

STATE OF MICHIGAN
STATE BAR OF MICHIGAN

MEETING of the REPRESENTATIVE
ASSEMBLY of the STATE BAR OF
MICHIGAN

Proceedings had by the Representative Assembly of the
State Bar of Michigan at DeVos Place, 303 Monroe Avenue,
N.W., Grand Rapids, Michigan, on Thursday, September 27,
2007, at the hour of 10:00 a.m.

AT HEADTABLE:

EDWARD L. HAROUTUNIAN, Chairperson
ROBERT C. GARDELLA, Vice-Chairperson
KATHERINE A. KAKISH, Clerk
JANET WELCH, Executive Director
HON. CYNTHIA D. STEPHENS, Parliamentarian
ANNE SMITH, Staff Member

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9-27-07

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Grand Rapids, Michigan

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Thursday, September 27, 2007

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10:03 a.m.

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R E C O R D

5

CHAIRPERSON HAROUTUNIAN: Ladies and

6

gentlemen, my name is Ed Haroutunian. I am the chair

7

of the Representative Assembly of the State Bar of

8

Michigan, the final policy-making body of the Bar.

9

(Applause.)

10

CHAIRPERSON HAROUTUNIAN: And I hereby call

11 this meeting to order.

12 Madam Clerk, do we have a quorum?

13 CLERK KAKISH: I am pleased to announce,
14 Mr. Chair, that we do have a quorum with over 50
15 members present.

16 CHAIRPERSON HAROUTUNIAN: Thank you, Clerk
17 Kathy Kakish.

18 Do I see a motion to be made? Oh, yes, I see
19 someone coming to the microphone.

20 MS. KRISTA HAROUTUNIAN: Mr. Chair.

21 CHAIRPERSON HAROUTUNIAN: Please give your
22 name and your district.

23 MS. HAROUTUNIAN: Krista Licata Haroutunian,
24 6th circuit. Mr. Chair, I would move at this time for
25 the adoption of the proposed calendar as handed out

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1 here today.

2 CHAIRPERSON HAROUTUNIAN: Is there support?

3 VOICE: Support.

4 CHAIRPERSON HAROUTUNIAN: Any discussion?

5 All those in favor say aye.

6 Opposed no.

7 Any abstentions say yes.

8 The ayes have it.

9 By the way, I may very well have some
10 additional remarks after lunch at about 2:00. Could I
11 have a motion to that effect? Is it so moved?

12 VOICE: So moved.

13 CHAIRPERSON HAROUTUNIAN: Support?

14 VOICE: Support.

15 CHAIRPERSON HAROUTUNIAN: Any discussion?

16 None.
17 All those in favor say aye.
18 Opposed no.
19 The ayes have it.
20 Could I have -- let's see, do I see -- is
21 Victoria Radke in the room?
22 MS. RADKE: Right here.
23 CHAIRPERSON HAROUTUNIAN: Victoria, do you
24 have a motion with regard to the approval of the
25 April 21, 2006 summary of proceedings?

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1 MS. RADKE: So moved.
2 CHAIRPERSON HAROUTUNIAN: Could you give us
3 your name and your judicial district, please.
4 MS. RADKE: Victoria Radke, 47th judicial
5 circuit, and I would support the adoption of the
6 minutes.
7 CHAIRPERSON HAROUTUNIAN: Is there support?
8 VOICE: Support.
9 CHAIRPERSON HAROUTUNIAN: Any discussion?
10 All those in favor say aye.
11 Opposed no.
12 Any abstentions say yes.
13 The ayes have it. Thank you.
14 As a housekeeping matter, by the way, your
15 program indicates that Judge Cynthia Stephens of the
16 Wayne Circuit Court will be acting as parliamentarian.
17 She is unable to be here this morning. She will be
18 here after lunch at 2:00, and I have asked Tom Rombach
19 to act as parliamentarian between now and then, until
20 Judge Stephens comes back, so I say that for your

21 information as temporary parliamentarian.

22 Let me call upon Elizabeth Moehle Johnson,
23 chairperson of the Assembly Nominating and Awards
24 Committee, for purposes of filling vacancies.
25 Elizabeth.

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1 MS. JOHNSON: Thank you very much, Ed.
2 Elizabeth Johnson, 3rd circuit. This morning we have
3 four vacancies to fill in the 24th, 28th, and 30th and
4 37th judicial circuits. The following lawyers have
5 been nominated to fill those vacancies. Ryan M.
6 Edberg of Sandusky for the 24th judicial circuit.
7 Eilisia G. Schwarz of Cadillac, 28th judicial circuit.
8 Josh Ard of Williamston for the 30th judicial circuit,
9 and Darling A. Garcia of Grand Rapids for the 37th
10 circuit.

11 At this time I would move that the
12 individuals be appointed to fill the vacancies in
13 their respective judicial circuits.

14 VOICE: Support.

15 CHAIRPERSON HAROUTUNIAN: It's been moved.
16 Is there support?

17 VOICE: Support.

18 CHAIRPERSON HAROUTUNIAN: Any discussion?

19 All those in favor say aye.

20 Opposed no.

21 MR. ABEL: Mr. Chair, Matt Abel, 3rd judicial
22 circuit. I just have a question. Are any of those
23 people present or are they all present? If they are
24 present, then I support them. Thank you.

25 CHAIRPERSON HAROUTUNIAN: I think it's fair

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1 to ask who are the folks that are here, Elizabeth.

2 MS. JOHNSON: I believe we have Ms. Garcia
3 here with the 37th, and we have Eilisia Schwarz of the
4 28th, they are both in the back. Could you raise your
5 hands, please, and Josh Ard is here from the 30th
6 circuit. Will you raise your hand. And I believe
7 Mr. Edberg is in the building somewhere and will be
8 arriving shortly.

9 CHAIRPERSON HAROUTUNIAN: Any other
10 discussion?

11 All those in favor say aye.

12 Opposed no.

13 Any abstentions?

14 The ayes have it. Congratulations.

15 (Applause.)

16 MS. JOHNSON: I am pleased to announce with
17 the filling of those vacancies we now have 100 percent
18 participation from all circuits, and so I thank you
19 all.

20 Furthermore, today the Representative
21 Assembly awards will be presented at the luncheon. At
22 the April meeting the Representative Assembly approved
23 the awarding of the Michael Franck award to William P.
24 Hampton and Allyn D. Kantor and the Unsung Hero Award
25 to the late Norris J. Thomas, Jr.

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1 Additionally, this body voted a special
2 resolution in tribute to the late President Gerald R.
3 Ford, which will also be presented today.

4 We are very fortunate there will be a special
5 presentation regarding the President and his work as a
6 lawyer in the State Bar of Michigan, and I am so
7 grateful for the committee that assisted in these
8 awards, and I would again like to recognize them and
9 say thanks to John Mills, Dana Warnez, Jeff Nellis,
10 Suzanne Larsen, Krista Haroutunian, David Korterling,
11 and Michael Olson. Thank you very much for your hard
12 work on all those awards.

13 And then a special thanks to Anne Smith of
14 the State Bar, her invaluable assistance in getting
15 the plaques for the special Gerald R. Ford award. I
16 think you will find it's a lovely award, and there
17 will be people here today at the luncheon from the
18 Ford Foundation.

