Proceedings had by the Representative Assembly of the State Bar of Michigan at Dearborn Hyatt Regency, Great Lakes A, 600 Town Center Drive, Dearborn, Michigan, on Thursday, September 15, 2011, at the hour of 9:00 a.m.

AT HEADTABLE:

VICTORIA A. RADKE, Chairperson
STEPHEN J. GOBBO, Vice-Chairperson
DANA M. WARNEZ, Clerk
JANET WELCH, Executive Director
HON. JOHN CHMURA, Parliamentarian
ANNE SMITH, Staff Member
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Dearborn, Michigan
Thursday, September 15, 2011
9:05 a.m.

RECORD

CHAIRPERSON RADKE: Good morning, ladies and gentlemen. I am going to call this meeting to order. Welcome to the Hyatt Regency in Dearborn for this session of the Representative Assembly.

At this time I will ask our clerk, Dana Warnez, to certify that a quorum is present.

CLERK WARNEZ: Yes, there is.

CHAIRPERSON RADKE: And we have a quorum, so we can continue.

I will at this time entertain a motion to adopt the proposed calendar.

MR. BLAU: Good morning, Madam Chair, Mike Blau, 6th judicial circuit, and move for adoption of the proposed calendar.

CHAIRPERSON RADKE: Is there support?

VOICE: Support.

CHAIRPERSON RADKE: Any discussion?

All in favor.

Thank you. We will proceed.

At this time I will entertain a motion for approval of the April 9, 2011 summary of proceedings.
VOICE: So moved.

VOICE: Support.

CHAIRPERSON RADKE: All in favor.

Thank you. At this time I would like to introduce Jeff Nellis, the chair of the Assembly Nominating and Awards Committee, to fill vacancies. Mr. Nellis.

MR. NELLIS: Good morning. As is always the case between meetings, we typically have a few people who move or get out of the Assembly, and so we had several vacancies to fill again. I am proud to report that with the help of several people, including Anne Smith, our committee, and I would like my committee members to stand and be recognized. I don't think people sometimes understand there is a lot of work that goes into this.

My committee members this year are Kathleen Allen. Please stand. Elisia Schwarz, Anne McNamara, John Mills, and LaNita Haith.

We also throughout this process get a great amount of help from folks on the Executive Board here. Victoria, Steve and Dana have been a great help, along with Anne, but I am very proud to report that we once again have all of the seats filled, we have a hundred percent participation, so at this time I am going to
read off the names of the folks that will fill those seats if approved.

In the 3rd judicial circuit, Rebecca Simkins of Detroit; the 20th judicial circuit, Peter J. Armstrong of Grand Haven; the 25th judicial circuit, Nels Christopherson, Marquette; 29th judicial circuit, Pamela Munderloh of St. Louis; and the 30th judicial circuit, Shenique A. Moss of Lansing. So at this time I would accept a motion to fill those vacancies with the persons that were mentioned.

VOICE: So moved.

VOICE: Support.

CHAIRPERSON RADKE: Is there any discussion, any other nominees? Thank you.

All in favor of seating these people to their respective circuits.

Any opposed.

Thank you. Thank you, Jeff.

Just as a matter of information, when we get to the awards section, after you have received your award, our distinguished recipients, the photographer is going to be at my left-hand side. This is where the photos will be taken, just to let you know.

Moving on in the agenda. At this time I would like to invite to the podium Stacy Combs, who
will introduce the recipient of the Unsung, of one of the Unsung Hero Awards. Ms. Combs.

And I forgot. I am also happy to introduce and welcome back to the Representative Assembly, a former chair, Bob Gardella. Welcome.

MS. COMBS: Good morning. As an attorney who has practiced child welfare law for the past 11 years and stood in the role of prosecutor, guardian ad litem attorney, defendant attorney, and juvenile court referee, Karen Cook I nominated for this award. Karen has truly stood out in many years of practice as an attorney who goes above and beyond for children in the child welfare law system. Karen is an expert in child welfare law. She also is an expert in DHS policy. She always is willing to help other attorneys. She can, in fact, cite case names, statutes off the top of her head. Many attorneys have her on speed dial to be able to discuss issues with her, and she can always point them in the right direction.

Karen always makes sure that the children that she represents are zealously represented, and she has made a difference in countless families, and children in the system. So that is some of the reasons why I nominated Karen, and I believe Mr. Gardella also would like to say a few words about
MR. GARDELLA: Thank you, Stacy. It's good to be back at the Assembly gatherings. I miss it. I have been gone for, I think, three years now, even though I did come back and visit at the April meeting and was able to speak with a lot of you at that function.

It's an honor to join Stacy Combs in the presentation of the Unsung Hero Award to Karen Cook of Oakland County. I thank the Assembly for recognizing Karen's wonderful accomplishments, and she does have wonderful accomplishments.

I know a couple years ago I tried a case where Karen was the guardian ad litem on the case in Judge O'Brien's court in Oakland County, and she put her total focus on this case helping a very, very troubled situation involving parents and guardians and really brought great order to a situation where there was chaos and animosity and the children were in the middle, and she turned that case around and helped the parties, I think, to see a lot more clearly when they couldn't see that without her help.

And the more I was involved in that case, the more I talked to other attorneys and was able to recognize that she does this in all of her cases, not
only does she do a great job in advocating for the children and working for the children's best interests, she also helps other attorneys in Oakland County and many other counties throughout the state in terms of knowing what the rules are, what all the case law happens to be, the statutes involving children protective law. And she also does many appellate cases in addition to her trial work and guardian ad litem work in Oakland County, but I think many of you may have spoken with Karen over the years and asked her for assistance and guidance, because some of the law can be complicated, and many of us need that assistance. She definitely is a great resource, and that's her passion, child protective law.

Karen gives her enthusiastic dedication for the children for whom she is appointed to protect. She steps into environments where kids are plagued with abuse, neglect. Probate and family court judges in Oakland County often appoint Karen as a guardian and guardian ad litem for protecting children. While serving as a GAL, Karen is known as a thorough investigator and for being diligent in her efforts to make sure that solid remedies are put in place to meet the needs of the children, both physical needs, emotional needs and also the academic needs of the
children when those are at issue.

She demands a code of conduct for the children's guardians, the foster parents, the parents, and even the Department of Human Services. She often devotes hours, uncountable hours, tending to the duties without being paid. She many, many times will work on the weekends and in the evenings to make sure that the needs are met for the children, and she carefully coordinates supervised parenting time sessions. She also seeks to comprehensively implement orders of the court and also will ask the court to change orders when things are needed and the orders are insufficient.

Karen graduated from Duke University with a B.A. degree. She also graduated from Wayne State University with her J.D. Karen was admitted to the Michigan Bar in 1976. She practices family law, probate law and consumer law in Oakland County. She has been a member of the State Bar of Michigan's Children Law Section. She was on the advisory board to prepare the guardian ad litem protocol handbook published by the Michigan Judicial Institute. The 6th Circuit Court judges and Oakland County probate judges frequently appoint her as a guardian and guardian ad litem for the children, and that's been her priority.
in her career.

The judges in Oakland County are grateful for Karen's special talents and as a troubleshooter in difficult child protection cases. In fact, I was speaking to some of the judges yesterday asking them to give their thoughts on Karen Cook, and even though they had busy schedules -- it was motion Wednesday in Oakland County -- they took time out of their schedules to give me a few quotes.

First of all, Judge Daniel O'Brien, his quote reads, I am regularly confronted with a difficult case where the welfare of the most vulnerable members of the community is in jeopardy. In those cases I often think of Karen Cook as the one person I can count on to appoint, work tirelessly to protect their rights.

Judge James Alexander stated as follows, Karen Cook has always been a strong advocate for children. She performs above and beyond the duties expected by the court. I have great respect for Karen's unwavering determination to help children as their attorney, guardian ad litem and friend. Congratulations, Karen, for a well-deserved award.

And also Cheryl Matthews, I think she summed it up maybe the best from the attorney's point of view. Karen's encyclopedic knowledge makes her the
Cliff Claven of family law. And for those of you who don't know who Cliff Claven is, he was the postal worker on Cheers years ago, in case anybody has forgotten.

The award that we present to her will hopefully show her that we appreciate all of her hard efforts and the commitment she has made. We congratulate Karen Gullberg Cook as this year's recipient based on her commitment to children in Southeastern Michigan.

(Applause.)

CHAIRPERSON RADKE: It's a great honor to be able to present this Unsung Hero Award to Karen Gullberg Cook.

MS. COOK: Thank you. Good morning. Receiving this award is quite overwhelming, and I am pretty nervous, but I want to thank Stacy Combs and Robert Gardella, my colleagues, for nominating me. Thank you, Representative Assembly, for giving me this award.

To be brief and to be gone is a virtue in these types of occasions, but I do want to share one experience which I think exemplifies why I do what I do and why I love it so much.

In the summer of 2001 a grandmother...
petitioned to be guardian for her granddaughter, who was about 12 years old and was getting severely abused. A stepmother was beating her with a heavy metal dog chain, and she didn't have statutory grounds for guardianship, but the judge was concerned that DHS had not petitioned the child into a child protective proceeding, so Judge McDonald called me in and said, Can you fix this? I said, Well, just keep the guardianship case open so I have some authority. So for two months I kind of annoyed DHS and the prosecutor's office trying to get a petition filed. It was finally filed on 9-11-2001.

We had a preliminary hearing, court did not close, and an order to take into custody ensued, and Nicole, the little girl, was picked up later that night. And when I later spoke to her about getting removed from the abusive situation and being placed with her grandmother, she said to me, This might have been the worst day in American history, but it was the best day of my life, because you got me to my grandma's.

So I think that's a reward in itself for being able to help that little girl. I ran into her grandmother recently in the courthouse. She is now in nursing school and doing extremely well. To be able
to do that kind of work is extremely rewarding, and to receive this reward is an additional blessing. Thank you very much.

(Applause.)

CHAIRPERSON RADKE: At this time I would like to introduce Lawrence T. Garcia, who will present the second Unsung Hero Award of the morning. Mr. Garcia.

MR. GARCIA: Thank you very much. Good morning. Buenos diaz. It is my honor to address this august body and also my honor to introduce a friend of mine, Mayra Lorenzana-Miles, as a recipient of the Unsung Hero Award. Mayra is my personal hero because she has built a practice the many years as she has been working as a lawyer that is representative of the reasons that I got into wanting to be a lawyer in the first place when I was a much younger and much more idealistic person.

Mayra's career has been one of service, dedicated, tireless, thankless service, and it is only fitting that we recognize her for that today. Mayra always has a dozen pro bono cases open at any time, and in her work what she really tries to do, I think, if I could sum it up in a sentence, is to help people legally navigate our broken immigration system, which is so cruel and so unfair to so many people today, but
Mayra is helping to work within the system to the greatest degree possible to ameliorate some of the suffering that's caused by our inadequate system.

For over 15 years that I know Mayra has been helping people, many of them Latinos, in this way, volunteering twice a month at basically a one-woman pro bono clinic is what Mayra is. She is just a walk-in pro bono clinic for people with immigration problems. You might have guessed all of that about someone receiving the Unsung Hero Award today, but I would like to share with you a few tidbits about Mayra that you probably wouldn't guess.

First, looking at her, her youthful appearance and all of her energy, you wouldn't guess that she is married with children and has been practicing for 28 years. They have been very kind to you, Mayra.

Second, during many of those years that she has been practicing Mayra was legally blind. She has macular holes, which is a very serious sight-threatening disease. It is progressive. It's treatable, and Luckily in her case she has had a lot of healing take place. But for much of the time she has been practicing as an attorney she has been unable to drive, for example, because she was blind.
She was one of the founding members of the Hispanic Bar Association of Michigan. A lot of people don't know that. And she is a mentor to nearly every young attorney that she meets, especially the ones that practice immigration law. A lot of people don't know that, because she is a very humble person.

Finally, when you hear her accent, you might not believe this one, but Mayra was actually born a United States citizen in Puerto Rico, and she is just a remarkable woman. She is my personal hero, and I hope today you will be an unsung hero no more, Mayra. Congratulations on this award.

(Applause.)

CHAIRPERSON RADKE: You got to give the paparazzi their due, right? It is a great pleasure to be able to present the Unsung Hero Award to Mayra Lorenzana-Miles.

MS. LORENZANA-MILES: Thank you so much, and I do have some notes to your benefit, because I know I have just a few minutes, and if I get talking about my passion, I would be thrown out of here.

I am honored to be recognized by this group that I respect so much and did so much for me, especially when I began my practice here after practicing in Puerto Rico and Louisiana for six years.
I came here in 1995 with my husband and family who are the light of my eyes and they are first, second, third fourth. They are first thing.

And through this body and belonging to committees and coming here and getting my bag and going to all the stations, not knowing anybody, one committee at a time I began a solo practice, and I did not want to do immigration. I was kind of forced into it because the lawyer referral lines were referring to kind of case it was, domestic or immigration because my accent, and I opted for immigration. I did not want to, because I wanted to incorporate myself into the community and not limit myself to maybe the Latino community.

But I want to take the opportunity to tell you how blessed I am and how lucky I am that I was pushed by life to do that and in this time invite you -- I know that I am preaching to the choir, because if you are here you are dedicated, you have service, and you are doing this when you are not getting paid.

So this room is full of unsung heros, because I think as attorneys we have more than one case that we have not been paid, we have more than one client that has been our worst enemy because they didn't give.
us all the information we needed. We have all been
victims of a judge in a bad mood or the prosecutor
that does not tell us all, so we all are. I think I
invite us to a flame that's in our hearts that we all
have, because we are all unsung heros.

But a little bit that I want to tell you,
sometimes it's not that I embarked in this big
crusade, although many times I did feel like don't
give up the fighting, the meals, and crying a lot. I
am sure that the other recipient also feels the same
thing.

But I invite you to -- we are given the
unique opportunity as attorneys to serve. And I think
it only to service we can find the best of all, and if
we are all the best, we can make a whole, complete
country, nation, planet that is better. And I
challenge us to look at the people that are around us,
not because of their faith or their color of the skin
or what is different, and begin to think again of all
of us, we are one, and that's what made us great.
That's what makes the association so successful,
because all the little pieces that we can make
something different, and I would like us to be
challenged to begin to live without fear and serve in
a case even though we may know that we may not get
paid, because life will take care of us once we find
that inside us that is what we all came here for.

So I am very honored. I am happy for the
people from my office and my mom and my sister that
came from Puerto Rico for this five minutes of glory,
and I thank you for the opportunity, because I do
respect this body. Lawrence Garcia James Feinberg,
and the people from the Hispanic Bar Association who
have been there through the years, thank you very
much. And, again, I think we all do a little bit,
this place can be a whole lot better. Thank you.

(Applause.)

CHAIRPERSON RADKE: At this time -- I am so
excited about this one -- we would like to invite
Michael Hale to the podium to introduce this year's
Michael Franck Award recipient, and this is a great
honor for me personally, because Professor Clark
taught me at DCL, and for those of you who were not at
the awards banquet last night, Harold Norris also
received an award, so we are doubly blessed this year
if you are a DCL graduate to have two of our esteemed
professors receive awards this year. Michael Hale.

MR. HALE: Good morning. Someone once told
me in offering these kind of introductory comments and
remarks that you have to treat them a lot like a mini
skirt. You have to make sure they are short enough to make it interesting but long enough to cover the essentials.

