 26, 2006

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