19 And lastly, a special thanks to our officers,
20 to Kathy, to Barb, to Bob, and to Ed Haroutunian.
21 They have been especially helpful to me and to the
22 committee. So thank you very much.

23 I have just been informed that Edberg from
24 the, Mr. Edberg from the 24th circuit is now here, if
25 you could raise your hand and be recognized. Thank

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1 you very much. And to be seated. Yes, you may be
2 seated in your circuit. Thank you.

3 CHAIRPERSON HAROUTUNIAN: Liz, thank you very
4 much for that report. Appreciate it.

10 Supreme Court believed there was a need to have a
11 greater amount of input from a broader body of folks
12 that was really a more diverse group than the
13 20-something members of the then Board of
14 Commissioners.

15 Today there are 38,000 lawyers in the state
16 of Michigan. In my opinion that need for responsible
17 input is still there and perhaps more so today than in
18 the past.

19 Part of the goal this year with regard to
20 what we all have been doing has been to raise the
21 profile of the Representative Assembly through the
22 pamphlets that are there on your desks in front of
23 you, and we have had input in that obviously from the
24 staff and the officers, articles in the Bar Journal
25 from various chairs, past chairs of the Rep Assembly,

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1 and e-mail blasts, not only you folks but others, and
2 our 35th anniversary of the Rep Assembly and our
3 reception activities.

4 why? The idea has been to be able to let the
5 members of the Bar know that there is a Representative
6 Assembly. Many really just don't know that.

7 And, in addition, in an effort to raise that
8 profile within the Bar itself and with the assistance
9 of Kim Cahill, the president of the State Bar, the
10 Representative Assembly will have space at the Bar
11 building in Lansing for pictures of the past chairs of
12 the Rep Assembly to be set forth somewhat similar to
13 the pictures of the past presidents of the State Bar.

14 I think that's an important aspect so that if

15 someone walks into the Bar building somebody knows
16 that there existed a Representative Assembly. Because
17 if you walk into the Bar building today, you will not
18 know that. And so the point is that I believe that
19 that's something that's extremely important for this
20 organization. First you have to know that you exist
21 and then to move forward.

22 Finally, as Elizabeth Johnson said, we have
23 100 percent participation for this meeting. The
24 vacancies have been filled. Maybe everybody is not
25 here, but the vacancies have all been filled, and that

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1 credit goes to Elizabeth Moehle Johnson, Bob Gardella,
2 Kathy Kakish, and Anne Smith, our staff person at the
3 State Bar who puts up with the chair, the vice chair,
4 and the clerk and all their idiosyncrasies. So thanks
5 to Bob, Anne, Kathy, and Liz for all their hard work.

6 well, as I indicated, I will have some
7 additional remarks later, but do I see -- there you
8 are, okay. I am ahead of schedule. I want you to
9 know that.

10 (Applause.)

11 PRESIDENT CAHILL: It doesn't mean they don't
12 love you when they do that.

13 CHAIRPERSON HAROUTUNIAN: I understand that,
14 and I saw the person who led the applause was Don
15 Morgan out of the 3rd, and I thank you, Don. I
16 appreciate that.

17 Let me introduce to you an individual who has
18 led the Bar over the last year, and most of the time
19 one sees the president of the Bar in meetings, unless

20 you are attending one of the Bar associations, many,
21 many bar associations that the president goes out and
22 talks to those bars, but the point is I would see the
23 president, talk to the president primarily during
24 Board of Commissioners meetings, Executive Committee
25 meetings, and I want you to know that in my judgment

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1 she has done this past year as president of the
2 State Bar a wonderful, wonderful job, and I am very
3 proud and privileged to be able to introduce to you
4 the president of the State Bar of Michigan,
5 Kim Cahill.

6 (Applause.)

7 PRESIDENT CAHILL: Good morning, everybody.
8 It's a real honor and a pleasure to be here for what I
9 assure you will be some very brief remarks.

10 I have two hours left. Make sure Ron doesn't
11 get hurt between now and then.

12 It's been a wonderful and a productive year,
13 and it's a year that I wouldn't trade for anything in
14 the world, but it's a year that I am very, very happy
15 is coming to an end. Both my law partners, who happen
16 to be my family, are here today also, and they are
17 telling me they will also be very, very happy when I
18 come back to work on a full-time basis and actually
19 look at the money that's coming in and did come in
20 last year.

21 So I think that really for the Bar as a whole
22 and for the Assembly in particular this has really
23 been a productive year. On the administrative side we
24 have hired, as we discussed at the last meeting in

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1 Janet Welch who will be speaking to you shortly, and
2 one of the things I am really proud that we have been
3 able to do this year is to form and continue to form
4 partnerships and alliances with other Bars, with civic
5 groups, and even to work with some of our sections on
6 substantive law issues. And I really think that that
7 is the future for how this organization is going to
8 become as productive as it can and move our agenda
9 forward.

10 We need to form partnerships with other
11 entities. We need to form partnerships and work very
12 closely with our own internal groups so that we have
13 the most, the best, the most inclusive information
14 that we can as we go forward and work with the public,
15 work with the legislature so that we can make sure
16 that our agenda is going to be addressed, we can make
17 sure that our members are going to be taken care of,
18 and we can make sure that what we talk about
19 continually, access to justice, is a reality and not
20 just something that we talk about. So I am very proud
21 about that.

22 One of the great things that I have seen this
23 year is that the Bar has often been asked by the
24 court, the Supreme Court, to submit amicus briefs in
25 particular cases, and our sections are asked to submit

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1 on a regular basis. So I think that's a great
2 improvement. It happens much more often than it used
3 to when I started nine years ago or ten years ago with
4 the Bar work, and I think that's a real, real
5 important factor.

6 We have done a lot of work in the legislature
7 this year. I will leave it to Janet to tell you
8 whether or not she thinks it's been effective. I
9 didn't listen to the news this morning. And one of
10 the things that I am happiest about is that we took
11 time this year to update our strategic plan, and I
12 hope that all of you will have an opportunity to go
13 onto the website, take a look at the strategic plan,
14 and look at the direction that we have cooperatively
15 set for the organization going forward.

16 You are a big part of that strategic plan.
17 You approved our previous strategic plans, and what we
18 have done now is just kind of tightened it up, updated
19 it. These are the things we are doing well on, these
20 are the things we haven't started yet, these are the
21 things over here that we now need to go forward on.
22 So I hope you will all take a look at that and really
23 take it to heart.

24 I really do appreciate all the work that the
25 R.A. does, and as I heard Ed talking about sometimes

1 it's unappreciated. I think I have a little different
2 perspective than a lot of presidents because a long
3 time ago, far, far, far away I stood up here and ran

4 this organization, this Representative Assembly.

5 I hope really that you will continue the hard
6 work that you have done, and one of the most important
7 functions that you have for the Bar as a whole is
8 being a body that can take the time to gather
9 information and be a very broad-based sounding board.
10 The 150 of you come from far more places than the five
11 officers do or the 30 commissioners do, and we need
12 your input, we need your broad-based input on the
13 challenges that face the Bar.