So, Clark, I am going to do my best to try to cover the essentials that I have on you for your 37 years as an educator and a professional, because, in fact, the Michael Franck award is given annually to an attorney who has made an outstanding contribution to the improvement of the legal profession. It has been bestowed on many dignitaries since 1998, including Michigan Supreme Court justices, many other judges, State Bar presidents and prominent attorneys who have made a special mark upon this profession, and this year the award unanimously goes to someone who humbly refers to himself as school teacher, Professor Dr. Clark Johnson.

For those, such as myself, who recall the hallowed halls of the Detroit College of Law, learning from Professor Clark Johnson was originally always a rather inspiring experience, whether it was his often to the point comments in class, such as that's what you do to them on cross-examination, or watching him wheel down Elizabeth Street in his it O.J. Simpson-like Bronco carrying his loads of books.

Dr. Johnson was and is a unique kind of
educator who has made a significant difference in the
lives of countless budding attorneys. This certainly
has continued in the years following DCL at the now
Michigan State University College of Law.

Clark also was very, very pragmatic in some
of his teaching for those of you who had some of his
classes. He actually would teach life lessons as
opposed to just case law. Some of the lessons that he
would teach the students, in fact, were that there is
no such thing as drinking two beers. It is either one
or 12.

The other one that comes to mind is his
lesson that you don't ever want to take a sleeping
pill and a suppository at the same time. I think
maybe Clark may have learned that one the hard way.

It's rare to find a law school professor who
imparts compassion for the lowly law student. They
generally do not occupy the same space, yet Clark has
found a way, somehow understanding that the agonizing
metamorphosis from layman to lawyer does not always
have to be agonizing all the time. He is known for
telling students that practicing law is like having a
front row seat to the greatest show on earth. I am
sure we can all relate to that in many ways.

And really one of my favorite testimonials
about Clark Johnson is at the end of his examinations, for those of you that have had him, I am sure he still does this today, at the end of the final examination, you go through this agonizing exam, and there would be a note from Clark at the end saying, Your tuition with me is good for a lifetime. If you ever have anything that I can do to help you, please call upon me. And he meant it. I am sure I am not the only one who has taken him up on that offer and called upon him for guidance in my days since law school.

That spirit and attitude simply made you want to learn the law and taught you what it meant to practice law. The simple gesture at the end of these examinations is perhaps one of the finest testaments to the true care he has for his students and the difference one educator can make in the lives of those he is educating. This is, indeed, worthy of recognition as a substantial improvement to the profession that we are all part of.

Clark is an alumnae of this very Representative Assembly he told me recently -- I did not know -- having been elected several years ago. He has always given back to this legal community in ways even outside the educational process.

Seventeen years ago I recall Dr. Johnson.
advising me upon my graduation from law school at DCL about a career opportunity with a major firm in Detroit, and he told me, he said, You are lucky, Mike, but you are not as lucky as they are to have you. This was the spirit of engendering confidence in young lawyers that makes him in some ways larger than life in my view of the legal community and deserving of this award.

At one time Dr. Johnson was cited in the Detroit College of Law Journal about achieving yet another degree, this one a Ph.D. in psychology. And he remarked, I actually might just plan to get another degree, maybe two. He was always learning, and he has really been a great example for students even outside of the classroom in that regard.

When Clark learned he was going to be the recipient of this award at my nomination, he wrote me that there were many others far more deserving and that all he had ever done was to really look after his students. This was not surprising to me, for that is what Clark Johnson has stood for as an educator for over 37 years. He often signs his letters and emails Clark Johnson, school teacher.

It is time that this inspiring level of humility be recognized for the significant
improvements he has made to the legal profession and how fitting that would be with the Michael Franck Award. Stimulating, intelligent beyond words, artful with language, eloquent, a master of the law. The only other adjective that really comes to mind in speaking of Clark Johnson is that of a giver.

There is no one quite like this man in the legal community. Just ask around for those that he has touched in so many ways. And among all his great accomplishments he can now add one more, and this one is a big one, the substantial honor of being a recipient of the Michael Franck Award, named after an attorney who stood for something of significance and for whom the building housing the State Bar of Michigan was named in Lansing. Please join me in congratulating Clark Johnson.

(Appause.)

CHAIRPERSON RADKE: I am so proud to be able to present this to Dr. Johnson.

DR. JOHNSON: Good morning. I am Clark Johnson, school teacher. Trying to gather myself together.

Mike, the last I knew, it was not proper to argue facts in closing argument that had not been put in as evidence. However, I am so honored to be here,
and I thank you so much.

Mike did tell me my remarks were limited to five minutes. I think he has forgotten that what it takes to say in five minutes generally takes me about three hours. However, I want him to know that he, among so many in this room, faces that I recognize, former students, that we are all so fortunate, every one of us, blessed to be here, blessed to be part of the Bar, blessed to be part of the Representative Assembly.

And as one speaker said, I dedicated my life to giving in this and giving in that and the children, what have you. I am a school teacher. I decided that I could do my very best there. Had a lot of trial experience, been in every court in the country from the lowest municipal court all the way to the top, and for me the greatest rewards have come in being a school teacher. And I will be so ever grateful for having had the opportunity to serve in that capacity and to have this great ride in life, and I do thank all of you from the bottom of my heart. Thank you so very, very, very much.

(Applause.)

CHAIRPERSON RADKE: I would like to thank all of the award recipients and the presenters for this
morning's presentation. Thank you so much for bringing these people to the attention of the Representative Assembly, which brings me to another point, you know people in your own lives that would be worthy recipients of those awards, so think about who they are and submit those applications and nominations. Thank you.

This is the point at the meeting when we are supposed to be receiving remarks from Tony Jenkins, the current State Bar President. And I have been advised that we are supposed to take our break right now, so sorry about that. Go fill your coffee cups up and we will be back in ten. Five minutes. Thanks.

(Break was taken 9:40 a.m. - 9:52 a.m.)

CHAIRPERSON RADKE: This is the time set aside actually for remarks from the Chair, and just to apologize to the Assembly for my phone going off, that was Tony Jenkins, and apparently we need UPS, because I guess our logistics failed. Tony didn't realize he was on the agenda, so we are going to have a little stand-in for him. Bruce Courtade has graciously agreed to step in on behalf of Tony, so I will give you the podium in just a few minutes, Bruce. Thank you.

First of all, I want to thank the staff of METROPOLITAN REPORTING, INC. (517) 886-4068
the State Bar, and especially Anne Smith, because she
is the person who takes care of the logistics for the
Representative Assembly, and she more than anybody has
the backs of the Executive Committee for the
Representative Assembly and makes us all look so good.
So any screw-ups are our own. It had nothing to do
with Anne, I just wanted to point that out.

I would also like to thank the Board of
Commissioners, as well as if Tony was here I would
shake his hand, Janet Welch, our executive director,
for all the help they provide to the Representative
Assembly throughout the year as well.

Thanks too to all of our RA committees and
their chairs for their hard work in getting ready for
this meeting today. You don't know how much Dana and
Steve and I appreciate your hard work. I know that we
thank you, but it's really from the heart, and we
appreciate all that you do. And, again, I want to
thank all of the Representative Assembly members for
being here, because this takes time away from your
practices and you earning a living and you do this
voluntarily because, like so many of us, you are a Bar
geek.

Speaking of which, at this time, because
seems to me half the room is filled with former chairs
of the Representative Assembly, I would like all these
former chairs to stand and please be recognized by
your colleagues. I think that includes Nancy Diehl,
Bruce Courtade, Elizabeth Johnson, Kathy Kakish,
Bob Gardella if he is still in the room, Tom Rombach
who is already on his feet. I hope I didn't miss
anybody. Carl Chioini, sorry. Thank you so much.
Can we have a round of applause for these people.
(Applause.)

CHAIRPERSON RADKE: They just keep coming
back. We love them.

It has been a great year for me to be Chair
of the Representative Assembly and to be able to stand
up here and work with all of you to make the policy
decisions and set the course for the State Bar of
Michigan, and I appreciated the opportunity that you
have given me to do that, and so thank you all for
that.

At this point in time I want to introduce an
issue that has arisen that you will be hearing more
about in the 2011-2012 Bar year. As you know, the
State Bar has a standing committee on the unauthorized
practice of law, and that committee selected an ad hoc
committee to help them. That ad hoc committee was
chaired by our own chair-elect, Steve Gobbo. Thank
you, Steve, for that.

   And the purpose of that committee was to come
up with the definition of the practice of law. And
you will be presented in the future, in the near
future we hope, with an opportunity to vote on
amending the rules of the State Bar of Michigan to
include that definition.

   I want you to know that in selecting the
members of that ad hoc committee, the UPL committee,
picked distinguished practitioners from across the
state and from a broad constituency of sections to
develop a uniform definition, and as you receive more
information during the course of the coming Bar year
about this definition, I want you to consider what
effect it will have and ask you to support it to
assist the State Bar of Michigan in its efforts to
protect the citizens of our state from the
unauthorized practice of law.

   And I just mention this now to alert you to
the importance of this issue, which the Board of
Commissioners has requested be presented to this body,
because it is going to change policy for members of
the Bar, and so I want to alert you to that so that
when you start receiving this information you will
give it due attention on behalf of the citizens of the
state of Michigan as well as members of the State Bar.

I just have a few housekeeping matters that I want to alert everybody to just at this point, because I am the chair and I can do that, and that is you know we have a contested election for clerk this year. There are three people running. You have received that information and their background in your packets. At the front there are envelopes for each member of the Assembly. The tellers who have been selected will be passing those out. When you get your envelope, please carefully print the name of the candidate you are selecting, put it back in the envelope, and the tellers will recollect them, and then they will convene and count the votes and deliver a result to us later in the meeting.

At this time it is a great pleasure for me -- Julie, oh great. Even better. Bruce Courtade has alerted me that in place of Tony Jenkins that he is ceding his position at this podium to our President-Elect, Julie Fershtman. Welcome, Julie.

(Appause.)

PRESIDENT-ELECT FERSHTMAN: All right. Talk about speaking when you had no idea that you were going to be here. Yes, I am not Tony Jenkins. I know I look a little bit like him, slightly challenged in
The height department. But, first of all, I would like to welcome all of you here.

Ten years ago I was chair of the Representative Assembly and had an absolutely wonderful time working with the then composed Representative Assembly, some of whom I think are back. You do, as you know, a wonderful job. So I would like to thank you for being here, thank you for the work that you are doing, not just now but at our next meeting next year.

And I would also like to thank and to congratulate or outgoing chair, Victoria Radke. This is a difficult meeting, because it's exciting. You have got a great agenda, so many different things to cover, and then after all of this Victoria steps down. So I know it's a tough time, but you have done a wonderful job as chair, and it's been a pleasure working with you at the State Bar on the Board of Commissioners.

I would also like to congratulate Steve Gobbo who becomes the new chair and who I will be working with quite a bit in the year ahead and, of course, Dana Warnez who steps up to the vice chair.

And I would like to thank in advance the three candidates, or congratulate in advance the three
candidates, because one of you will win the election, and I know we have a three-way race for clerk, which is not typical of a Representative Assembly election. When I ran for Assembly clerk way back when, it was an uncontested election. It was just a walk straight in. I think everybody was, frankly, not interested at that point, and I just happened to be the only one standing, and there I was.

But it will be a challenging race. You will learn a lot if you haven't already about the candidates. So I would like to thank the three of you for stepping up and looking to a leadership position in the Representative Assembly, which of necessity will give you a leadership position in the State Bar of Michigan. You will serve on the Board of Commissioners, you serve as you move up to vice chair and chair on the Executive Committee, so the position that your leader here, your top two leaders in the Representative Assembly have, takes them even further in terms of Bar governance. So preemptive congratulations to the three of you who are stepping up.

I know that you have awards that the Assembly has given and will be giving. There is the Unsung Hero Award, and that will be given later today.
CHAIRPERSON RADKE: No, already done.

PRESIDENT-ELECT FERSHTMAN: Already done.

They just threw me in here and didn't tell me what was on the agenda. You think I would have known.

But congratulations to the award winners, and that would be to Mayra Lorenzana-Miles and Dr. Johnson, and I have Ms. Cook in my notes here.

CHAIRPERSON RADKE: Karen Gullberg Cook.

PRESIDENT-ELECT FERSHTMAN: Karen Gullberg Cook. Of course the two names would have been a little bit easier than Ms. Cook, but that's okay. All right, Bruce, don't worry. I still love you.

But congratulations to the award winners, and I offer all of you the invitation that when we come back next year we will have other award winners to congratulate and think about people that you believe are deserving out there and put their name in for consideration.

You may want to know about the Bar, seeing that this was supposed to be Tony, the president's presentation. What I will leave for you, because we have a lot to cover in the morning's agenda, is that the State Bar of Michigan is in very, very good shape. The leadership in the State Bar of Michigan, with one exception, me, is very strong. We have a tremendous
Board of Commissioners. We have dedicated officers, and, as you know, we have an exceptionally good executive director in Janet Welch. She has done and will continue to do an absolutely wonderful job.

We are, I should tell you, because one of the things I have done is travel around the United States. We are here, in the state of Michigan, considered widely, nationwide, as one of the leading Bar associations in the country. We are on the cutting edge. We are a Bar that people look to. Frankly, they copy us. They do what we do after we have done it, because we have been very successful with our initiatives and our programs.

So I want you to know that not only are we strong, but we are clearly and very widely perceived as being a strong Bar association. So I commend the leadership of Janet, there you are, and of course the staff of the State Bar of Michigan that have worked very, very hard, and then of course my fellow commissioners, Representative Assembly leaders, and all of you for making the Bar association what it is today.

Couple of things that I wanted to mention and then I will step down, because, again, you have a lot to cover. Tonight is the Diversity Reception and,
yes, you have seen signs. People are probably cornering you about it. It takes place over at the Henry Ford Museum. Shuttle busses will take you back and forth. Don't even worry about driving to and from. We have got that covered. So I hope that you will all join us at the Diversity Reception, which is tonight at the Henry Ford Museum. Tickets are at $10. The event starts at 6:30.

Between now and then, if you have dead time, there will be plenty of receptions that you can either go to invited, like the Law School Reception, or you could be like me and just crash a few of them and nobody will really complain, but there will be plenty of receptions going on between now and then that will keep you busy, or you can check your email on your Blackberry.

Speaking of diversity, one final note I leave with you, and that is the diversity pledge. The diversity pledge was initiated a year ago. Law firms, lawyers, corporations, schools, sections of the Bar, committees have signed onto it. I strongly believe that all of you as leaders in the Bar have an opportunity that awaits you to sign on to the State Bar of Michigan's diversity pledge.

So if you haven't done so already, think
about doing it, and if you are wondering how that gets done, easy. Do a little surfing on the State Bar's website and you will see it and you will see how easy it is to simply put your name in as somebody who is committed to the goals of diversity for the Bar and for the profession.

I will be seeing more of you in the year ahead. I would leave with my final parting comment, which is this. One of my goals as the State Bar of Michigan President, which, of course, hasn't begun yet because this is Tony's last few hours, but one of my goals is to be accessible and to communicate, and I strongly encourage all of you to take advantage of that opportunity that I am giving you to contact me if there is something that you think that the Bar should be doing better, a concern that you have, an unique idea that you have, something that you would like to help do within the Bar that I can assist you with. I invite all of you to contact me at any time.