14 And I think you are going to do a couple of
15 those things today. We are talking about UPL, and you
16 are also getting a report from the Attorney-Client
17 Task Force, and those are the issues that are going to
18 be facing us in the upcoming year, those are the
19 issues that we need broad-based feedback from the
20 membership on, and short of calling all 39,000 of us,
21 which would be ineffective and annoying, you are our
22 best shot at that, the 150 of you.

23 The last thing I want to do is to thank your
24 leadership for their active leadership role, not only
25 here which you see, but for all of their work on the

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1 Board of Commissioners. All three of your officers
2 serve on the Board of Commissioners. They are very
3 active and vocal. They provide a lot of input. They
4 provide your viewpoint always, and I think you should
5 be very, very appreciative of them for that. I know I
6 am.

7 And with that I will tell you thank you and
8 hope that we have a continued good meeting, and am I

9 supposed to actually let them ask me questions? I
10 never did that when I was chair. If there are
11 questions, I would be happy to answer them now, or I
12 will be here for the rest of the meeting. You can
13 pose them to me individually. All right. And nobody
14 is rushing to the microphones, so thank you, have a
15 great morning.

16 (Applause.)

17 CHAIRPERSON HAROUTUNIAN: Thank you, Kim.

18 Let me now introduce our executive director.
19 Generally in the life of a bar association one does
20 not necessarily have the opportunity to select the
21 executive director, the executive director is already
22 there, but during this past year that opportunity came
23 along, and I think really from the Board of
24 Commissioners' point of view, from the officers of
25 this organization's point of view also it was really

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1 unanimous, that the selection of Janet Welch as the
2 executive director of the State Bar of Michigan was
3 absolutely the finest choice we could make, and I will
4 add something, and that is that what I said in the
5 Board of Commissioners meeting yesterday afternoon,
6 which is that Janet's great knowledge of the subject
7 matter that we all deal with allows her and results in
8 her being able to bring to the table great judgment,
9 great judgment, and in my opinion judgment is perhaps
10 the single most important thing in the Bar association
11 that anybody can bring to the table.

12 Ladies and gentlemen, let me introduce to you
13 the executive director of the State Bar of Michigan,

14 Janet Welch.

15 (Applause.)

16 MS. WELCH: Good morning. When I last spoke
17 to you in April I was a rank novice at the job of
18 executive director of the State Bar of Michigan, and I
19 am pleased that I am facing you now as a veteran, not
20 quite a gristled veteran yet, but a veteran.

21 I have two stories to tell you today. The
22 first story I have to tell you is about the State Bar
23 of Michigan and the fact that we are operationally
24 strong and fiscally sound.

25 Yesterday the Board of Commissioners passed a

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1 \$10 million operational budget, and at the end of this
2 fiscal year in a few days we will declare a surplus of
3 \$900,000. We will have, in addition to that -- I have
4 to get the right fund balance -- approximately a
5 year's worth of operating expenses. That's really an
6 extraordinarily sound and wonderful position for a
7 State Bar to be in.

8 And I want to give credit where credit is
9 due. The credit, first and foremost, belongs to the
10 leadership of the State Bar of Michigan, the officers,
11 the Board of Commissioners who have made tremendously
12 wise choices, have held our feet to the fire in terms
13 of our budgeting, and that's the officers both of the
14 Board of Commissioners and the Representative
15 Assembly.

16 I also have to credit the staff of the
17 State Bar of Michigan. The budget that we adopted
18 this year actually is down 3.5 FTEs, and we are able

19 to not only maintain the services that we are
20 providing to the State Bar of Michigan, but we
21 expanded them and deepened them.

22 As Kim noted, the services that we are
23 providing to sections and to committees is stronger
24 than it has ever been before. Our relationship is
25 better. At the same time we are very consciously

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1 devoting resources to local and affinity bars and
2 cultivating those relationships in order to expand the
3 service that we bring to members.

4 We are putting resources into technology,
5 which is increasing our productivity. We are putting
6 resources into research, so we have a better idea
7 where we are headed and how we can help members in the
8 future. Our Practice Management Resource Center has
9 hit the ground running and is providing tremendous
10 service to particularly solo and small practice
11 lawyers throughout the state.

12 And, finally, I have to note that we have
13 also made some very prudent investments with our
14 dollars, which also helps our bottom line
15 tremendously.

16 So I am telling you this because I think we
17 can all take pride in that accomplishment. It's not
18 something that the general membership knows about. I
19 think we all know as a mandatory bar that most members
20 take for granted or maybe even begrudge the fact that
21 there is a State Bar of Michigan, so you can help tell
22 the story of expanded services and a very, very sound
23 fiscal position of the Bar.

24 At the same time, the second story I want to
25 tell is the story that Kim alluded to, which is what

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1 is going on in Lansing. When we met in April I think
2 we all knew that the state was facing an unprecedented
3 crisis of the biggest budget crisis in my long
4 lifetime. That includes payless paydays in the '50s,
5 because I think that was not -- the shift in the
6 economic position of the state was not as substantial
7 as what's occurred in Michigan lately.

8 But we also expected that when we met now
9 that the budget one way or another would be fixed, and
10 of course it hasn't been fixed. Today is the day in
11 which they have to fix it. I won't bore you with the
12 details which you already know about the options that
13 are on the table.

14 The conference committee that has been
15 assigned the income tax bill, which is one of the
16 pieces of the puzzle that they have to put together,
17 is meeting this morning, and my phone hasn't gone off,
18 and they wouldn't call me and tell me what the outcome
19 is immediately anyway, but today is the day that we
20 will know whether there will be a partial shutdown of
21 the State or a complete shutdown and maybe can even
22 project for how long that's going to go.

23 The pieces are familiar. We know that the
24 income tax increase is being considered from between
25 4.3 to 4.6 percent from 3.9 as one piece of the

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1 solution, but that doesn't close the gap. Budget cuts
2 from serious to monumental are on the table, and also
3 still on the table is a tax on services, possibly a
4 tax on legal services.

5 The only thing I can tell you is that I have
6 confidence that we have done the best job that is
7 possible to do to explain why a tax on legal services
8 is bad for the public, and if a tax on services ends
9 up including being adopted and including a tax on
10 legal services, I can tell you that we have done
11 really the best possible job that we could do.

12 I would say what I have been saying for about
13 a week is that I think we were sort of at yellow alert
14 on a tax on legal services, that's down from sort of
15 an orange alert at the beginning of the year, but
16 depending on how negotiations go today we are still in
17 alert status, and we are watching it very, very
18 closely. And you can find out what happens on the
19 State Bar website. We update the budget crisis news
20 on a daily basis. If you are not close to radio or a
21 television, you can find out on our website what's
22 going on.

23 The State Bar of Michigan made a big deal at
24 the beginning of the year that for the first time in
25 modern history, probably for the first time in the

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1 entire history of the State Bar of the State of
2 Michigan, the Governor, the Speaker of the House, the

3 majority, the Senate Majority Leader, the House
4 Majority Leader, and the Senate Majority Floor Leader
5 were all lawyers, and I have to tell you there have
6 been times in the last few months where I wished we
7 hadn't made quite a big deal out of that.

8 But I think one thing that we all need to
9 bear in mind is that all of those people are very
10 talented people, very smart people, and people of
11 goodwill. That's why they are where they are, and you
12 have seen them at their best, and the reason that this
13 budget hasn't been solved I think really underscores
14 how difficult the work of politics is.

15 And I wanted to mention that to you today
16 because there are 148 legislators, almost exactly the
17 number of members as in this Representative Assembly,
18 and what you do, the issues that you tackle,
19 particularly, for an example, the attorney-client
20 privilege issues this afternoon, they are difficult
21 issues, they are issues of incredible importance to
22 the public and to the profession, and I want to salute
23 you for the way that you go about the very difficult
24 business of resolving those issues.

25 I look forward to your debate this afternoon.

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1 You always manage to debate in a civil way, and it's
2 always revealing, and the discussions about these
3 important issues are always aided by the way you go
4 about doing your work. So this afternoon should be a
5 treat for all of us, and it should benefit the
6 profession.

7 Finally, I want to say as a point of personal

8 privilege what a pleasure it has been to work with
9 Ed Haroutunian this year. I have come to know him as
10 a wise man and even more importantly as a kind man.
11 And I hope he doesn't take this the wrong way, but he
12 is a real sweetheart, and I will miss him
13 tremendously.

14 I look forward to working with Bob. It's
15 going to be a very interesting year ahead, and I look
16 forward to getting to know you in the same way that I
17 have gotten to know Ed, and I look forward also to
18 saluting your honorees at the lunch today, and I will
19 be standing by. I don't know whether you want to take
20 any questions, but I will be here all day. Thank you
21 very much.

22 (Applause.)

23 CHAIRPERSON HAROUTUNIAN: By the way, let me
24 add that before we, just a moment before we ask the
25 folks on the Unauthorized Practice of Law, the

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1 informational panel, before they come up, those who
2 will be members for the April 2008 meeting, we are
3 trying to be able to get pictures taken of those folks
4 who will be in the Assembly for April of 2008. We are
5 not going to be able to get everybody, because some of
6 those folks are not here today, but we are going to
7 try to do our best so sometime -- Marge Bossenbery,
8 who is in the back, and if you will turn around you
9 will see Marge, she has got her hand up. Of course
10 she has got a bottle. Did that come across the way it
11 was intended? Anyway --

12 MS. BOSSENBERY: I knew what you meant.

13 CHAIRPERSON HAROUTUNIAN: She will be taking
14 pictures, but when is that going to happen?
15 Throughout the day, throughout the morning.

16 MS. BOSSENBERRY: I don't want to take away,
17 but if you want to slip out, it only takes a few
18 seconds. Between 2 and 4 I will be out in front.

19 CHAIRPERSON HAROUTUNIAN: So if there is an
20 opportunity, see Marge, and you just go outside and
21 have a picture taken, and you will move on. And so I
22 share that with everybody, so that during the day you
23 will do that if you are going to be a member in April
24 of '08. And we will end up ultimately, for those
25 folks that are going to be in the April Rep

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1 Assembly -- I think I am losing my voice, I am
2 sorry -- sending out informational sheets with
3 regard -- oh, the informational sheets with regard to
4 practice areas and that kind of thing.

5 By the way, let me make one other comment,
6 and that is for those folks who have not listed their
7 committee preferences for the future, I believe that
8 information is at each of your desks, and so let's
9 make sure that that gets filled out so that Bob and
10 Kathy will have that information so that they can then
11 determine who the members of the various six
12 committees of our Representative Assembly, so they can
13 fill those positions.

14 Okay. If you have any questions in that
15 regard, by the way, you can either talk to me, Bob,
16 Kathy during the day.

17 Okay. Let me call upon our next item of

18 business, and I point out that it's now 10:39 and the
19 item is supposed to start at 10:45, so, again, Don, I
20 am ahead of schedule.

21 MR. MORGAN: Excellent.

22 CHAIRPERSON HAROUTUNIAN: And that is the
23 unauthorized practice of law. It's an informational
24 panel, and it's presented as considered by the Special
25 Issues Committee. Steve Gobbo is the chair of the

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1 Special Issues Committee. He is going to also be a
2 panelist, as well as John Anding, who is out of the
3 Drew, Cooper & Anding firm out of Grand Rapids, as
4 well as Kim Eddie. Is Kim here? Kim, okay, well,
5 come on forward. Kim is a prosecuting attorney and
6 out of Lansing, and he is on the Prosecuting Attorney
7 Coordinating Council, and as well as Josh Ard, and
8 Josh Ard is the chair of the Unauthorized Practice of
9 Law Committee, and please come forward here.

10 Just to let you know, the intent of the panel
11 discussion is to be able to, in effect, give
12 information without taking any action today. It may
13 very well be that, depending on how things go, that
14 there will be from the Unauthorized Practice of Law
15 Committee in April, could even be September of next
16 year, but it could be April of '08, issues to be
17 discussed and then ultimately voted upon. But that's
18 not the goal of this for this morning.

19 Having said that, Josh, let me, or Steve, to
20 be able to turn it over to one or both of you with
21 regard to beginning the presentation of the
22 unauthorized practice of law, and I know that, Josh,

23 you have been doing a great deal with regard to the
24 committee yourself as the chair.
25 MR. ARD: Thank you. Is this working?

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1 VOICE: No.

2 CHAIRPERSON HAROUTUNIAN: It's right at the
3 very top, Josh, right at the very top.

4 MR. ARD: Okay. What we are going to do is
5 run through some brief presentations, and we want to
6 save a lot of time at the end for questions, because
7 we thought there might well be some.

8 The basic order in which we are going to
9 present things is John is going to talk about the
10 historical situation. I am going to give a little bit
11 of an overview of the current law, a bit about what is
12 and what is not the unauthorized practice of law.
13 Steve is going to talk a lot about what goes on with
14 regard to other professions, and he is going to begin
15 a discussion of some other remedies that might be
16 available besides what the Bar itself can do.

17 Kim is here to talk a lot about the criminal
18 side of things, because we find that that's often a
19 question of why aren't these people in jail or
20 something like that, and we will also talk a little
21 bit about some other things that possibly -- well,
22 some of the things that you can do now that you might
23 get others in your community to do now, and, without
24 making any specific proposals, we will give just a few
25 suggestions perhaps of some things, of some changes

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1 that might be feasible that would really help the
2 problem out.

3 So as to not slow things down too much, I am
4 going to turn the program over to John Anding, who is
5 going to give us an overview of the historical
6 situation.

7 MR. ANDING: Good morning. The unauthorized
8 practice of law issue has been one that has really
9 transformed itself over the last ten years, and more
10 specifically over the last four or five years,
11 primarily through the decision by the Supreme Court
12 here in the state in the Dressel versus Ameribank
13 case.

14 I think I was asked to be on this panel
15 because all of the bad things that have happened in
16 this arena happened during my charge as the chairman
17 of the committee, and I was actually the lawyer, the
18 lead lawyer, in the Dressel versus Ameribank case that
19 has now given rise to a definition of the unauthorized
20 practice of law that is quite unwieldy and
21 unmanageable, but I don't see anybody throwing
22 anything at this point, so I think we are safe.

23 I thought we might start with an historical
24 perspective on UPL, because I think where we have come
25 from, as is always the case, in most discussions of

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1 human affairs where we have come from might tell us

2 something about both where we are at and where we
3 might need to go going forward.