And you will learn a little bit later at the inaugural luncheon about a blog that's being launched. Everybody loves the State Bar of Michigan blog. Janet does a great job with it, but there is a blog going out called SBMpres2012.com. It goes live in a couple of hours. It's my blog, and I will be updating
everybody about my travels all over the state,
sometimes even at Washington, D.C. and what I will be
doing, people I will be meeting and what's happening
around Michigan mainly in the profession. I think you
will find it interesting, and keep your eyes open for
it. It will be not just a journey with me, but I
think it will also be an eye opener as you see the
types of things that are happening in the profession.
So have a wonderful meeting, and thanks for
allowing me to pinch hit.

(Applause.)

CHAIRPERSON RADKE: Thank you, Julie. It's
always great when someone can step up at the last
minute. We appreciate it. And I would like to thank
Bruce, who I know sweated a few minutes when he
thought he was going to be up here. Thank you, Bruce.

We will now have remarks from Janet Welch,
our executive director, but before I let her get to
this microphone, I would be remiss if I didn't ask for
your acknowledgement of the fact that she has been
nominated as a Woman in the Law Award by the Michigan
Lawyers Weekly, and we are so proud of Janet and her
hard work.

(Applause.)

EXECUTIVE DIRECTOR WELCH: Thank you,
Victoria. If I could, I would have taken myself off the agenda after extravagant praise, because I always worry about disabusing people of the notion that it all is true, but I am pleased to be here. I have come to you directly from speaking to the Solo and Small Firm Institute, and my message there was that the world is changing so fast in so many ways, and the way in which it is changing is impacting the practice of law in such a significant way that the Solo and Small Firm attendees are to be commended for their good sense in checking in.

And my message to you in regard to the topic of how fast the practice of law is changing and all the forces that are coming to us is that you are at ground zero for that change, because what it means is that our Rules of Professional Conduct, the tools that lawyers have, all of those are in flux, and you control how that's going to look in Michigan.

Victoria has already indicated to you that the question of how we define the practice of law is coming to you, and that is just one of the examples of the way in which legal services is being impacted by technology in particular and by the access to information about legal knowledge that used to be behind closed doors on our shelves and is now on the
internet for everyone to see.

   Julie, I can't embrace Julie's praise of me, but I can embrace the idea that the State Bar of Michigan is at the cutting edge of paying attention to what's going on and making wise decisions about how to guide our members in moving forward and that we are doing that for the cheapest cost of business for practicing law in the country. Maryland might have some sort of an argument with us, but I think we would win it.

   The average practice of law, if you don't include even continuing legal education, the average cost to practice law that you have to pay just to not be accused of practicing law without a license is $389, so we are significantly below that amount, and we don't anticipate that's going to change for a long time. I know that's one of your responsibilities, to pay attention to what our dues are, so I wanted to call that to your attention.

   Elizabeth Lyon is on the agenda, so I won't wander into her territory and tell you some of the things that are going in terms of the Judicial Resource Report, but change is happening all across the board.

   I want to update you on one interesting piece
of the way in which the legal landscape is changing
globally that I talked to you about last year, and
that was that in England they have changed the rule
that says that legal practices cannot be owned by
nonlawyers. And I said that I think we need to be
concerned about that change, because if it is
successful commercially, if it looks like it's making
more money, giving more people legal services, I don't
see how it will be resisted here, although when I told
you that I thought that that was several years down
the road for us to worry about because we have such a
balkanized set of rules of professional conduct across
the whole country.

What's happened in the past year that I
wanted to tell you about, it's happened since the last
annual meeting, is that a law firm on the east coast
has actually brought a lawsuit against the State Bar
of Connecticut, the State Bar of New York, the New
York State Bar Association, and the New Jersey Bar
challenging that rule. And just last Friday I was at
a symposium on the law at Michigan State College of
Law, and one of the professors there, he has written a
paper, the premise of which is that the Robert's court
will uphold that challenge on first amendment grounds.

So that's the sort of earth-shaking challenge
that's coming our way, and if you want to describe to your constituents what that might mean, my shorthand for that is a legal practices aisle at Wal-Mart, that we will have, you know, toothpaste aisle 4, toilet paper aisle 12, testamentary trust aisle 25. That, I think, illustrates how important your work is and how important all of our work is going forward.

Before I relinquish the podium, I just want to express my thanks to Victoria, and I want to let you know what a passionate and tenacious advocate she is for what you do on the Board of Commissioners. It has been a pleasure to work with her and for her, and I will miss her very much. Thank you, Victoria.

(Applause.)

CHAIRPERSON RADKE: Thank you, Janet, very much. I am going to miss the Board of Commissioners, especially our executive director, who is such an advocate for our Bar and its members throughout not only the state of Michigan but around the country.

And from this point you are going to hear from Elizabeth. Where are you?

MS. LYON: Behind you.

CHAIRPERSON RADKE: I am looking all over for her and she sneaks up. Elizabeth Lyon is going to give us our public policy update. Welcome, Elizabeth
MS. LYON: Good morning. So the beauty of this vantage point is that there is no clock that I can see, and since we are running ahead of schedule, as far as I am concerned we have a lot of time to hang out and you can ask me lots of questions. I will keep it brief.

I always like to start the report with updating you on our status about tax on legal services, since that has been one of the bigger issues that we have talked about when I am able to provide you with public policy updates. I am happy to report that there is still no action that we are anticipating for a tax on legal services to be discussed. The legislature, if you read the newspaper and those sort of things, you know that they have a budget in place, they have an anticipated budget for next fiscal, they have done some major tax changes, and as far as what we are hearing right now, we don't anticipate that any future tax changes they may do will include the sales tax. Although we do hear discussion about what they might do with the personal property tax and those other types of issues that are typically more towards businesses and helping businesses reduce taxes.

I think another one of our favorite priority issues is reform of the public defense system. I
don't have anything concrete to share with you today.
I believe in the spring we talked about the approach
of establishing a commission of high level
stakeholders that would carefully review the issues
and make recommendations back to the legislature. I
think this fall you will see some very public activity
on that public defense commission concept moving
forward and that we will see that starting to really
ramp up this fall and through next summer. So in the
spring I will have a lot of details to share with you
about that, but as we are able to share information,
we can do email blasts and let you know sort of as
that's happening.

Also happy to report that Senate Bill 152,
which implements audiovisual recording of in custody
interrogations, which is a direct action and response
to what this body voted on several years ago under the
leadership of Nancy Diehl and others that led that
effort. That bill came off the Senate floor
unanimously, which is a really tremendous
accomplishment, and we anticipate a hearing in the
House this fall and to get it off the House floor too.
So congratulations to you on the implementation of
that legislation that was supported by this body.

We will also actively working on legal aid
funding. As you know, the federal government has had one or two parols about funding issues and budgets in the last couple of months, and we are certainly seeing that potential impact ripple down to legal aid funding and what that means for Michigan and legal aid providers. Just yesterday the Senate Appropriations Committee marked up that legislation, that bill to do the funding, and did an across the board cut of two percent that included legal aid funding, which is a much more generous sparing of that funding, if you will, than what the House has proposed. So, again, we'll have to see it go into this reconciliation process that we are all getting used to watching on the evening news, and hopefully it does improve.

The other issue, and I was asked quite a bit about this yesterday, so I am going to bring it up today, thinking that perhaps the interest exists here too, is the proposal to increase the jurisdictional limit for small claims court, and that was voted out of the Senate Judiciary Committee Tuesday afternoon increasing the level from the current 3,000 to 8,000. That was a substitute bill. It had been originally proposed to raise the limit to 10,000, so we got it down to 8. The Bar only supports an increase based on inflation, which is about 3,800, so there is still a
pretty big gap there that we are trying to work on in the Senate floor and out of the House, but that is certainly an issue that I know has gained some interest.

As Janet mentioned, I think that we will see a flurry of activity this fall. We are getting very used to working with this administration and the current Republican majority in the House and Senate, which tends to work through issues very quickly. Now that they have done the budget, we will see them digging their heels into more policy tech matters, more substantive law matters, and perhaps in anticipation of the fall election some more partisan issues as well.

We do know that there will be sort of a comprehensive package to look at proposals within the judicial branch, and this will mainly be implementation of the recommendations that were released in the Judicial Resources Recommendation report. If you are not familiar, that's a report issued by the State Court Administrative Office. You may have seen the headlines and the editorials that called for the reduction of the size of the bench, and so we are anticipating those bills to be implemented and considered in both chambers pretty quickly.
Certainly that's something that the State Bar anticipated while in the Judicial Crossroads Task Force and other recommendations that were encapsulated within those recommendations will also be coming up this fall.

We are seeing a lot more use of technology in the court system. Something that will be particularly careful to watch there is that in criminal proceedings, if we start to use technology, making sure that it's two-way interactive or other types of systems are in place to make sure that we are not violating the confrontation clause. That's something that we consider to be very important.

We are also seeing a lot of interest in specialized courts and treatment courts. There will be legislation introduced this fall at least to implement in a larger scale veterans courts that help to coordinate benefits and help those who have crimes specifically relating to something to do with service, like PTSD or those other types of issues.

We often talk a lot about legislation in these updates, but there is also a lot happening too within the Supreme Court administrative arms and their ability to issue rule amendments. A few of the items that have received some great debate at the Board of
Commissioners has to do with a proposal to limit what you can receive for a referral fee in a case. Also on some of the rules, that they are looking at advertising materials. And certainly within the context of communicating the State Bar's positions on the advertising materials, we have reiterated this body's position on what should be done in terms of family law matters, which I know was important to this body and something that you adopted. So there is lots of stuff happening there as well.

With that, I would open myself up to questions if anybody has any. You are letting me off easy I see. Feel free to tag me throughout the annual meeting or any time. You know how to get in touch with me. I am happy to answer.

MS. SADOWSKI: Elizabeth Sadowski, 6th circuit, Oakland County, Rochester, Michigan. Is anything being done about the mandatory fee paid e-filing proposals that are going on right now? It's of great concern to me as a family law practitioner, because Oakland County is introducing a mandatory fee paid e-filing, which is to me very, very troublesome.

MS. LYON: I think that we will potentially see the courts encouraging e-filing more and more. We have heard, and I think maybe Janet is better -- go
EXECUTIVE DIRECTOR WELCH: Is this on? Okay. I can tell you what we are advocating for through the Supreme Court, and that is to make sure that as e-filing is implemented that the rules ensure that you don't have a different system from circuit to circuit and that the fee be uniform. I can't tell you what the fee will be. There may actually be a filing fee charge. That's still up in the air, but if there is, it will take into account the fact that if you e-file that will save money for everybody down the road. What we will be advocating strongly against is the idea that from jurisdiction to jurisdiction there will be a different way of doing it and that the local jurisdiction can set a filing fee wherever they want.

MS. SADOWSKI: If I may, there are more complicated issues than that which I would like to be able to address to someone.

EXECUTIVE DIRECTOR WELCH: We would love to get your input, and it may be an issue that comes back here.

MS. SADOWSKI: Thank you.

MR. POULSON: Barry Poulson from the 1st circuit. I know you are heavily involved in the public defender initiatives. An aspect just came up
in conversation with the Casemaker presenter here in the hall of vendors, and I know the State Bar has provided that as part of our service.

My latest move as a public defender, because of increased insurance and flat pay, has been to cancel my WestLaw subscription. I simply can't afford it anymore. The concern I have is the beta for the Casemaker, which is sort of their shepherdizing approach, company comes out of beta and suddenly is going to have a fee. If the collective wisdom at the table will consider whether public defenders could be able to get Casemaker shepherdizing somehow paid for, and I certainly wouldn't rule out the civil community, but I know they have lots of money.

MS. LYON: Some of them might disagree

MR. POULSON: It is kind of a worry, because now we are dependant on Casemaker, Google Scholar. We can't afford those tools, and the prosecutors, of course, do have them, but not us.

MS. LYON: In response to that, I think one of the main jobs of the Public Defense Commission will be to review resources, and that's a pretty long list, including sort of legal resources, you know, investigators, you know, expert witnesses, all of that sort of a thing, so having to look at sort of all
those comprehensive things I think should be, and I
can help make sure that's there. Thank you.

(Appplause.)

CHAIRPERSON RADKE: Thank you, Elizabeth.
And I would recommend that if your constituents have a
question they want answered about some pending
legislation that Elizabeth Lyon is the person that you
need to contact, and she has got her fingers on the
pulse of the legislature like nobody else I know. So
please utilize that State Bar resource. It is there
for your use.

At this time I would like to invite Dan Quick
from the 6th circuit to come up to introduce the first
item of business for consideration by the
Representative Assembly. Mr. Quick, you have the
podium.

MR. QUICK: Thank you. Good morning,
everybody. I am proud to be here on behalf of the
Civil Procedure and Courts Committee. The proposal we
have in front of you is to fix the Supreme Court -- I
am sorry, to fix the term of the Supreme Court.

You have the briefing materials, but the
thought is basically this. The Supreme Court term
starts in October. There does not seem to be a
particularly good reason for it. The problem with it
is that in odd numbered years or even numbered years
when there are elections, it often results in
arguments taking place in the fall but then not all
justices participating in the decision in those cases.

The sense of the committee is that this is
inefficient, that the election cycle should not be
the, or that the term should not be the tail that wags
the dog, and that we should reorganize to a calendar
year term.

I will note for this body that the Criminal
Jurisprudence and Practice Committee was advised, of
the State Bar, was advised of this proposal, and they
have indicated their support. If there are any
particular questions about the resolution, I would be
happy to take those, otherwise I would move the
Rep Assembly to endorse the proposed language to
7.301(B) which you see on the screen in front of you.

MR. ABEL: Second.

CHAIRPERSON RADKE: There has been a motion
and support for the proposal. Is there any
discussion? I see someone approaching the mike.

MR. BOONSTRA: Mark Boonstra from the 22nd
circuit, Washtenaw County. I am wondering, since this
proposal affects the calendar of our Supreme Court,
whether anyone consulted with the Supreme Court as to
what they might think about this, and that was the
question that occurred to me last week when I was
reviewing the materials and realized for the first
time that this was on our agenda. And I appreciate
the rationale that you put forward, but since that
question occurred to me, I did take it upon myself to
inquire with our chief justice as to whether he knew
about this or what he might think about it, and I also
had occasion to speak with the chief of staff and
general counsel of the Supreme Court, and it was
apparent to me they knew nothing about this. It
wasn't on their radar screen.

Frankly, I think they don't appreciate -- or
at least some of the justices. I can't represent what
they all might think, but don't appreciate the Bar
going out in front of an issue that affects their
calendar, that there very likely are not three votes
for this on the Supreme Court, and more importantly
substantively a rational was conveyed to me as to why
they would not want to do this, and that is simply
this, that the end of the court's term is its very
busiest time. It's when the justices are busy
writing, crafting, polishing, and getting out all the
opinions that they haven't yet gotten out for all of
the cases that were heard during that term. Currently
that means July, and the last week of July in particular, are the very busiest time for our Supreme Court.

If we adopt this, we will be asking the court to change its calendar such that the month of December and the holidays, and particularly the week between Christmas and New Years are the very busiest time for the court when they are drafting those opinions. I for one am not inclined to ask them to do that, and I would encourage this body not do that. Thank you.

CHAIRPERSON RADKE: Do you have any response, Dan?

MR. QUICK: Just to respond to the direct question as to what extent, if any, the Supreme Court was asked to give thoughts on the proposal. Certainly that was not something done by the Civil Procedure and Courts Committee that I am aware of, although I will tell you that there were informal discussions, much in the nature that you had, with some of the justices as to both the historic rationale for the term being organized the way it is, as well as a discussion about the pros and cons of altering it.

I ensure, and this will shock nobody, that the different justices have different thoughts and different opinions on this topic. But I don't know
that anybody from the committee reached out. Whether or not once it came out of committee folks within the State Bar circulated this to whatever it would be, whether the Supreme Court directly or other bodies, that I do not know.

CHAIRPERSON RADKE: Is there any further discussion, any further comments?

MR. MCCLORY: Mike McClory from the 3rd circuit, and up until I heard this last comment I thought for sure I was going to vote in favor. I am not sure I am going to vote now. I appreciate your rationale, and what I am going to say, maybe Janet can comment on, because she has been in the position of chief counsel of the Supreme Court, but just that I think this body should think strategically.

I think it makes sense to change it for the reason that you said, but we want to think strategically that if we go forward with something like this, what impact will that have on the perception by the Supreme Court for every other rules proposal we bring forward? I don't know what that impact would be, but that's a factor we have to consider if we are going to decide to do that.

I don't know, Janet, if you want to comment or if that's going out of line a little bit further.
EXECUTIVE DIRECTOR WELCH: Let me say this, if the Representative Assembly wanted to ask State Bar staff to engage in conversation with members of the court about proposals that they are considering adopting, we would obviously take that direction. Is that responsive to you?

MR. MCCLORY: I just meant that looking at the overall picture in terms of every other thing we are trying to get through, what would be the dynamics? Maybe there would be no difference. Maybe there would be. I just don't know. I am throwing that out there. If they perceive something being kind of dictated to them on their issue, how would that impact other rules that we propose? Maybe not at all, maybe it would. I may be totally addressing a nonexistent issue.

EXECUTIVE DIRECTOR WELCH: Just extemporaneously, much of what you pass that requires rule changes deal with the practice of law in the rules, and I think that they see that as a body of lawyers telling them their opinions about the practice of law. I think it's correct that this is, because this impacts the world that they know the best, it does belong in a different category, and so you might want to think about how you approach the conversation with the court about this.
CHAIRPERSON RADKE: Mr. Rombach.

MR. ROMBACH: Tom Rombach from the 16th circuit. At this time, because of some of the difficulties, and I do believe that Janet is right, that we are a wholly-owned subsidiary of the Supreme Court by rule, and we would rather be a wholly-owned subsidiary of the judicial branch than of the legislative or executive branches, I would like to move to table this proposal so the committee can seek additional input before bringing a recommendation back before the Assembly.

VOICE: Support.

CHAIRPERSON RADKE: There has been a motion to table and support. We will take discussion on the motion to table.

Tom, would you accept a friendly amendment as a motion to postpone consideration rather than to table?

MR. ROMBACH: If it were to table, then it could be brought up -- I believe our parliamentarian would say the same thing -- we could bring it up at any time we choose, and, again, I would defer to the leadership. If we postpone it, then it would have to postpone to a date certain, and, again, I am not sure of what the particular discussions would be. Again, I
defer to our parliamentarian.

CHAIRPERSON RADKE: I am going to do that.

Judge Chmura.

PARLIAMENTARIAN CHMURA: A motion to table is only in order when there is some problem or something that comes up that prevents discussion on the item that normally would be discussed. So it would be, let's say, very hot in the room and there was a motion to table to take care of the heating problem, that would be appropriate.

If you want to defer action on a particular item, it's not a motion to table, it's a motion to postpone to a time certain, which would probably be the next meeting, and that would be the way to do it. And then it would come up at the next meeting, would be on the agenda or the calendar for the next meeting, and the Assembly could take whatever action it decided to take at the next meeting in April or March at that time. I think that's the correct motion.

MR. ROMBACH: Again, then I would amend that to a motion to postpone to the next meeting. I believe that would give sufficient time to Mr. Quick, his committee, the Criminal Law Jurisprudence Committee and our staff, of course, to try to extend a hand to the court, because, again, I just don't want
to put a gun to our head and claim we have a hostage.

CHAIRPERSON RADKE: Thank you, Mr. Rombach.

Is there support?

VOICE: Support.

CHAIRPERSON RADKE: Is there any further discussion on the motion to postpone? Hearing none, we will ask for a vote.

All in favor of postponing this issue until the next meeting.

Any oppose.

And any abstaining.

Thank you. The issue is postponed. Thank you, Mr. Quick.

Moving along in the agenda, next I will ask Martin Krohner to come forward to present consideration on the establishment of the eye witness identification task force, and I believe that Nancy Diehl and Valerie Newman are going to be presenters. If they are both here, they should come forward as well.

MR. KROHNER: Good morning. Thank you, Madam Chair. I am Martin Krohner, 6th circuit, proponent of the issue of the Identification Task Force.

Very quickly, this body, as was mentioned
earlier this morning, authorized the resolution that established an Interrogation Task Force, which has been very successful. As Elizabeth Lyon has indicated, legislation has already passed the Senate and it's in the House now.

So this particular resolution has the support of the Committee on Justice Initiatives, on the Criminal Jurisprudence and Practice Committee, as well as the Committee on Criminal Issues Initiative, and we have been very successful in having a very diverse committee on the Interrogation Task Force, of which I was a member of, and it took a long -- it was a long, arduous process, and the end result maybe didn't fit everybody's satisfaction, but it turns out it's a good result which would be beneficial to the practitioners especially on the defense side, as well as the prosecution.

So without further ado, I would like to present Nancy Diehl, who will present a resolution on the Identification Task Force.

VOICE: Support.

MS. DIEHL: Good morning, everyone.

VOICES: Good morning.

MS. DIEHL: It's good to come home. I am Nancy Diehl and a long time member of the Rep
Assembly, and it's great to see, as someone mentioned earlier, I think it was Julie, some of the faces are the same, so I am going to thank you for sticking with it and coming back and helping us.

I was a career prosecutor, and I want to tell you, and I see some other prosecutors in the room, probably the most compelling evidence that can be presented in a courtroom is someone on the witness stand pointing and saying, That's the one. Why aren't you looking at me Matt Abel? May the record reflect the witness has identified Matt Abel.

MR. ABEL: Thank you for putting my name on the record.

MS. DIEHL: But what we also know as prosecutors is, depending on the circumstances of that eyewitness identification, it can be the most unreliable, and what we know in terms of the exonerations, out of 250 exonerations based on DNA testing, 190 out of those 250 exonerations were based on misidentification.

What we know over the years with numerous research studies, there is a better way to do things, and we need to do it better. Even one innocent person being convicted based on faulty misidentification is one too many, and we have the ability to make a
difference. And Val Newman just walked in. See, her
timing is perfect. She remembers the old days of the
Assembly when you were always running behind. I told
her not to worry, you are never on time. But I was
here early, because I know sometimes you change things
up. So let me introduce Val Newman, who will make the
motion.

(Applause.)

MS. NEWMAN: Well, good morning. I apologize
for my tardiness, but I see that we were well
represented, so I am not going to add to what Nancy
said. I don't think anything has to be added. I will
simply make the motion.

Should the State Bar of Michigan call for the
appointment of an Eyewitness Identification Task Force
including State Bar members in the criminal defense,
prosecution, judicial and law enforcement communities,
to develop and promote legislative and/or court rule
changes that advances the improvement and reliability
of eyewitness identification procedures, and on behalf
of myself, Nancy, and Marty, certainly we ask that you
vote yes.

VOICE: Support.

CHAIRPERSON RADKE: A motion has been made
and supported. Is there any discussion?
MR. KRIEGER: Madam Chair, Nick Krieger from the 3rd circuit. I will be very brief. I just want to say that as, I guess, a career law clerk at the Court of Appeals, and, Marty, you know this, but eyewitness identification comes up all the time, and for those of you who don't do anything in criminal law, this issue comes up all the time, and usually we end up saying, oh, this is a meritless argument.

And you will look up the case law. I have to say the Curlchek (sp) case and Anderson, they are all over the place. I can find published, not even Court of Appeals, I can find published Michigan Supreme Court case law saying, oh, you should do a lineup, but if you can't do a corporeal, it's all right, and then I can find something that's directly opposed to that that says, oh, you always have to do an inperson lineup, and if the guy comes in court and doesn't testify consistent with the lineup -- you know, it's so messed up, and I really think this is important, and I want to say, Mr. Krohner and Ms. Diehl and also to Ms. Newman, although I understand where she is coming from on this working where she does, but I think it shows a lot of courage for people on sort of both sides of the, I don't know what you want to say, but both sides of the issue in
criminal law to agree that we need to have this. I really think it's important, and I would just ask my fellow members to vote yes. Thank you.

THE COURT: Thank you, Mr. Krieger. Is there any further discussion or comment on the motion? Hearing none, we will take a vote.

All in favor of the motion, please indicate by saying eye.

Any opposition?

Any abstentions?

Thank you. The motion passes. Thank you very much.

(Appause.)

CHAIRPERSON RADKE: It never ceases to amaze me that what we plan for up here putting this together never seems to happen. When we allow a lot of time for discussions on an issue because we think it's going to be controversial, you guys just pass it out of hand. That's great. I love being wrong.

Once again, I will ask Mr. Quick to come to the podium to introduce to the Assembly consideration of discovery only depositions. Mr. Quick.

MR. QUICK: Thank you, Madam Chair. Again, on behalf of the Civil Procedure and Courts Committee, the proposal is to modify some language in MCR 2.302
primarily dealing with the topic of discovery only depositions.

By way of background, discovery only depositions under the existing Court Rule are permitted either by stipulation or by court order under MCR 2.302(C), which is the general protective order subrule. In practice, the committee was under the impression that parties are unilaterally noticing up discovery only depositions, and there at least is some commentary through Court of Appeals opinions which would seem to condone this process. So part of the Court Rule change is, frankly, is simply to reinforce that discovery only depositions can only be taken either by court order or by stipulation of the parties.

Discovery only depositions have particular import as it relates to expert witnesses because of the hearsay rule exception which permits expert witness deposition testimony to be admissible. So in that regard there is some, I would characterize primarily as tweaking of the rule dealing with experts who are expected to testify in 2.302(B)(4)(a), specifying that, again, unless there is a stipulation or an order, the deposition is usable for all purposes.
If a deposition is to be discovery only, the court, and the court already has this discretion, but this makes it explicit, would have authority to address and mandate how the fees of the expert are to be handled. There was a lot of debate at the committee level about the pros and cons of discovery only depositions, whether they are fair or unfair. The Court Rule change was brought to you doesn’t seek to really change the practice permitting those under certain circumstances but simply trying to make more clear when they are permitted and if they are going to be permitted to make sure the court addresses the court issue which the committee thinks is an important consideration.

There are a few other very minor word changes throughout the Court Rule to make it consistent, but I think the intent of the committee in that regard was not to have those be substantive changes, if you will. With that, would be happy to answer any questions or to move the matter for the Assembly. I have to make the motion first?

CHAIRPERSON RADKE: You have to make the motion first.

MR. QUICK: So I move on behalf of the committee to adopt the proposed changes to MCR 2.302
as set forth in the materials of the Representative Assembly.

CHAIRPERSON RADKE: Is there support?

VOICE: Support.

CHAIRPERSON RADKE: I hear support. We will open it up for discussion. We will now take any discussion or comments from the floor.

MR. HERMANN: Fred Hermann, 3rd circuit. I rise solely to offer a friendly amendment to insert one word into the fees and expenses of Paragraph C. You are missing "of", I believe, in payment and expenses.

MR. QUICK: You are correct, sir, and that is accepted.

CHAIRPERSON RADKE: Any other comments or discussion? The chair recognizes Peggy Costello.

MS. COSTELLO: Peggy Costello, commissioner from the 3rd circuit. I just have a question more than a concern. Having practiced in civil litigation for many years, I question the need for the rule, and I am not sure I completely understand the rationale. At least during my practice, if a deposition was noticed for discovery purposes only, unless there was objection, the deposition went forward that way.
And I am just concerned about the need for stipulations and whether that's just going to require more arguing between the parties about the wording of the stipulation and whether it just makes things more difficult, but I guess it's more in terms of a question as to the rationale for the rule and the need to lay out who is going to pay who and all of this stuff when it was pretty much, if there was no objection it went forward and the party whose witness it was paid the party.

MR. QUICK: I can only share with you some of the deliberations at the committee level, and of course the committee is made up of practitioners throughout the state and who do many different things. There apparently are areas of contention in this where a party will unilaterally notice up a discovery only deposition. The other party will oppose, and again that discussion itself will then prompt a fight. And there really is no basis to simply do that, to unilaterally notice it up, and I think that parties feel that the practice at the Court of Appeals, and we cite a case in the materials here, suggested that maybe they also think that parties can unilaterally do this.

And there are some lawyers who believe that a
discovery only deposition imposes a significant and unfair cost on them and that if it's going to take place that it either should be on an agreement, which would include this consideration of fees and expenses, or by court order where everybody can sort of have their say in court, if you will, on the topic. But I am informed by the members of the committee, and, as I say, there was significant debate on this that this is a problem, an area of clarification that ought to be addressed.

CHAIRPERSON RADKE: Any other comments, questions or discussion?

Hearing none, all in favor of this motion please say aye.

Opposition.

Abstention.

It unanimously passes.

MR. QUICK: Thank you very much.

CHAIRPERSON RADKE: Thank you, Mr. Quick.

At this point, as you all may know if you were looking at your phones or your watches, we are way ahead of schedule. What I would like to propose and have your consent for is to move up the clerk's election. Okay, we will keep the announcement until after the last presentation, but we would like to,
with your consent if you approve, and I will move that
we move that vote up to this time. Once we have taken
the votes, we will adjourn for the lunch break and
expect you all back here at 2:00. Do I have a support
for that?

VOICE:  Support.

CHAIRPERSON RADKE:  All in favor?

Any opposition?

Abstentions?

Hearing none, I would ask the tellers to come
forward, please. You had the little pink tags on your
badges.

Oh, you know what, I forgot. The candidates
get a chance to speak. Well, you know what, I am
going to invite the candidates to come up and speak,
but I am going to ask Kathleen Allen to be first, and
only because I noted that both Mr. Krohner and
Mr. Quick had an opportunity to introduce items.

And I need to see Bruce Courtade, Mike Blau,
and Lauren Rousseau, in that order, because
Mr. Courtade, I believe, is going to move the
nomination of Ms. Allen. So we will take care of that
first and then take a vote and then adjourn for lunch.

Mr. Courtade.

MR. COURTADE:  Thank you, Madam Chair.
Ladies and gentlemen of the Assembly, it's my honor and privilege to nominate Kathleen Allen as the next clerk of the Assembly. Kathleen is many things, but I will start out with she is a lawyer's lawyer. She is in the courts every day. She is a legal aid attorney who represents the force of the board and does it among the best of the best.

She is a judge's lawyer. I have spoken to a lot of the judges throughout West Michigan before whom she appears, and they know that when Kathleen shows up she is going to have her homework done, she is going to be a complete professional, she is going to advocate, do it within the rules, and do it to the best of her ability, again, for people who could not afford to get a lawyer of anywhere near that quality.

I can also tell you that she is a lawyer's lawyer, and by that I mean the amount of time that she dedicates to our profession, and I know, you know, both Mr. Krohner and Mr. Quick will be able to tell you the same thing. I can tell you from my personal experience working with Kathleen, she goes above and beyond on a regular basis. I can think of no person that I would more happily nominate for this position and encourage you to vote for her, so I would move her nomination for Assembly clerk.
CHAIRPERSON RADKE: Ms. Allen, please come to the podium to make your remarks.

I guess I need to ask Bruce is there support for your motion.

VOICE: Support.