4 I would like to start, just very briefly, by
5 talking about what our statutes in the state of
6 Michigan look like. We have two statutes, one that
7 governs individuals and one that governs corporations.

8 The statute that governs individuals, which
9 is 916, essentially says in the very first clause, A
10 person shall not practice law or engage in the law
11 business, and I emphasize engage in the law business,
12 because that was really the hot button in the Dressel
13 decision by our Michigan Supreme Court, and I believe
14 it might be an area that it continues to be a hot
15 button as we talk about remedies that we might
16 formulate to move us away from the rather difficult
17 position that we are in today.

18 The difference between practicing law and
19 engaging in law business, as you might suspect, is
20 that in one you actually make money, you take a fee
21 for what you do. And we will talk a little bit about
22 the implications of that as we go forward.

23 The corporate statute is quite lengthy and
24 quite wordy. Surprise, surprise. It, in short,
25 states that it does not apply where corporations

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1 otherwise lawfully engaged in the business authorized
2 by statute. A perfect example of that is a specific
3 carve-out for title companies. So it's not terribly
4 meaningful to the discussion, but I think it's
5 important to know that it's out there.

6 Let's talk about the trend up till 2003 when

7 the Dressel decision came down. There were a number
8 of Michigan Supreme Court decisions over the hundred
9 years that preceded the Dressel decision, all of which
10 took a rather circumspect and responsible approach to
11 the unauthorized practice of law issue. What emerged
12 from those decisions, and I have not given you the
13 cases here because for the most part the Dressel
14 decision has rendered them meaningless, but by name
15 they are the Denkema decision, the Kupris decision,
16 the Neller decision, and these decisions by our
17 Supreme Court, as I said, were quite circumspect and
18 dealt specifically with the facts before them, but a
19 couple of things emerged.

20 One was that a universal definition of the
21 practice of law is difficult, if not impossible, at
22 least for every supreme court of this state, except
23 for the current one.

24 Secondly, that there is an important
25 distinction between filling out forms that might be

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1 incidental to some other authorized business or
2 providing forms on the one hand and on the other hand
3 engaging in activities that are being engaged in for
4 profit. And this picks up on the language that we
5 talked about from the statute, which says that
6 engaging in the practice of law business is something
7 that is prohibited, although certainly less clear
8 today than it was when the statute went into effect
9 and in the hundred years leading up to the Dressel
10 decision.

11 The impact of the Dressel decision is --

12 first of all, the facts in that case were, these were
13 legal forms, essentially deed type information that
14 was being prepared by financial institutions for which
15 they were collecting a \$250 fee, basically filling out
16 mortgages and filling out deeds, and the question was,
17 well, are they engaged in the law business? Are they
18 engaged in the practice of law by virtue of filling
19 out these rather critical pieces of documentation, at
20 least for most ordinary citizens.

21 The circuit court found that it was not the
22 unauthorized practice of law. The Court of Appeals,
23 with a very balanced bench that included what you
24 would consider to be conservative, moderate, and
25 liberal influences, all found that it was the

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1 unauthorized practice of law, so it was granted in a
2 7-0 opinion, surprisingly enough, in an opinion
3 drafted by Marilyn Kelly we have what we have today,
4 which is the new definition, universal definition, of
5 the unauthorized practice of law.

6 And that definition is that a person engages
7 in the practice of law when he counsels or assists
8 another in matters that require the use of legal
9 discretion and profound legal knowledge.

10 Now, how is that for a hair ball? Pretty
11 difficult for I think most lawyers, especially, as I
12 will point out later on, solo practitioners, to choke
13 that one down, because there is a lot of solo
14 practitioners in small communities across the state
15 that do the kind of work that has traditionally been
16 considered the law practice but who are now being

17 told, well, you don't do anything that's terribly
18 profound and can be done by just about anybody.

19 And I think that's an important piece for us
20 to get our arms around. The definition I think on its
21 face has problems. Judge weaver in her concurring
22 opinion I think makes the point. She says, Legal
23 discretion and profound legal knowledge are amorphous
24 concepts that, like the practice of law, do not lend
25 themselves to a single interpretation. And there you

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1 have it.

2 what it has really done is it has, the
3 fallout from this decision, is that we have seen an
4 increasing number of document preparation companies
5 invading the state because they see this as a
6 get-out-of-jail-free card.

7 Trust kit companies that were already here
8 and who were subject to the diligent efforts of our
9 staff at the State Bar, UPL staff in terms of
10 prosecuting claims have been emboldened by this
11 decision, and then the noninstitutional small-time
12 offenders really hide behind the amorphous definition,
13 saying, well, I thought this didn't constitute
14 profound legal knowledge, I thought I could do it, and
15 I think we all can sympathize with that argument.

16 And so it has put the Bar in a very difficult
17 position. During my tenure, and Josh was on our
18 committee for many years while I was chairman, our
19 response was, what do we do? That was our first
20 response, hanging our heads a little bit, and the
21 first thing that we concluded was that prosecuting

22 enforcement was becoming ever more complex in light of
23 this definition, and that, coupled with the lack of
24 funding, made it very difficult, for example, to take
25 on the larger institutional type document preparation

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1 companies that come in well-heeled and ready to fight.
2 And that's a problem. At least it was a problem when
3 I was chairman. I think it's still a problem today.
4 I think that's probably why we are talking to you.

5 The efforts that we took, in addition to
6 augment the enforcement actions, was we began some
7 educational initiatives, but, again, those cost money,
8 and we were able to put together a few that were, I
9 thought, very, very effective. It's television and
10 radio spots and hotlines for people to call. We have
11 lawyers running OpEd pieces. We began making
12 presentations to local and State Bar meetings,
13 including the judges meetings, so we could alert the
14 judges to this issue, because they are the ones on the
15 front lines who can often run interference on these
16 sort of issues and bring them to our attention.

17 We also began interfacing with target groups,
18 likes AARP. The trust kit arena is one that is very
19 well-monied and have a substantial presence, and they
20 do a fair amount of victimization of elderly people,
21 if you can imagine approaching someone in their 60s or
22 so and telling them they need a trust and most
23 often -- I am not a trust person, but Josh can speak
24 to that -- these plans are inappropriate, if not
25 entirely unnecessary for these folks, and they are

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1 paying out 11, 12 hundred, two grand for these trusts
2 by people who don't know the first thing about putting
3 trust plans together.

4 So we began work with those groups, making
5 presentations with those groups, and we developed UPL
6 pamphlets that we began to distribute, but without
7 that sort of educational initiative being an enduring,
8 ongoing process, we are not going to get where we need
9 to be, and where we need to be is a place where we can
10 educate the public and our lawyers about what UPL is
11 and what the price of the unauthorized practice of law
12 is measured in terms of victimization of people in the
13 public.

14 In that regard I think we have to say that
15 those kind of continuing efforts are absolutely
16 essential. This problem is an enduring problem and
17 will continue to be a problem, apart from what
18 solutions we may be able to formulate in whatever
19 realm, whether it's legislative or judicial or
20 otherwise. We as a Bar association have an
21 obligation, at least it's my view, it was my view
22 while I was chairman of this committee, and I hope to
23 marshal some support for this view, it's our view to
24 protect the public from the unauthorized practice of
25 law.