CHAIRPERSON RADKE: Thank you MS. ALLEN: I am going to make my remarks quick and fast, because I know everybody wants to get out of here shortly.

I want to thank everyone for being here today. I know a lot have driven a long distance, and I want to thank those -- I have had contact with a lot of people today, during the last two days, and I want to thank those who are checking their e-mails, their voicemails and return my phone calls. I think it's very important to be connected to the community and being connected to everybody here at the Assembly for what we do on a daily basis and what the State Bar and Rep Assembly does. I want to thank you for your support, and since you have to write in the name, the spelling of my name is Allen, A-l-l-e-n. Thank you, everybody.

(Appause.)

CHAIRPERSON RADKE: Mr. Blau, approach the microphone, please.
MR. BLAU: Good morning again. Mike Blau, 6th circuit. I am very honored to place into nomination Marty Krohner for clerk of the Assembly. Marty brings a wealth of experience to that position, practice experience, really seeing the needs of members of the Bar and of the community. He has very extensive community service experience, experience of the Bar, and I have had the pleasure of working with Marty on the Justice Initiatives, and he has always brought very thoughtful perspective comment to any matter that we had to deliberate about and basically understands too the procedure and process involved in trying to enact change where it's necessary. So I strongly recommend and support Marty as the next clerk of this Assembly. Thank you.

VOICE: Support.

THE COURT: Thank you. Mr. Krohner. Will you please come back to the podium.

MR. KROHNER: Good morning. I am Martin Krohner. Very briefly. Yes, I have been around a long time with Bar activities and service, not only the State Bar but the Oakland County Bar, Detroit Metropolitan Bar Association.

It's kind of funny, because I only became involved with the State Bar activities because of
request of my old boss, the Honorable John D. O'Hare, who wanted to know if people on the staff of the Wayne County Prosecutor's Office would participate in some Bar activities. And so as a result I joined what was then the Criminal Jurisprudence Committee. We had such illustrious Bar members as Seymour Posner and Bobby Mitchell and Pat Meter, who sits on the Court of Appeals as the chair at that time. From there I just built up my time on this particular committee, becoming chair not once but twice, and then when we merged it with the old Defenders Committee, became Criminal jurisprudence Practice the third time.

I just completed my term as co-chair of the Criminal Issues Initiative. I have been involved with the Interrogation Task Force, also the Task Force on Attorney-Client Privilege, as well as having the honor of setting up in Oakland County for the Oakland County Bar as a member of the committee, our Ask a Lawyer Program, which went about nine years, where we offered free legal advice generally during the Law Day week, and that was a big job. That was a committee where you really had to work, because you had to go out and recruit people to come and offer their services as an attorney on a Sunday afternoon in May, which was a difficult job. But we got everybody in there, and we
generally serviced anywhere from 5 to 700 people in
one afternoon.

So I would like the opportunity to continue
serving this august body, as well as the Bar, and I
would urge you to consider me serious for the position
of clerk of this body. Thank you very much.

(Applause.)

CHAIRPERSON RADKE: Thank you, Mr. Krohner.

Lauren Rousseau.

MS. ROUSSEAU: Good morning, everyone.

Lauren Rousseau from the 6th circuit.

It's my pleasure and privilege today to
nominate Dan Quick for the position of clerk of the
Representative Assembly. I have a little cheat sheet
here.

Dan is a partner and governing board member
of the law firm Dickinson Wright, and despite his busy
law practice he has been extremely active in Bar
association activities and in community service
activities as well.

In addition to his work with the State Bar,
he has been active with the Oakland County Bar
Association. He serves as director, sustaining
member, as well as past chair of the OCBA Circuit
Court Committee. He is on the Executive Committee of
the OCBA chapter of America in the Court. In 2009 he was awarded the distinguished service award, which is the OCBA's highest honor, recognizing members who gave exceptional voluntary service to the organization. He has been a member of the Representative Assembly since 2007, and I think, as you all know from his presentation, he is currently chair of the State Bar's Committee on Criminal Procedure in the Courts.

In addition to all of this, in addition to his busy practice, he is on a diversity committee -- I am sorry, he is the Diversity Committee co-chair of the Federal Bar Association and co-chair of the ABA Copyright Litigation Subcommittee. He has written extensively for numerous publications you have all seen from his resume. On top of all of that he teaches as an adjunct professor at Cooley Law School, which is where I first made his acquaintance.

Over the years I have known Dan my experience with him is that he is a dedicated professional, he works hard, and he is extremely committed to the legal profession and to the legal community.

In preparing to make this nomination speech today I asked him why he is so active in Bar association activities, why he engages in all these publications, why he teaches on top of his busy
practice, and his response, I thought, was telling.

He said that he has always viewed the law as something
bigger and more important than his individual practice
or even that of his firm. He said he went to law
school because the concept of the law, with a capital
L, his words, was something admirable.

To Dan, making a significant contribution to
the law is a humbling and wonderful experience, and
it's clear to me that Dan would make an excellent
clerk representing this body, and he would also do an
excellent job filling the positions that come after
clerk, ultimately chair of the Assembly. So I
wholeheartedly recommend Dan to the position of clerk,
and I request that all of you support his nomination
as well.

VOICE: Support.

CHAIRPERSON RADKE: Thank you. Dan, you once
more come back to the podium, please.

MR. QUICK: Let me just say two things.
First of all, it is a tremendous compliment to this
body and a benefit to the State Bar that people like
Kathleen and Marty are willing to step up and be part
of this Assembly in a leadership role. We all will
tremendously benefit from that, and it ensures a good
sign as to the health of the State Bar and the level
of volunteers that we have. It's fantastic.

Secondly, it's often said, but I think it deserves to be constantly said, is that we need to continue to fight for the importance and relevance and participation of this body in the affairs of the State Bar. This is the ultimate policy-making body of the Bar. It needs to be treated as such, and we need to continue to find ways to make sure that our representatives, the people in the Bar from our various circuits, that their voices are heard and we continue to advance their agendas. Thank you very much.

(Applause.)

CHAIRPERSON RADKE: Thank you, Mr. Quick, Mr. Krohner, and Ms. Allen. I just want to say one thing at this point, and that is you do realize you will also be a member of the Board of Commissioners. If that doesn't scare you away, that's fine. They will look forward to having any of you on the board.

At this time I would like the tellers to come up and collect the envelopes for distribution to the members. Anne Smith has them over here on my left.

It's been pointed out to me that we can also have nominations from the floor. Is there anyone who would like to nominate another member at this time?
No. Okay. Thanks.

I also would like to remind everybody, because this is a contested election, if no one candidate receives a majority of the votes, we will be revoting after lunch. So I don't mean to sway your votes, but I do want to remind you that we are doing it in two parts. The announcement will come later if somebody has a majority, and if they don't have a majority, we will be revoting. Thanks.

The two top vote getters then will go head to head.

(Voting taking place.)

CHAIRPERSON RADKE: I you are here and you haven't received a ballot, will you stand up, please. In the back, 6th circuit. Ms. Haroutunian, thank you. Anybody else that did not get a ballot?

At this time if your ballot has been filled out, just hold it up, and the tellers will come around and collect them.

Since it looks like we have all of the ballots at this point, I am going to ask the tellers to retire to go count the ballots. The announcement will come where it is presently on the agenda after the first presentation this afternoon.

At this time I am going to let you adjourn.
Please remember the luncheon starts at 11:45, so it would behoove you not to be late so they can start on time. I am going to ask you to leave at 5 to 2 so you are back here by 2:00 so we can resume the afternoon session.

I would commend you to the vendor exhibit area. If you haven't already been there and you have got a few minutes now, you might want to take the opportunity to do that. Otherwise, have a good lunch. I will see you at 2. Thank you.

I am sorry, we have a question. You've got to go to a microphone. Hold one second, please.

MR. MEKAS: Peter Mekas, 49th circuit. We have an unused ballot in our row. I believe that it's from someone that was also circulating ballots.

CHAIRPERSON RADKE: I will let Anne Smith take care of that.

MR. MEKAS: 47th circuit.

CHAIRPERSON RADKE: Yeah, that's Anne McNamara. She is one of the tellers. We will take care of it. Thank you.

(Lunch break 11:10 a.m. - 2:02 p.m.)

CHAIRPERSON RADKE: I am now going to ask the Assembly to come to order so that we can commence with the afternoon session. Please take your seats.
Thank you. It is now my distinct pleasure to introduce the Honorable Thomas P. Boyd, the chief judge of the 55th District Court in Mason, Michigan, and the Honorable David F. Viviano, from the 16th Circuit Court in Mt. Clemens who will give us the presentation on the new jury reform court rule. There is going to be a question-and-answer session when they finish. They have assured me that their presentation has been greatly shortened, so there will be lots of time for questions afterward. Ladies and gentleman, Honorable Thomas Boyd and David Viviano.

(Applause.)

JUDGE VIVIANO: All right. Good afternoon, everybody. I am Judge David Viviano, and Judge Boyd and I are going to sort of intersperse our remarks or go back and forth. We are going to try to move quickly through the presentation, because I understand there are some questions about jury reform which we are anxious to answer, and so if we are moving quickly, a little bit more quickly than you thought, I apologize in advance.

Before talking about the specific reforms, I want to give you just a little bit of background about the jury reform movement. I want to make some general observations about the reforms and then make some
general observations about the reforms that were recently adopted.

First, the jury reform movement actually began about two decades ago. It actually was initiated by the American Bar Association on a symposium called the Future of the Civil Jury System in the United States. The movement includes, as you might imagine, lawyers and judges, but also includes academic, social scientists, psychologists, and others who are interested in improving the effectiveness of juries. The movement has been led these past two decades by the Litigation Section of the ABA and also very actively led by the National Center for State Courts, which has a center for jury studies. The topic is now actually on the national agenda of several prominent national attorney organizations, including the American College of Trial Lawyers, the American Board of Trial Advocates, and the International Association of Defense Counsel.

In terms of the purpose of the jury reform movement, I think there has been a recognition that in the modern age juries are asked and called upon to decide cases that involve new and more complex matters but they are not given the tools they need to analyze and understand increasingly complex evidence. And so
there is a growing consensus, there has been, that something needs to be done, some changes need to be made. The goal, obviously, is to implement reforms that are designed to help the jurors process information and to improve the overall quality of juror decision making and, of course, the overall functioning of the court system.

Courts in other states have already been doing these reforms for several years. Courts in Arizona and New York led the way back in the early '90s. They inspired much of the rest of us to follow by looking at our own jury systems. Currently over 30 states have either adopted or studied reforms to the jury system.

If you look at the slide just briefly, in Michigan you can see that jury reform started as a proposed rule change. That was in 2006. It then was converted into a pilot project in 2010, and then, of course, the rules have recently been implemented effective September the 1st, the new rules. So that's the first slide.

The next slide shows briefly all the judges who participated. I think there were 12 or 13 of us district and circuit judges across the state who were asked to test the reforms and to give feedback to the
Supreme Court, which we all did and we were all happy
to do.

Just as a general observation about the
reforms, the way that I look at things, having
participated in this pilot project now, is that the
jury reform changes in Michigan caused me as a trial
judge to try to look at things from the perspective of
the jury box, something I hadn't done. I guess I was
a relatively new judge when I started on this pilot
project. Most of the reforms or the changes or the
new rules are actually discretionary with the trial
judge, so they will be implemented in different ways
in different courts by different judges and certainly
on different types of cases.

Our job as judges in the pilot project was to
evaluate the reforms. It was not to advocate for any
particular reforms, and we are not here to do that
today, although I think Judge Boyd and I both will
take some license in telling you which of the reforms
we think have worked very well in our individual
courtrooms.

The next slide I think Judge Boyd will take
over.

JUDGE BOYD: Thank you, Judge Viviano. Good
afternoon, ladies and gentlemen.
Let me just begin with a couple preliminary notes. First, in your package of information behind tab 15 is a copy of the Supreme Court's order in Administrative File 2005-19 which contains the new rules. The balance of our presentation this afternoon is going to be walking through a couple of the rules that have had some changes that we think you would like to know about. So if you want to follow along, that's where you find that information.

I would next like to thank Dawn McCarty and the good people at the Michigan Judicial Institute who were instrumental in helping Judge Viviano and I prepare the information that we are presenting to you today.

The next slide is introduction -- sorry. 2.512, instructions to the jury. There is really nothing new here. Some of the things have been moved around, and some of the things that are most strikingly new aren't because the language is new, it's because their placement within the rules are new. So, for instance, rules that used to be at 4.614, which is a felony criminal rule, are now going to be found, and we will talk about some of them, at 2.513.

Well, obviously the significance of moving something from 6.414 is to 2.513 is now they apply to
all trials. Not just felony criminal trials but civil trials and misdemeanor trials. So some of the things that we are going to talk about are not really, the words aren't that much different, but their placement in the rules creates a significant difference for all of us.

The next slide is 2.513(A). Now, in the pilot project, one of the things that we spent a lot of time on is preparing written instructions for the jurors and giving them to the jurors and allowing them to follow along. Some judges have done that all along, because it used to be discretionary on the court. Now it's mandatory on the court.

As you can see in 2.513 in the highlighted portion of sub A, the court is responsible -- now two major changes -- to provide to the jurors every element of all civil claims and all charged offenses, as well as the legal presumptions and burdens of proof. They have to give that to the jury before the proofs. So in a criminal case, historically the elements might be given at the end of the proofs. Kind of counter-intuitive when you have done it the other, which we did in the pilot project.

Judge Viviano and I, we did take a little license. It makes a lot more sense to tell the jury
what they are looking for before the evidence instead of after. So this is a change that makes a lot of sense. It is not discretionary, it is mandatory. The judge must inform the jurors of these things.

The next sentence says, they must provide each juror with a written copy of such instructions. Major change, not discretionary, should have happened 1st of September. If you had a trial since then, depending where in the state, they may not have done that yet, but that rule is effective. All these rules are effective two weeks ago.

Now, the next slide is 2.513(B), the court's responsibility. This is an early and good example of no change in language but significant change in impact. That's because this language used to be in 6.414 for felony criminal trials. Now it's in 2.513(B), it applies to all trials.

The rule itself isn't significant. I don't believe you are going to see any change in any trial as a result of this language being in 2.513. Every trial I have ever been in, not only this side of the job but on your side of the job, has included this. I don't think it's any different, but now it's mandatory in civil to do it this way as well as in a misdemeanor criminal case, as opposed to just a felony criminal
In 2.513(C) opening statements. The language is moved to 2.513(C) from 6.414(C). There is some suggestion by lawyers that this now applies not only to jury trials. The consensus rule is in this place and worded this way that the opening statement is mandatory in a bench trial. May not make a lot of difference, probably that's how bench trials start, but now that's mandatory that the trial is going to start with an opening statement. Not a big deal probably because that's probably how we are doing it in reality, but now we don't have any choice. It's a change.

The next slide is 2.513(D). You know, this is new. This is entirely new. This is something that has, you know, brought some comments from people, and that is that each party may in the court's discretion present interim commentary at appropriate junctions of the trial.

I can tell you I did, I don't know, something like 20 jury trials during the pilot project. I am a district court judge. You don't need interim commentary. I mean, the trial lasts a day, a day and a half. So if the jury forgot something, you have got other problems other than interim commentary. But
what I can tell you that as a lawyer, as a prosecutor, I would have loved to provide interim commentary at certain points of longer trials. It doesn't have to be an opening statement. That's not what the rule says. It says at appropriate junctures in the trial.

So, for instance, I did a long, very complicated fraud case once, and my last element that I needed to prove was the value of the thing that was stolen, which was an item of intellectual property, a lot of very highbrow witnesses, was worth more than $20,000. I had a very lowbrow, low-tech witness. His concession to the fact it was a felony trial was he wore a new shirt. Old blue jeans, but a new shirt and no tie. As soon as I called him, he came in from out in the hall, and the jury looked at me like, man, we have been here way too long already, and it wasn't until about ten minutes into the questioning that they understood, oh, I get it, this is why this guy is here.

If I were able at that time, and I am sure the defense attorney wouldn't have minded, and I bet I could have got the judge to agree, to say the next witness is here for the purpose of valuing that asset that we have been talking about for a week, it would have been a much smoother transition. This rule
allows little things like that, and it allows large interim commentary if there has been a week-long break in your trial. Again, it's discretionary in the court.

JUDGE VIVIANO: Moving to the next slide is reference documents or notebooks. Again, this rule is discretionary. It speaks to having the lawyers provide a notebook or a booklet of mostly instructions and exhibits for the individual jurors. In my courtroom we use a one-inch wide three-ring binder that my secretary prepares for each of the jurors. It's been very popular with the jurors. We put in there the instructions that we are required to put. Judge Boyd just went through the rule, so we put the elements of a cause of action or the charged offense, the presumption of innocence, the burden of proof in a civil or criminal case.

Again, logically, we are giving the jurors what they will need to decide the case while they are hearing the evidence. Instead of giving them the question at the end of the case, we are going to give them the question earlier. You are asked to decide whether these elements are being proved beyond a reasonable doubt, so they know that as they are evaluating the witnesses.
We are also, in my mind there is, and I guess we are required to invite the lawyers to present exhibits that have been admitted or that are stipulated. Seems to make sense. The lawyers in my courtroom, for whatever reason, didn't really take advantage of that, but it's a great way in a court like ours that doesn't have much courtroom technology to publish your exhibits to the jurors, particularly important ones that you are going to be referring to over and over again, again to help the jurors process that information.

Our binders also include pages for notes, and we will get to notetaking in a moment, and they also included, we would put scraps of paper in there so the jurors could write down written questions that they might have for a witness, and we will get to that as well in a moment.

This minor thing that we did, this minor change was very popular with the jurors. As you all know being here today, when you show up for a seminar you are typically handed materials, so it makes for a more professional presentation. The jurors are able to stay organized in their thoughts and information they are given, and they are able to use that information when they are back in the jury room.
together deciding the case. It's inexpensive and easy
I thought to prepare and very popular with the jurors.

Moving on to the next new rule, MCR 2.513(F),
is deposition summaries. Again discretionary with the
court. The idea is -- well, first of all, we should
encourage the parties to do it, and if they do it,
then we should provide copies of the summaries to the
jurors. The idea is to get rid of the antiquated and
extremely boring practice of having people read
depositions into the record in open court.

I will tell you in my four and half years on
the bench that has not happened. It seems to me a bit
of a relic of the past. It's pretty easy to get video
depositions and play them in court now, so this
doesn't happen very often. But I think, again looking
at it from the perspective of the jurors, everybody's
least favorite thing to do is to spend a Friday
afternoon having somebody read a three-hour deposition
into the record, so we are trying to avoid that if at
all possible.

The next slide talks about scheduling of
experts, new rule 2.513(G). It's discretionary, and
one change from the pilot proposed rule to the rule
that was adopted is this is only applicable now in
civil cases, and also the court eliminated maybe not
the possibility but the suggestion of one potential way to organize expert testimony by having panel discussions of the experts.

Instead, the suggestion is that we as the judges can schedule the experts sequentially, have one expert testify and then have the opposing expert on that issue testify next. Again, from the jurors perspective when we asked them to focus as lay people on highly technical issues and have either doctors or other experts come into court and testify about those issues, it really typically used an entirely new language, a new jargon or terms that people aren't familiar with. It's much better to have the jurors evaluate all that testimony at the same time when they are focused on those issues and then have the ability to look at and perceive the opposing expert's testimony right after the initial expert and make a judgment who was more credible, who was more persuasive, who had a better handle on the issues, et cetera. And I think that's the goal there. It's not something I have tried yet, but it's something I think will work well in a lengthy civil case involving complicated issues.

The other suggestion in that rule is to allow the opposing party's expert to be present in court and
assist the lawyer in formulating questions for
cross-examination, which again I think makes sense in
helping the lawyers to handle technical issues in
their presentation to the jury.

The next rule is on notetaking, 2.513(F) -- I
am sorry (H), and jurors are permitted, of course, but
not required to take notes. This represents no change
at all from existing practice. The existing standard
jury rules in both civil and criminal cases provide
for this if the judges decide to allow it. Most
judges already do allow notetaking. All of us took
notes on our way through law school, and when we are
trying to remember something, just makes sense to
allow the jurors to do that as well. Really, if you
think about how your mind works, it helps you to, when
you are not only listening to something but also
taking notes, you are using two senses instead of one
and hopefully retaining more information, and I think
Judge Boyd may want to make a brief comment about
this.

JUDGE BOYD: I just wanted to add, you know,
when I started, it's a one-day trial I used to say.
You don't need to take notes. It will just interfere
with your paying attention to the evidence. You all
heard that standard expression, right? But, you know,
it was right at the beginning of this pilot project
and a colleague of mine from Grand Rapids says, Well, 
Tom, what do you do during the trial? I said, Well, I 
take notes. So ever since I have let the jurors take 
notes, and it's never interfered.

JUDGE VIVIANO: I would just say it fits in
with the reference notebook, because, although I don't 
require it or even encourage it too much, I encourage 
it from the standpoint of providing everybody with a 
notebook with pages and a pencil if they want to take 
notes.

The next slide or the next rule is juror 
questions for witnesses. This also is something that 
is not a change. It's there in the existing civil and 
criminal standard jury instructions. I have to 
confess as a new judge before I was asked to be on 
this pilot project it's something I wanted nothing to 
do with. The last thing I wanted was to have an 
unpredictable question from a juror throw a wrench 
into a trial that I had hopefully been conducting 
efficiently and according to the law and later won't 
be reversed on appeal, and so I just ignored that 
instruction and never gave it essentially.

Under the pilot project though, after having 
gone through this, I have to say my view has changed
dramatically. We have to have a procedure for allowing questions. We have to explain that procedure. We, of course, don't allow jurors to ask the questions themselves. They submit them in writing. In my courtroom I have gotten to the point now where at the end of each witness' testimony I actually look to the jury and ask if any of them have questions for the witness, because I want them to feel that this is a natural part of the proceedings and there is no barrier to them asking questions. I want them to be comfortable and feel that it's a natural thing for them to do.

It has never caused any problems in my courtroom during trials. The lawyers then are given a chance to object to the questions. If there are problems with them, typically we can either work them out and reformulate the question in a way that's satisfactory to everybody, or if it's a question that's out of left field or obviously not allowed by the rules, then I just explain to the jury that the rules don't allow us to ask your question and we move on.

In terms of looking jurors and looking at it from the jury box, again, what every speaker knows, if you want to give a talk and hopefully keep the
audience engaged, hopefully we are doing that today, what do you do? You invite questions from the audience, so you make them feel engaged in the process, more focused on the evidence.

Also, with jurors, when they are listening to witnesses and thinking about things that they may have a question about, obviously allowing them to ask those questions and ask them of the very witness who testified is making them, again, be more engaged in the process and helping them to do the very difficult task that we ask them to do.

From a lawyer's perspective, this is one of the only ways, and I guess it's the only way now that the lawyers will have, skillful practitioners, of learning a little bit about what the jurors are thinking during the trial while you have a chance to do something about it. I let lawyers follow up questions of that witness so they can address those issues then and, of course, the lawyers can then try to address those questions in the presentation of other evidence during the trial.

There is a concern that's raised, mostly by criminal defense attorneys, that this allows jurors to participate in the presentation of evidence. If you can imagine a case where the prosecutor just blows it
and forgets to ask a question that goes directly to
one of the elements of the offense, and then if the
juror asks that question, now the juror has elicited
significant testimony in the case.

I think we need to be conscious of that
concern, but I have to tell you that at the end of the
day this whole process, the jury trial and the court
system, is a truth-seeking function, and I don't
think, as I am sure you all don't think that that
system should be only determined or entirely
determined by the skill of the lawyers, and if the
jurors are smart enough to ask an intelligent
question, my own view is we should let them do that,
and I now do it, as I have already suggested, in every
trial. I think Judge Boyd has something to say on
that as well.

JUDGE BOYD: This is really a juror
engagement issue. I mean, you have all been in a
trial where juror number three is like sound asleep.
I remember one trial I had to hit my wedding band onto
the bench every now and then just to wake up juror
number two.

Doesn't happen. They are paying attention,
they are taking notes. They know that at the end of
each witness the judge is going to turn to them and
say, Does any juror have a question for this witness? They are engaged, they pay attention. Again, it's a day-long trial. I don't know what would happen in a month, but I have not lost a soul since they have responsibility, ongoing responsibility in the trial.

Second point is Judge Viviano and I both presented last week at seminars for judges to help them get up to speed. We had a panel, the district court judges, including prosecutor, defense attorney and two jurors who had served under the pilot, and the defense attorney said I was so terrified about this, but it never, ever hurt me, and I found a couple times where it really helped.

JUDGE VIVIANO: The next slide -- we are going to keep moving, because we got to get through all this -- jury view. Not much change on this rule. I think this was one of the rules that was moved from the criminal 6.414, I think that's the rule, into 2.513(J), so now it applies to civil cases as well as criminal cases. Also, I think the rule makes it clear it can be done on the motion of a party, it can be done sua sponte by the court or, interestingly, at the request of the jury, again giving them an outlet if they have a curiosity about the scene if the judge thinks that it's appropriate.
And then one other small note, I suppose, is that the parties have a right to be present, except in criminal cases the judge has to make an assessment of whether the criminal defendant should be there for safety and security reasons.

Next slide, juror discussion, 2.513(K). This is a dramatic departure from current practice, and it's probably the most controversial of the changes that I regularly implemented or used in my court under a couple of procedural notes. One is, of course, again, it's discretionary with the court. The judges do not have to allow that, so it's up to the individual trial judge. The attorneys, of course, have an opportunity to object.

Secondly is, under the current rule effective September 1st, it only applies in civil cases. That's done for a very specific reason, and that is one of the cases where I allowed the jurors to discuss the case before the end of the case, I guess for those of you who don't know, letting them discuss it while they are all in the jury room together while the case is pending before the end of the case, so before final deliberations. One of the criminal cases where I did that is now on appeal. I was affirmed at the Court of Appeals. It's now all the way up to the
Supreme Court, and they are going to decide this case, and depending on the outcome of that case, they may change the rule to include criminal cases for jury discussion.

Of course there is a concern when you do this that jurors will decide important issues in the case before both sides are given an opportunity to present their views, or their evidence I should say. We are instructed and have to advise the jury and caution them, and I regularly did so, that they were not to do that. Although we were letting them discuss issues, they weren't to reach any ultimate conclusions on any issue in the case until both sides had had their opportunity to present their side.

I would even do it at night before they went home, you know, don't talk to your spouse, don't look on the internet and, by the way, remember, you are not allowed to discuss or to decide any issues in this case until you have heard all the evidence from both sides.

I am a strong proponent of this reform. I think the, first of all, from the concern -- the negative side would be, obviously, we don't want juries deciding cases before they hear from the defense. I think, though, when they are instructed
that jurors have an innate sense of fairness, and it's
not a difficult concept to them that they shouldn't
decide the case until both sides have an opportunity
to be heard. It helps the jurors, again in the way
that their mind works, focus on evidence and discuss
evidence close in time to when they hear from a
witness.

So you can imagine in a two-week trial, if we
make them wait until the end, they are not going to
have nearly as good a recollection about what the
first few witnesses said as they would if you let them
discuss that testimony close in time, so they are able
to break down that testimony, what the strengths and
weaknesses were. It will affect their analysis and
examination, I think, of other witnesses as the trial
progresses as they are accumulating that information,
and so I think it helps them do their job.

It was very popular with the jurors. It does
tend to shorten final deliberations, because they have
already started analyzing the evidence. I think it
also gives them a chance to formulate some questions
they might have for witnesses, so it works in
conjunction with one of the other changes.

Also, when you think about, again, human
nature, I think it gives jurors an outlet to do what
all of us want to do when we are confronted with what
jurors always find to be a very interesting life
experience, and that is they are taken out of their
daily lives, they are placed into the court process,
they are placed in a room in a criminal case with 14
other individuals whom they have never met before and
who are all different demographics, age groups,
gender, ethnic groups, and they are brought together
in a common cause and asked to do something that's
very important in our society and in our government,
which is to decide a case. And even jurors who are
hesitant at the beginning of the trial and don't want
to serve almost always tell me by the end how glad
they were for that experience.

People find this interesting. You know, it's
on television, all these shows about law and order and
all these things. People find the criminal justice
and the civil justice system to be interesting. So
what do we ask them to do? We tell them, You are
going through this very interesting life experience.
You are not allowed to talk to your spouse, your
coworker, you are not even allowed to talk to the
people that you are going through this experience
with, and I think it tends to be an instruction that's
very difficult for people to follow.
So at least by letting them talk to their fellow jurors in the jury room under this cautionary instruction, you are giving them an outlet to talk about the case, and you are making the process much less frustrating, and I think you are making it more likely that they are going to abide by the court's instruction. Again, this was something that was very popular with the juries.

The next slide is summing up the evidence. This one is probably the most controversial element of the jury reform rules. Although, as Judge Boyd had encouraged me to do, I finally did some research in this area. So first let me tell you what the rule is, and then I will briefly tell you about the history of the rule or the history of this area of the law.

The rule says, after the close of evidence and the arguments of counsel, the court may, so it's discretionary, fairly and impartially sum up the evidence. We have to also instruct the jury it's the jury's responsibility to determine the weight of the evidence and the credit to give witnesses and, of course, the juries are not bound by the court's summation. We're not allowed to comment on credibility or state a conclusion on the ultimate issue of fact before the jury.
First I would say the rule is not without historical precedent. I am told by some people who are more experienced than I that this was something commonly done at the 16th judicial circuit court in Macomb County 30 or 40 years ago. One time I watched television myself with my life, Law and Order U.K., and guess what they talked about, how the judge just got done summing up the evidence. So apparently, if that show is to be believed, it's something that happens in England up to the current day.

Perhaps not surprisingly, the rule or this authority of judges has a lot of authority and precedent in the law. There is actually the former court rule, prior Rule 2.516(B)(3), allows judges to do this, to comment on the evidence, et cetera. The legislature has a statute that authorizes us to comment on the evidence and the testimony of character witnesses, which we are apparently not now allowed to do. And there is a lot of case law on this going all the way back to the 1800s and up to the present date. Believe it or not, this issue was litigated, the most recent case I saw was in July in an unpublished decision of the Court of Appeals.

The Supreme Court spoke most definitively or thoroughly on this issue most recently in People
versus Anstey, which was a 2006 decision. Actually if
you read the Anstey case, you will learn a couple
things. First of all, all the various phases of this
rule come right out of the case law, number one. And,
number two, this was another way that the court
changed the rule from the pilot rule to the one they
ultimately adopted and they actually narrowed our
authority in this area, because now the rule says
summing up the evidence. They got rid of our ability
to comment on the evidence. If you read Anstey, you
will understand that summing up the evidence is only
one of the ways that you can comment on the evidence.
So they have tried to narrow it, I think to satisfy
some of the justices when they adopted these rules.
Again, we can fairly and impartially sum up the
evidence, but we cannot comment on the evidence more
broadly.