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1 I mean, I understand that this is part of the
2 Bar that first and foremost is interested in its
3 membership, but we have a higher duty, and that duty
4 is to protect the public, and victimization of the
5 public is real. Josh can speak to some examples and
6 illustrations where people have lost thousands and
7 thousands, tens of thousands of dollars, especially
8 older seniors who are being victimized in the trust
9 arena. That's the one that jumps to mind most often,
10 but there are other situations where people have had
11 deeds prepared that were inappropriate, cost people
12 substantial portions of their real estate interest
13 because they were inappropriately prepared. This is a
14 real problem, and there are people out there in the
15 public who are being harmed.

16 Now, as it relates to our charge in terms of
17 our membership, no question but that this problem
18 disproportionately impacts the solo practitioners in
19 the small communities around this state, and while I
20 know they do not have a substantial voice in this
21 group, I have always advocated that it is our job, at
22 least in the UPL area, to take steps to protect the
23 interest of these solo practitioners whose livelihoods
24 are being undermined by the ability of these
25 companies, aside from the victimization, which I think

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1 is where you start, their livelihood is being
2 undermined by the ability of these people to come in
3 and engage in essentially the practice of law or what
4 has been traditionally understood to be the practice
5 of law up until 2003.

6 Those are my remarks in terms of historical
7 background.

8 MR. ARD: Thank you, John. You covered
9 actually a fair amount of some of the current law in
10 Michigan. I would like to give you a little bit of
11 perspective, in case you are not aware of this. This
12 is certainly not a Michigan problem. This is a
13 national problem. There had been some Bar
14 associations, some states who have developed a fairly
15 expansive reading of what the practice of law is, and
16 often those have run into trouble with the federal
17 government. In particular the Federal Trade
18 Commission and the Department of Justice have argued
19 that this is some sort of constraint on trade, a
20 restraint on trade that should not be allowed.

21 Legislatures have not always been friendly.
22 The legislature in Utah was asked to come up with a
23 definition of the practice of law, and they decided
24 that the practice of law was defending criminals in
25 court. They since changed that statute, but that was

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1 what they came up with when asked to define what only
2 attorneys can do.

3 In Texas the Bar committee was very
4 aggressive. They went after Nolo Press, an
5 organization I am sure many of you know, saying, well,
6 you shouldn't be able to put out all those self-help
7 books, and they claim that was the practice of law,
8 and what happened was that the legislature in Texas
9 immediately afterwards changed their law to say that
10 that was just fine. So this is certainly not a unique

11 Michigan problem.

12 Now, a lot of things that John talked about
13 are still going on. Some of them have changed. In
14 particular, most of the will and trust organizations
15 have subtly changed, that what we see now is, and I am
16 sure they are operating in your communities, and there
17 are a lot of these free lunch financial planning
18 seminars, and if you go and you buy their wonderful
19 product, which usually are inappropriate annuities,
20 they will give you a free estate plan, and what they
21 have done is they have gotten some attorneys to sign
22 up to get maybe \$300 a pop to have their names on the
23 documents.

24 Generally these attorneys don't do anything
25 with them, but of course the problem would be proving

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1 that the attorney was not involved in preparing the
2 document. It's not as obvious as where you have a
3 company that says we can do it, we don't need any
4 stinking lawyers, that type of thing. So that's been
5 one of the major changes.

6 Actually that's probably more harmful for the
7 profession of law than the will and trust companies
8 that were at least putting a value on the product. If
9 they are telling you what you are offering is a free
10 service, then how valuable are you?

11 We have seen -- the things that have come to
12 the committee and the Bar where there has been
13 probably the most stuff going on, besides those areas,
14 estate planning and Medicaid planning, areas like
15 that, are things like immigration, family law,

16 criminal law, and some sort of ongoing issues of
17 perhaps title companies going too far.

18 One of the things in the current law that is
19 fairly clear is that people can act as scriveners, as
20 amanmuenses in filling out forms, but the question is,
21 well, when do they go beyond just filling out the
22 forms and giving advice as to what to do?

23 There was a relatively recent settlement the
24 Bar reached with the we the People franchise. I
25 believe it was the one in Grand Rapids, wasn't it,

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1 Catherine?

2 MS. O'CONNELL: Yes.

3 MR. ARD: Yeah, and some people say, well,
4 why didn't you just completely shut them down?
5 Actually Catherine arranged a very good settlement
6 with them, but one of the reasons we can't shut them
7 down is that the current courts would not say that if
8 they really did what they are supposed to be doing of
9 just filling out forms that's the practice of law, and
10 obviously it requires more work to see what they were
11 really doing.

12 In this case they decided that they could
13 write a special needs trust, and I don't know how many
14 of you know about public benefits, but, you know,
15 that's not the kind of thing you should do if you
16 don't know what you are doing, and fortunately that
17 was stopped before there was any damage.

18 we are going to talk about some of the other
19 things that we can look at. The statutes that have
20 been mentioned so far are the particular statutes

21 having to do with the unauthorized practice of law,
22 but when we really get down to it, when we see the
23 unauthorized practice of law, it's almost always some
24 sort of unfair and deceptive marketing practice.

25 These people aren't saying, I am no good, I

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1 am charging you money for a product that's no good,
2 but please give me your money. That's not what they
3 are saying, and in many instances what they are doing
4 is presumably criminal, it's presumably false
5 pretenses in a number of areas. So there are some
6 other areas we can be looking into, and we will come
7 back to that a bit later.

8 But one of the things that we wanted to talk
9 some about is that in many of the instances of the
10 unauthorized practice of law we have other people who
11 are licensed professionals who may be involved in
12 that. So a lot of these free lunch seminars that we
13 are talking about, there are insurance agents, perhaps
14 CPAs, other people who are involved in setting this
15 up. So we need to look at some of the enforcement
16 mechanisms with regard to other professions and also
17 to try to put this into some sort of context as to how
18 does regulation work for other licensed professionals,
19 what's going on, and that's the kind of topic that
20 Steve is going to give us some more information about
21 now.

22 MR. GOBBO: Thank you, Josh. First I have to
23 make a small disclaimer. My comments will be
24 personal, not related to my employment with the State
25 of Michigan and the Department of Labor and Economic

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1 Growth.

2 what I do for a day-to-day living, at least
3 until maybe tomorrow, is enforce various statutes
4 related to occupations and professions within the
5 jurisdiction of the Department of Labor and Economic
6 Growth and a bureau called the Bureau of Commercial
7 Services. We regulate all of the commercial and
8 related type endeavors in the state, including we have
9 a division that incorporates all the different
10 companies that you would form throughout the state,
11 all the business entities.

12 It's pretty far reaching. There is about 30
13 different occupations. Most of these occupations are
14 regulated under the Michigan Occupational Code, which
15 is PA 299, 1980. It's broken up into several articles
16 that addresses each of the varying professions,
17 occupations that will range from public accountants to
18 funeral home directors. In the past we regulated
19 boxing under that act, although that's been moved to a
20 separate act. Real estate professionals, real estate
21 appraisers, and a number of other ones I am not going
22 to get into at this point.

23 For an example, for the purposes of making
24 this discussion as short as possible so we can open it
25 up to questions from you, I am going to use public

1 accountants as an example, because they have had some
 2 recent activity in the legislature amending Article 7
 3 of the Occupational Code.