Having said all that, this is not something
that I have done. I don't think any of the judges in
the pilot project do it, although this apparently was
part of our system. For some reason it's something
that no one apparently feels comfortable doing
anymore. Speaking from my vantage point, we are
extremely busy in our court, and although I think I
could do this properly in a neutral way, it would take
a lot of time to make sure my notes are thorough and
accurate and then to go through them again and make
sure that I am presenting them fairly and impartially
to the jury, and after a two or three-week trial, I am
not willing to take a day or two to do that to delay
the proceedings further, so it's not something I have
done. With that, I am going to turn things over to
Judge Boyd for the final three slides.

JUDGE BOYD: Let's go to final instructions
to the jury. Some different things here again.
Actually if we go to next one, 2.513(N)(2), the judge
has to solicit questions from the jury. The rule says
they shall invite the jurors to ask questions in order
to clarify the instructions before they retire to
deliberate.

Now, we didn't do that in the pilot project.
This rule was there, but I never saw it, and I never
did this, and I don't know how to do this. We are
going to be all learning how to do this together,
because the juror asked the question -- I guess I have
them submit in the writing, things like that, but you
can't discuss it in front of them, so each judge is
going to be trying to figure out how to do this.
That's a shall. There is very few mandatories from
the judicial side, a lot of discretion. This is one
of the shalls.

The next shall in the same rule is shall provide a written copy. Interestingly, as opposed to 2.513, I think it was (D). Here it's a copy. In the other rule with the preliminary instructions, it was each juror must have a copy. Now, I intend to do what I have been doing for years, which is to give each juror a copy of every instruction. A judge might decide, and you might argue, that this rule says a instruction, and one is good enough. I don't know why you want to do that, but I think you could.

The next slide is 2.513(N)(3) and (4). This is talking about the final jury instructions I just mentioned. It's new. This rule also talks about impasse, and there is new power at impasse, and that is it gives the court discretion to, quote, when it appears that a deliberating jury has reached impasse or is otherwise in need of assistance, the judge may invite the jurors to list the issues that divide or confuse them in the event the judge can be of assistance in clarifying or amplifying the final instructions. Totally new.

So, of course, I think this is going to be done in cooperation with the parties. If the jurors send out questions or send out lists of issues. I
certainly know Judge Viviano in our conversations will be working with the lawyers to see if there is additional information or things that could be pointed to in the record for clarifications of the other instructions that could be used in response to those items, but that's a new power there in 2.513(N)(3) and (4).

If we go to 2.513(P), the last slide. This, again, isn't a new rule. It was in the 6.414, the felony criminal rules. What it says is that if a juror, jurors, the jury, asks questions during deliberations about testimony, you can't refuse a reasonable request. You can't say, Well, yeah, you know, just go back and use your collective memory about what Jane Doe said during her testimony and whatever you think is fine.

What I have done because of this rule is start offering alternatives. You know, Jane Doe testified for 22 minutes, because now we have digital recording. It's easy for me to figure that out. It will take 90 minutes for the court recorder to type that up for you and you can read it. You can come back and all sit in the courtroom and we can replay it over the speakers in the courtroom, or you can use your notes and collective memory and you just figure
out yourselves what Jane Doe said. Please go back in
the jury room, send me a note, tell me how you would
like to proceed.

The one time this happened to me, they
decided they would like to hear Jane Doe's testimony
again. It was about 15, 16 minutes. They came in the
courtroom, we flipped it on, flipped it off, they went
back and deliberated for less than two minutes,
because whatever it was they were stuck on was
answered in that question. As soon as they all went
back, they said, Okay, we got it, we are done. So
that's the new rules.

CHAIRPERSON RADKE: At this point we are
going to take questions for Judges BOyd and Viviano,
and I knew Barry was going to stand up, but I would
like to thank the judges for their presentation today.

(Applause.)

JUDGE BOYD: I am new here. Does clapping
before the question, is that a bad sign?

MR. POULSON: I have to say that I am an old
country lawyer, but I am still afraid when they say a
judge and --

JUDGE VIVIANO: Let me just interrupt.
First, I am happy that we went so quickly. I
apologize. I know I talk really fast, but we did so
because we were looking forward to a robust questioning session, so I hope that you will feel free to express yourself fully.

MR. POULSON: Oh, please, I have a nature that way, and that's scary to me though, and I know my client over here, Mr. Abel, looks at this whole spectrum as the system, and, in fact, many of my -- I am a public defender, as you can probably tell, and many of my clients think I am part of the system, and they are afraid, and the only people they trust in there is the jury. And I come in the courtroom, I carry my bond money, I carry it every day, because I am in front of a judge saying what's on my mind, but what worries me about these things is number (M).

(M) is about comments by the court, and you mentioned seeing some TV. I think that was Law and Order, and I remember the episode, but maybe Rumpole of the Bailey is another way to say. Judge Bullington is always commenting on the evidence, much to the dismay of the defense. And I am not saying that judges comment unfairly. My county, my judges, fair trials, there is no question whatsoever, but I don't think that it's psychologically possible to comment on the evidence without influencing the jury, because the jury sits in awe of the bench. They look for the
slightest hint, the eyebrow, the judge leans his head a little bit, is he sleeping, whatever. And then they watch every conceivable step.

To me there is a mechanism to do this already. It's called a bench trial, and a bench trial lets the judge comment on the evidence and then decide. And I don't see (M) as being any different. Frankly, I think it deprives the jury completely of its ability to make a decision.

Now, you experimented on these cases here. I hope there were no criminal cases in there, because you experimented on live human beings, violation of Nuremberg Convention. I was an engineer before this. We didn't experiment on people. This could all have been tested scientifically.

But I deeply, deeply am afraid of item (M), and so my question is what were they thinking when they wrote down item (M)? I can picture --

(Applause.)

MR. POULSON: I can picture the attorney general sitting up one night on his Royal typewriter watching Reefer Madness once yet again thinking, Now what can I do? And so I just think that (M) eliminates jury trials. Jury trials are the civilizing factor of western civilization, and if
Michigan is the first to abandon them, even an artifice like this, then we will go down in history as here began the end of our western civilization.

JUDGE VIVIANO: I would say to that, and I tried to give some of the history of it, but a couple things. First is, in a way I represent this modern trend which you are also a part of, which I didn't know was a modern trend until I learned about the old way of doing things, and that is the trial judge is supposed to sit there and be as emotionless and expressionless as possible and not inject him or herself into the proceeding and really not try to influence the jury in any way.

As a young judge, I don't smile a lot in court, I don't make light of many things. Despite my presentation today, I actually do have a sense of humor, but I try to be very straight down the middle for that exact reason, and so this rule sort of struck me the way it struck you, and I didn't do it for that reason.

I would say also to sort -- I shouldn't bolster your question, but if I had more time in my presentation what I would have said is that all of the judges or people in my building who told me this happened before would also say, and by the way, you
always knew how the case was going to come out right when judge so-and-so was done summing up the evidence. In fact, the Law and Order episode, if you actually did see it, I think the lawyer said the same thing, we have no chance in this case. Didn't you hear how judge so-and-so summed up the evidence?

So there is a strong concern. I can't speak for the Supreme Court except to say, and this is Judge Boyd's fault, he made me learn this, this is something that's been going on that's in the rule, that's in the statute books, that's in the case law, that comes from the common law that's apparently been done a lot. So when you say we have apparently evolved away from it, if we evolve back to it in the progression of the world at that time that we were negative, I can't speak to that.

The last point I would make is just to reiterate, I think the Supreme Court felt some of this blowback and they narrowed the scope by getting rid of commenting on the evidence, which they didn't do a press release on. I never would have figured out, except I did some research and it dawned on me now that they deleted this part of the rule that was traditionally part of what we were allowed to do.

MR. POULSON: Thank you for commenting on my
question. I appreciate that's part of this new
mechanism, and I will only add that we fought a
revolution not to have to hear English judges.

JUDGE VIVIANO: Didn't work very well though.

JUDGE BOYD: A couple observations first on
the rule. It is not entirely new. It is actually, if
you look at the old Rule 2.516(B)(3) it's a civil,
it's -- I am sorry, and then in civil cases there is
also, gave the court discretion to comment on the
evidence, testimony, and character of the witnesses as
the interests of justice require. So in some ways
this is a more restrictive, more jury-empowering rule
than the rule we had 21 days ago. As to the end of
western civilization, I am going to reserve judgment.
There is lots of other issues going on.

The second thing I want to say is the
observation that we were practicing on live specimens
that they outlawed at Nuremberg. We did a lot of
trials in this, and for a purpose unrelated to the
pilot process. It was actually in preparation for
some testimony on the indigent defense system in
Michigan before the legislature. I went back and I
looked at one of my criminal acquitted counsel,
indigent defense counsel, and she had selected ten
juries during the period of time between when the
pilot project began and that particular testimony. And in those ten juries, in those ten picks, one her client came in and pled guilty before the trial happened, two the case was nolle pros'd by the prosecutor before the trial happened, and the other seven she had acquittals, so she was 9 for 10 under the new system. I am not saying anything other than perhaps bad choice of cases by the prosecutor and good choice of cases for her. But the point is I don't think the deck is thoroughly stacked up against the human subjects of our experiments.

CHAIRPERSON RADKE: Other questions?

MR. REISER: Good afternoon, Your Honor. My name is John Reiser. I am assistant prosecutor from Ann Arbor, 22nd circuit, and are there going to be jury instructions that are going to be published soon? I have got jury selections coming up next week, and I want to be ahead of the game here. Where can I look to for what the jury will be told?

JUDGE BOYD: The Model Jury Instruction Committee has actually put out some proposals. I don't think they are final. For instance, in my court it's not a standard instruction. I have got it written in an order that's out to the parties ahead of time. So, for instance, under the pilot project when
I was instructing the jury on the elements of an offense or the elements of a claim prior to proofs, which doesn't really fit in, I would just do it last. The model jury instruction for me has suggested that come in a criminal case after the reading of the complaint or information.

No big deal. I mean, I can change it. The point is I think you work with your opposing counsel in the court to determine what words are going to be used in these narratives, but there are model jury instructions that have been written by the committee. I just don't think they are final yet. They are available. You can go online and find them. I am sorry I don't have the site with me right now, but I have them.

MR. REISER: You think the ICLE site or something like that would have them?

MR. BOONSTRA: Mark Boonstra, also from the 22nd circuit. We should talk. I happened to serve on that committee actually, and that was one of the comments that I was going to make. We did meet very quickly after the rules were adopted and put together a draft model jury instructions, and they are out there. We wanted to make time for comments, so we did not adopt them without a comment period. They are
available both on the ICLE website and the
Supreme Court's website, so you can find them there.

And we had recommended at least in the
interim, because we have the comment period is open
until October 1st, and so we will meet, we are
scheduled to meet October 4th to consider the comments
and adopt them finally, but in the meantime we have
recommended that people use those proposed model jury
instructions.

MR. REISER: Thank you.

MR. BOONSTRA: You're welcome. I want to
make one more comment, if I could.

JUDGE VIVIANO: Before you go, you are on the
Criminal Jury Instruction Committee?

MR. BOONSTRA: I am sorry, I am on the Civil
Jury Instruction Committee.

JUDGE VIVIANO: I think the same pertains to
the Criminal Jury Instruction Committee.

MR. KRIEGER: They are not online though the
same way that the model --

VOICE: They will be after Saturday

MR. BOONSTRA: The other comment I wanted to
make, in addition to thanking you both for the
presentation and for serving on the pilot project for
two years, is I also happened to be asked to serve as
a moderator if anybody wants to hear even more about this subject for a webinar that ICLE put on a few weeks ago, and I did that with Judge Hicks from Muskegon, who also was part of the pilot project, and Mitchell Ribitwer, criminal practitioner in Royal Oak, and the three of us sat down for 90 minutes, talked about both the changes to the rules and the Model Civil Jury Instruction changes. If anybody wants to hear more, you can find that on the ICLE website.

Also, there are some written materials that we put together, both what we called our top five changes, and while I appreciate the gentleman's concern about summing up the evidence, we didn't put that one even in our top five, simply because, and Judge Hicks was adamant ain't never going to see that happen, but I don't know.

JUDGE BOYD: I can tell you that not one of the judges who agreed to do the pilot project ever did it in a trial. Some of us tried. I got to the end of my first trial and I had copious notes. I sat down with counsel, and I spent 15 or 20 minutes, and I said I can't do it. So not one did ever. I don't know what that foretells for the future.

MR. MORGAN: Hello, my name is Ken Morgan. I am from the 6th circuit. My practice is commercial
litigation, and the nature of it tends to be fairly
detailed, technical, so jury trials in that area, I am
particularly concerned about how the information is
presented to the jury. Now, I have three objections
to the proposed rules. One is a general objection,
and then two specific ones.

My general objection is it strikes me that
the policy underlying the rule is to elevate the
interest of the jurors more than currently, and I
would argue not appropriately. My obligation is on
behalf of my client, one of the parties, not on behalf
of the interest of a particular person who happens to
have appeared at a given time to be a juror. My
client will have spent a great deal of money and time,
and I think they are properly entitled to a system
that does not put a thumb on one side or the other of
the scale or can't be argued to have done so. So I am
concerned about the rules, in particular (M) and (K),
I believe.

I would strongly object to the idea that the
jurors would be encouraged, and I think that's what
the rule says -- it may not say that in this text, but
I think that's the meaning of it -- to discuss prior
to all of the evidence and the argument of counsel
what their observations should be. We are all
experienced in getting a last piece of information and having it be more meaningful than something earlier. We have to present the evidence in a serial fashion, and I think that requiring the jurors wait until all evidence is in and arguments are there, I think that that serves a very appropriate purpose, so I would strongly object to the notion they be encouraged to discuss it beforehand.

I also have some strong objection, but perhaps less so, to the idea of the judge commenting. Judges are able to do so now. If we have a judge who is inclined to tip the scale that strongly, they will have done so at summary judgment or otherwise. But I still think that the evolution of the system to where it is now prior to such a rule favors the presentation of evidence by counsel and then a very deliberate process. I have no objection to the notetaking. In fact, during my presentation I will often tell the court and a jury why I am calling a given witness. I don't need a rule to give me that ability.

Mostly these are guidelines. That's how I read them. The only rules that seem to be in this are (K) and (M), and I object to both.

JUDGE VIVIANO: Thank you. I am trying to think exactly how to respond. We already talked about
summing up the evidence, so I am not going to say any more about that.

The overall point is an interesting point that I have heard before. I have had, being on the pilot project, the opportunity to speak a lot on this topic in front of a lot of groups, and that concern that we are tipping the scales, I think is the word you used, somehow favoring one side over the other by making these changes, it's one that you hear from attorneys. Depending who they represent or what type of law they practice, they are concerned that their client or their industry or whatever it is that they stand for is going to be negatively affected.

When you look at the system as a whole, it's a truth-seeking system, and we have to develop and devise rules of the game that help us to achieve those goals. For example, if you look at Justice Hathaway's dissent to the rules, she talks about making sure you have input from the attorneys, which I think is important, but I will tell you as a judge I have to always remember that the lawyers are advocates for their clients. They are not always advocates for the system. They are advocates for their clients and for the rules that are going to favor their clients the most in that trial.
And guess what, I mean, we are all adults here. Your client's interest may not be the truth, may not be putting a sharp focus or a clear spotlight on what actually happened in a case. And that's how our system works. It's a testing adversary system. You test the evidence. Sometimes a criminal defendant just doesn't have a defense, but still we have a trial and we test the prosecution's case. But the rules of the game should be set up to allow and to help jurors to make good decisions and to focus on the evidence and hopefully to find the truth.

So as we are doing things, I understand there will be objections and different people are going to object for different reasons, and obviously all of us judges will entertain those and work our way through them on a case-by-case basis, but the whole idea of the pilot project, and I didn't know I was working with laboratory mice, but of making changes to the way we do business in government, it's an obligation that we all have. It's something that's been going on all around the country. Michigan being in this area, as in most others, is not a leader, we are a follower. We are 20 years behind.

And so the idea is we are not doing new things and tipping the scale and doing all these
terrible things. We are looking at how we do business and how our court functions and how the jury system works. We are not denigrating it or saying it's bad or we should throw the whole thing out. We are saying how can we make it better. I think we have an obligation to do.

We did it as a pilot project. That's how many, many other states have done it. It's very hard to do these changes, to get all the analysis that we would like to have and statistically valid samples and all these things before we take a half step here or two steps there, but we are making these changes, and I think we have to be mindful of what the effort is all about, and then we have to honestly assess each of the individual changes.

I think summing up the evidence is just culturally something a lot of us aren't comfortable with on either side of the bench. The jury discussion, also controversial. Having done it, I am more comfortable with it. I have talked with lots of jurors who have gone through that process. I have asked them specifically did you decide issues early in the case or did you wait until the end? They have assured me that they listened to my instruction, which I repeated a lot, because I am concerned about that,
but that it didn't affect their ability to deliberate at the end of the case by letting them do what all of us do all the time. It's being a three or four-week commercial litigation case, and I used to do commercial litigation and tell the jurors you can't say one word to the person sitting next to you for four weeks about any of this and then expect them to actually have intelligent discussion about it at the end is just not going to happen.

I guess I will go one thing further, which is a lot of times in my court, now that I think about the jury more, I think to myself they have no idea what just happened. The lawyers are talking about some document or some issue, they are flashing it around, they are never putting it in front of the jury, they are opening up a hundred page contract and they are on page 63, clause 4, and it's not in front of the jury, and they are expecting the jury at the end of the week or two weeks to go back and find that exhibit and open it up and find that page and then know what somebody is talking about, and it's just not happening. So we need to start doing things, recognizing that these are human beings and that they are thinking people and we have got to give them the tools they need to make good decisions.
JUDGE BOYD: The only thing I would add is this is a very distinguished group, and each of you in your own practices have done things that I will never do and had experiences I will never have. Based on my experience (K) didn't tip the balance one way or the other. As I said, the defense did very well under the pilot. I did it for two years, and it wasn't a problem. Doesn't mean I don't respect your view or your opinion and if at the end of two years more we see in complex commercial litigation that rule is a real problem, I will be standing right with you asking for it to be changed.

JUDGE VIVIANO: I have to agree with Judge Boyd, as I usually do, not to interrupt, but obviously we are where we are today. If the body of statistics and research backs up that concern, then I think we have to move, and certainly in criminal cases, obviously, if it becomes a factor and people's liberties are at stake.

Yes, sir.

MR. FLESSLAND: I had a question about the -- first, my name is Dennis Flessland from the 6th circuit. I had a question about the interim commentary and reference document, the mechanics of that, how practitioners are to handle that. These
interim commentaries, I am not clear what that is. I mean, I can't get up and say, you know, his witness was a damn liar. I mean, I can't --

JUDGE VIVIANO: As much as you would like to.

MR. FLESSLAND: I think that would be out of bounds. I mean, what kind of things do you anticipate? Is it more, like you discussed, the transitional sort of thing, I am going to call Mrs. Jones now who was standing on the corner and saw the accident and will explain what she saw, is that what's going on?

JUDGE VIVIANO: It's, again, to help the jurors understand what's going on. So, as Judge Boyd said, in a short trial it's not really necessary with a couple witnesses. As the trial gets longer, a lot of things happen in trials. We schedule witnesses, for example, usually at the convenience of the court, the convenience of lawyers, the convenience of the witness. Usually the jurors are fourth or fifth in line. So we are presenting a complicated story, a lot of times out of order because a witness couldn't be here or we have to take the expert and go ahead of time because the doctor has surgery on Friday.

And so in my courtroom all I have allowed the lawyers to do under that rule is to do what Judge Boyd
said, you stand up and say we are going to hear from Dr. So-and-so out of order to accommodate his schedule. He is going to testify on this topic, then we are going to pick up with the rest of our witnesses.

MR. FLESSLAND: On the longer cases do you anticipate the lawyers sitting down with the judge and say I would like to make an interim commentary on Dr. Smith's testimony and this is what I want to say and then we argue about it? Is that what you are thinking?

JUDGE VIVIANO: I would. I think lawyers will push the limits a little bit and say, you know, I would like to make a commentary on this subject, and then we'd have to -- I'd have to decide, we all have to decide is that appropriate or not. Obviously if you allow one side, at least in my courtroom, to say something, I am then going to allow the other side to say something too to balance it out.

MR. FLESSLAND: But it's something you anticipate we talk with you about ahead of time, not just start firing on your own?

JUDGE VIVIANO: Absolutely. I would never allow the lawyers to directly address the jury without the court's permission.
MR. FLESSLAND: Then with respect to the reference documents, do you anticipate us coming in with, you know, 12 or 15 copies of a photo that we can hand to each juror if it's admitted into evidence? You know, because a lot of times our fight's over whether it's admissible.

JUDGE VIVIANO: I never required anybody to do anything on evidence, although I am thinking of doing it more. What I would like to see is the lawyers actually think ahead, before the trial, and say, you know what -- we used to call them the hot documents. I know there are a hundred exhibits, but there are five or six or ten that you are going to refer to over and over again, and then if there is a stipulation to their admission, obviously we are not publishing them before they are admitted, let's get them in front of the jury.

And, frankly, in my court, if you admit something and it's an important document, it wasn't by stipulation but you admit it while you are talking to the witness and then you want to publish it by providing 14 three-hole punch copies to the jurors, I would let you do that. I would certainly work with the lawyers in a way that's helpful. To me it's how you are presenting your case. Are you presenting the
information in a way that the jurors can understand it, and if we are going to look at that hundred page contract on page 63 fifty times -- well, it comes up a lot in medical records. You know, we have these big things of medical records but really only three or four pages are important. Let's get those and get them in front of the jurors so they can look at them so you don't have to open this big book every time. Let's move the case forward.

Anything else? Thank you.

CHAIRPERSON RADKE: We are way over time on this subject. Is this a real pertinent question?

VOICE: No, it's not.

(Appause.)

CHAIRPERSON RADKE: Privilege of the chair.

Thank you Judges Boyd and Viviano for taking time from your very busy schedule.

(Appause.)

CHAIRPERSON RADKE: We are going to move this right along, try and catch up so we can get out of here.

If there was anybody who wasn't here this morning and didn't get a ballot and hasn't had an opportunity to vote, raise your hand so we can get you a ballot. I see one, two, three, four -- whoa. Six.
All right. Let's get them ballots, please. The
tellers will pick them up. I am going to ask the
tellers then to reconvene. Keep your hand up until
you get your ballot, please. Way up. I have one over
here. I can't tell where she is though. I think
that's the 37th circuit.

Please vote, turn them back in. Tellers, you
will need to reconvene, retally, and bring them back
to us.

The rest of you can have a five-minute break.
Please come right back so we can move through the rest
of this very quickly. Thank you.

(Break was taken 3:02 p.m. - 3:08 p.m.)

CHAIRPERSON RADKE: Ladies and gentlemen,
please resume your seats. Ladies and gentlemen, take
your seats. We are ready to announce the election of
a new Assembly clerk results.

First of all, I want to thank all three
candidates for throwing their hat in the ring, to step
up to lead the Assembly. It is a position of great
responsibility that ultimately results in you standing
behind this podium and running a meeting, and I know
that the members thought long and hard about who they
wanted to see up here in making their decision, and I
am very pleased to announce that Kathleen Allen has
been elected clerk by the majority of the votes.

(Applause.)

CHAIRPERSON RADKE: Welcome to the Executive Committee of the Representative Assembly and to a new commissioner on the Board. Thank you.

All right. This is the juncture in which we recognize Assembly members who are completing their term of service. I am going to read your names and then I am going to pass your folder off to Steve Gobbo, who will meet you over here and hand you your certificate.


I want to thank you all for your service. I know that some of you have been reelected and will be coming back for another term. For those who are not, we will look for you to come back in the future if you are so inclined, and you are certainly most welcome. Can we have a round of applause.
CHAIRPERSON RADKE: Also at this time I would like to present to the committee chairs for the 2010-2011 Bar years a little token of our appreciation for you chairing your committees. Krista Haroutunian, who I know is not here, and if one of her family members would please come up and accept this for her, I would appreciate it.

Michael J. Blau. Martin Krohner. William Josh Ard. John W. Reiser, III. And Jeffrey C. Nellis. I want to thank each of the committee chairs for all of their hard work this past year. Thank you, Jeff.

PARLIAMENTARIAN CHMURA: Thank you, Victoria. Steve, first of all, I would like to say thank you for asking me to perform the swearing in for you. It's quite a honor for me to do that, and I am very proud that you asked me. Thank you for allowing me to swear you in, Steve.

Now, because I was the parliamentarian, I wanted to make sure we do this according to Robert's
Rules, so I looked up Gobbo in Robert’s Rules under G, and you’d be surprised to know, Steve, that you do have your own section in Robert’s Rules on how to do this. It’s the last section in the book, but it is there, so we will follow that section when we do this.

Raise your right hand, please. Repeat after me.

I do solemnly swear --

VICE CHAIR GOBBO: I do solemnly swear --

PARLIAMENTARIAN CHMURA: -- that I will support the constitution --

VICE CHAIR GOBBO: -- that I will support the constitution --

PARLIAMENTARIAN CHMURA: -- of the United States --

VICE CHAIR GOBBO: -- of the United States --

PARLIAMENTARIAN CHMURA: -- and the constitution of this state --

VICE CHAIR GOBBO: -- and the constitution of this state --

PARLIAMENTARIAN CHMURA: -- and the Supreme Court rules --

VICE CHAIR GOBBO: -- and the Supreme Court rules --

PARLIAMENTARIAN CHMURA: -- concerning the
State Bar of Michigan --

VICE CHAIR GOBBO: -- concerning the
State Bar of Michigan --

PARLIAMENTARIAN CHMURA: -- and that I will
faithfully discharge --

VICE CHAIR GOBBO: -- and I will faithfully
discharge --

PARLIAMENTARIAN CHMURA: -- the duties as
chair --

VICE CHAIR GOBBO: -- the duties as chair --

PARLIAMENTARIAN CHMURA: -- of the
Representative Assembly --

VICE CHAIR GOBBO: -- of the Representative
Assembly --

PARLIAMENTARIAN CHMURA: -- of the State Bar
of Michigan --

VICE CHAIR GOBBO: -- of the State Bar of
Michigan --

PARLIAMENTARIAN CHMURA: -- according to the
best of my ability.

VICE CHAIR GOBBO: -- according to the best
of my ability.

PARLIAMENTARIAN CHMURA: Congratulations.

(Applause.)

CHAIRPERSON RADKE: Steve, I would like, on
behalf of the Executive Committee and the
Representative Assembly as a whole, to present you
with this gavel as a symbol of your chairmanship.
Thank you.

CHAIRPERSON GOBBO: Thank you very much. For
those of you that know me, I may not be brief
sometimes, but I will try to be as brief as possible.
To begin with from a personal point of view,
I would like to welcome my wife Mary, my son Nicholas,
and his wife, my daughter-in-law, Jessica, who came to
attend the swearing-in ceremony. Four of my other
children are not here because they are in school or
working out of state. There are others that have a
lot of meaning in my life that aren't here, including
my parents, who are both deceased, but what I would
like to say this is not about me, this is about you.
I would like to engage the Representative Assembly and
its membership in some of the important things before
us.

You have heard over the last couple days, for
those of you who weren't here yesterday, you heard
during the inaugural luncheon Julie, who is one of my
predecessors, Victoria's predecessor as a chair of
this body, that there is a focus on the unlicensed
practice of law. This body will be actively engaged
with a proposed rule that will be coming before -- most likely in April.

There are committee members of the Assembly's various committees that have been appointed, along with members. The final tally, so to speak, will be issued, because we now know who the new clerk of the Assembly is. Congratulations to Kathleen.

In this room there are many persons who have served as the chair of the Representative Assembly. You could only serve once, so I indeed feel privileged that the body elected me as the clerk two years, three years ago, and I look forward to discharging my duties as best as my predecessors have, and I have tried to learn from them.

And when I talk about engaging the Assembly, I have made certain appointments to the Assembly Review Committee, because I have listened and Victoria and Dana and I have taken to heart some of the concerns that you have had, at least some members have had about the efficiency of the Assembly. So that committee is going to be charged with looking at bylaw amendments, looking at how we can run meetings maybe more efficiently, how to interface with the Bar and perhaps the Supreme Court on some issues.

One of my first steps actually was by asking
our parliamentarian to swear me in, not only because
he is a good parliamentarian but for the efficiency of
having somebody here already so we didn't have to wait
around for somebody in black robes to come in and get
things going.

So I just wanted to say those few comments,
and I look forward to working with each and every one
of you during my tenure this year as the chair. Thank
you.

(Applause.)

CHAIRPERSON GOBBO: I have to also perform
another duty, and that is for the outgoing chair,
Victoria, there is a plaque that we would like to
present to her which says, the State Bar of Michigan
honors Victoria A. Radke, Representative Assembly
Chair 2010 through 2011; Vice Chairperson 2009 through
2010; Clerk 2008 through 2009, in appreciation for
distinguished service to the Assembly, the State Bar,
and all Michigan lawyers, dated today September 15,
2011. Victoria, please.

(Applause.)

CHAIRPERSON RADKE: All right. Before I
bring the gavel down on this session, I have just a
couple of reminders. First of all, we have changed
the cycle of the committee assignments. Your requests
to fill out are due at the end of the April meeting.

Don't forget, you can't leave until you have filled out your attendance forms. If you want your mileage, you need to fill out your mileage form and get it to Ann Smith.

I also want to remind you again about the Diversity Reception this evening at the Henry Ford Museum starting at 6:30, and if you haven't already signed on to the diversity pledge, please do so either online or in person tonight.

For those of you who didn't get to the vendor exhibit hall, I would commend it to you once again, and if anybody is interested, there are discount tickets for both Macy's and Ann Taylor that have been made available through the Hyatt Regency Hotel. I will tell you that the Ann Taylor discounts are good through January 3rd of 2012, but the Macy's ones are only good for the next three days.

That being the case, I just want to take another opportunity to thank you all for letting me be of service to this body. I have so enjoyed my time on the Executive Committee and as a member of this body. Thank you so much, and enjoy the rest of your week. We are adjourned.

(Proceedings concluded at 3:22 p.m.)
STATE OF MICHIGAN 

COUNTY OF CLINTON 

I certify that this transcript, consisting of 137 pages, is a complete, true, and correct transcript of the proceedings and testimony taken in this case on Thursday, September 15, 2011.

October 6, 2011

Connie S. Coon, CSR-2709
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