4 Article 7 encompasses CPA's. CPA's are kind
 5 of unique in a sense, and actually most of these
 6 professions are unique in the sense that they all
 7 define in the statute what is prohibited and what is
 8 allowed under their professions.

9 I am going to just throw out another set of
 10 professionals that are under Article 20 of the
 11 Occupational Code, and that's typically termed design
 12 boards. We have land surveyors, architects, and
 13 professional engineers, and it's kind of an
 14 interesting interplay among those professionals
 15 because the way the definitions apply they are
 16 overlapped in terms of what those professions could
 17 do, and oftentimes there is some argument that one
 18 profession has intruded upon the other in terms of the
 19 type of work that they have done, and then you have
 20 them looking to the department to try to do something
 21 about the activities of the other.

22 So I bring that up because it's an
 23 interesting interplay, and I think the analogy could
 24 be made to a lot of the things that John and Josh had
 25 pointed out to you in terms of the issues with the

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1 definition in terms of the practice of law from the
 2 Dressel decision and just some of the types of
 3 activities that you as a group or the profession as a
 4 group may think is intrusive upon the practice of law.

5 within the Occupational Code there are
6 certain penalty provisions. There is a provision for
7 injunctive relief that not only can the department or
8 the Department of Attorney utilize to prevent somebody
9 from doing something that's prohibited under the code,
10 but also an association can use the injunctive relief,
11 and very similar to, I think, what the Bar has done in
12 many instances when UPL has been raised.

13 There are also criminal provisions, and
14 fairly recently most of the provisions were
15 misdemeanor, although certain professions, CPA's which
16 I am going to use as an example, have gone to the
17 legislature and gotten the legislature to up the
18 penalty provisions criminally to a felony.

19 Now the problem you still have with that is
20 that the agency I work for is not a criminal
21 enforcement agency, so we would have to rely on a
22 local county prosecutor or the Department of Attorney
23 General to enforce the criminal provisions, and, as
24 you all know, probably from your own practices,
25 whether the civil, criminal, administrative, trying to

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1 get a county prosecutor to do something when you have
2 kind of a regulatory violation versus murder, rape,
3 and all those other glorified crimes, it's pretty hard
4 to do. It's a matter of resources.

5 So that's the first thing you are going to be
6 facing in terms of this debate is to my knowledge
7 there is one staff member with the State Bar,
8 Catherine is the person assigned to UPL, and to expand
9 any type of enforcement activity, it could be pretty

10 overwhelming for just one person, I can tell you that
11 much.

12 The other aspect that you have, and I am
13 going to try to get back on course with talking about
14 CPA's. I mentioned that they are in Article 7 of the
15 code. There is a definition in Section 720, then
16 there is another definition in 723 that allows certain
17 people to use the title of CPA, very much like using
18 attorney or counselor at law, it's pretty well-defined
19 in the Court Rules, but there is a registration
20 provision where you do not have to actively practice
21 but if you register you are allowed to use the title,
22 usually it's college professors who want to use that
23 title while they are teaching but they are not going
24 to be doing public accounting in terms of attestation
25 reports, certifying financial statements and the like.

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1 But occasionally you have somebody who is
2 registered and then decides to make some extra money
3 on the side and does an attestation report. Is that
4 unlicensed practice when there is a statute that
5 allows you to do this? Now, this body right here at
6 the last meeting had to deal with a similar issue when
7 you looked at emeritus status.

8 The Article 7 goes on to 724 and talks about
9 those type of acts that are prohibited, and there is a
10 laundry list. With our profession, as attorneys,
11 there is no real definition of what's prohibited, and
12 when you get into the amorphous description of the
13 practice of law, profound legal knowledge, I mean, you
14 are treading into some deep, muddy waters.

15 In Section 734, there is a host of
16 violations, very much like our ethical provisions in
17 our profession.

18 Section 735 talks about criminal sanctions,
19 and this is the section that was recently amended,
20 calls for a \$25,000 fine for using the title or
21 practicing unlicensed public accounting, along with
22 the felony provisions. To date there has been no
23 prosecution under that provision, and the amendments
24 to the law occurred approximately two years ago.

25 what you have, I think, is a series of land

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1 mines that this body will have to make some decisions
2 on avoiding, because there is some I guess what you
3 call political issues where if decisions are made to
4 pursue a certain line, course of action, it may cause
5 some problems with some of these other professions,
6 and I am going to throw out real estate brokers, real
7 estate professionals as an example.

8 A very strong lobby in the legislature, they
9 fought very hard to carve out certain exceptions to
10 the practice in terms of real estate, and if you go in
11 one direction, unfortunately the legal profession may
12 not have the same persuasiveness with the legislature
13 as some of the other lobbyists, for various reasons,
14 they don't like attorneys. I don't know what to tell
15 you.

16 But as we get further into what may be done,
17 these are the things that are going to have to be
18 weighed and the land mines avoided, because, as John
19 has already pointed out, and Josh, I think with a

20 court, the Supreme Court that may be less than
21 sympathetic in some areas, we might end up with the
22 Utah situation where the practice of law is confined
23 to a definition that is very limited. So this is what
24 you are kind of facing at this point in time, and I
25 hope that kind of gives you a quick overview. I know

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1 at the end of the presentation we are going to open it
2 up to questions, and I would save further comment
3 until then if you have questions.

4 MR. ARD: Kim is going to talk now some about
5 the criminal, and that tends to be an area that a lot
6 of legislatures look to to solve everything by
7 making it a crime. There is a bill in Texas -- I
8 don't think it passed -- that decided to solve the
9 problem of parents not showing up for parent/teacher
10 conferences to make that a crime. And a few years
11 back our legislature decided that they would solve the
12 problem with deceptive mortgages by making that a
13 crime. Well, it didn't work, and Kim is going to talk
14 to us more about what's involved in criminalization.

15 MR. EDDIE: I would like to speak on behalf
16 of all 800 prosecutors in your state. All of us, we
17 are getting together and we are going to fight
18 everything. No.

19 Last year we pumped out roughly 60,000 felony
20 cases, those 800 people, about another half a million
21 misdemeanors. Now, what you have in the unauthorized
22 practice of law are two different misdemeanors. The
23 cases will generally break down as those people who
24 were never authorized to practice law, they are not

25 licensed, they never went to law school, they want to

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1 come in and represent somebody. We see those cases.

2 we also see the cases of the person who may
3 get an attorney who is either disbarred or suspended
4 that comes in to practice. We see those people who
5 completed law school but never quite got past the Bar
6 exam engage in the practice. A little bit tricky are
7 those who are licensed in other states. There is a
8 real question is that the unauthorized practice of law
9 if they have not been admitted pro hac vice.

10 And finally we see those who engage in
11 otherwise valid practice, i.e., the preparation
12 otherwise of forms who sort of gradually wander across
13 the line. Those are the type of criminal cases we
14 would see to prosecute under the two statutes which
15 were referenced, the 45621 and 600916.

16 Now, you also note those carry massive
17 penalties. For an individual, 93 days in the county
18 jail and/or \$750 fine. I can't get people put in jail
19 for armed robbery anymore because, guess what, they
20 are full. The county jails are full, the sheriffs are
21 letting people out. The prisons are full. The
22 governor is telling us we have to let these people
23 out.

24 well, we have let them out. We just let one
25 out in my county, in Ingham County. He murdered six

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1 women. We were real successful then.

2 So that is a huge problem for us in dealing
3 with this as a criminal problem. Oftentimes when this
4 comes to us as a criminal problem it is not looked at
5 as the unauthorized practice of law. It clearly is,
6 but there are other crimes that are committed by these
7 individuals which carry far greater crimes -- fraud,
8 embezzlement, obtaining by false pretenses. All of
9 these carry greater potential penalties.

10 So while it may be the unauthorized practice
11 of law, as a prosecutor I am looking at it and saying,
12 that's great, but if I have a five or 10-year felony
13 versus a 6-month misdemeanor or 90-day misdemeanor, I
14 am not going to call it that. I am not going to
15 engage in what is defined as the unauthorized practice
16 of law because the bang is not there for the buck.

17 The other difficulty with prosecution is --
18 Josh is right. If the legislature can't figure out
19 what to do with it, they make it a crime, and
20 oftentimes they make it a crime with a
21 disproportionate felony attached to it.

22 I am going to go after a CPA on a four-year
23 felony. I'd rather go after the CPA for the fraud he
24 committed or something else. I may throw it in,
25 because you can always do that terrible thing we all

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1 practice as prosecutors, we plea bargain. I always
2 wish I could go to the legislature and say eliminate
3 plea bargain. I would like to be a judge too, I might

4 not have to work as hard, whatever. Because that
5 would kick the system. It would die in a day, we all
6 know that. We all live under that myth.

7 But in terms of the unauthorized practice of
8 law, the reality is the statutes have no sufficient
9 penalty as a prosecutor to really attack it as that
10 particular crime. I will attack it as other means,
11 other crimes which are viable.

12 And for an example, we had an attorney who
13 was a guardian, and he clearly breached his duty as an
14 attorney, he clearly was engaging in improper
15 activity. We didn't prosecute any of that. It was
16 there. It was left to go. We prosecuted the fraud
17 and embezzlement, and because he did it at the state
18 court level, we prosecuted in federal court, and
19 ultimately he was sentenced to federal prison for
20 those violations.

21 As a prosecutor I look at what is the bang
22 for the buck. Unauthorized practice of law as a
23 90-day misdemeanor or a 6-month misdemeanor, makes no
24 sense when I have a far greater crime. Will I
25 prosecute it? I have two prosecutors in the audience.

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1 One of them serves on my board of directors, the other
2 one I have known for many years.

3 They have to evaluate what they are going to
4 do, evaluate staff, evaluate time, and that's a
5 critical part of this problem. You can make it a law,
6 you can make it a violation, but if you don't give us
7 resources to prosecute against it, it's just not going
8 to happen. And these statutes are not realistic to

9 prosecute. That doesn't get into the whole Dressel
10 issue of this profound legal knowledge.

11 Now, in the civil, which many of you do,
12 there is a different standard. As a prosecutor, proof
13 beyond a reasonable doubt as to what's profound legal
14 knowledge. I think I could take everybody in this
15 room and not get a good definition for that, and I
16 have to explain that to 6 or 12 jurors and have them
17 come out with an answer.

18 So I don't think criminal prosecution is even
19 viable. Unauthorized practice of law, I like a
20 definition, but it's not viable based upon the
21 potential penalty, the number of cases we carry. It's
22 viable only from the other crime.

23 One of the other difficulties we have as
24 prosecutors too is you people grade these, I want to
25 say you people pick them, and the worst offenders are

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1 those on the bench. They fix things for people to
2 come in and do them wrong. They want to move that
3 case along, I understand that. You know, if I move
4 the divorce along, it's off my docket. If I don't
5 offend my brother attorney, I am a good guy.

6 I say don't do that. If you have a case,
7 bring it to us. We may elect a prosecutor tonight,
8 but too many times we do not know what that case is or
9 what the potential for that case is, and neither does
10 Catherine. Catherine gets many calls, this is
11 terrible, this is awful. want to make a complaint?
12 well, no, but this is terrible, this is awful.

13 So I offer to you from the prosecutor's

14 standpoint, if you bring it to us, we will look at it.
15 I won't guarantee we will prosecute. I know Chris
16 over there sits alone by himself up in the U.P. I
17 just found a case the other day that he is taking on
18 for somebody else.

19 we will take it on. We will take a look at
20 it, but understand we may not prosecute unauthorized
21 practice of law. It's going to be something else,
22 something more viable.

23 MR. ARD: I have got just a few other
24 remarks, and then we are going to throw it open to
25 questions.

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1 There are some other potential remedies that
2 could be used that don't necessarily have to be used
3 by the Bar. They could be used by private attorneys.
4 One example is that, as I said, it's almost always an
5 unfair, unconscionable, or deceptive practice, and so
6 presumably this would come under the Consumer
7 Protection Act which somebody could bring, and if they
8 win, this could get attorney fees paid for them by the
9 losing defendant.

10 Some of you may be aware that the Consumer
11 Protection Act is virtually dead now in Michigan, but
12 the unauthorized practice of law would seem to be an
13 area where it's open, because it doesn't apply to
14 anybody who is specifically authorized to do what they
15 are doing. In almost every business claim, well,
16 gosh, I am specifically authorized to do what I am
17 doing, so go away. If it's the unauthorized practice,
18 how did you say you are specifically authorized to do

19 it?

20 There is also a possibility, one reading of
21 the act, is that if you as an attorney are harmed by
22 unfair competition that you have standing to bring the
23 case and to seek attorney fees for that. It would
24 help if the legislature clarified that a bit, but that
25 seems to be a possibility.

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1 Another one is that when these people are
2 engaged in the practice of law, they are really
3 engaged in the malpractice of law. They are not doing
4 a good job. We are not complaining that these people
5 out there are doing a great job and how come they are
6 doing a great job and we are not. So the way the
7 malpractice statute is written, that may potentially
8 apply. It's a little vague though. It talks about
9 people holding themselves out as a member of a
10 licensed profession.

11 If you are engaged in the unauthorized
12 practice of law, are you holding yourself out as a
13 member of that profession? You know, I would say so,
14 but I have found that the courts don't always listen
15 to me. I don't know why. But that, again, could be
16 something that would be clarified to say either
17 somebody who engages in the practice or holds
18 themselves out to be a member, and that would be a
19 potential remedy, and, of course, that puts a lot more
20 of a threat on people.

21 You know, we are probably not going to put
22 some of these people in jail, but if they could lose a
23 lot of money, that could be a problem. And one of the

24 things that really galls me is that if you want to
25 come play on my field, I want you to play by my rules,

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1 and in particular the idea of these waivers of
2 liability is a terrible problem. You can go into the
3 title company that would give you terrible advice
4 about what to do with your deed, but they will have
5 you sign a statement saying, well, we are going to
6 waive any liability claims that we are going to make.

7 That shouldn't be allowed. If you are going
8 to do something that's close to the practice of law,
9 you should have to stand behind it in case you lead
10 somebody astray.

11 Now, one of the things we wanted to get into
12 as well is, well, what can you do, and Kim gave one
13 good example is you can and you should be reporting.
14 Cathreine gets very few fully articulated complaints.
15 She gets a lot of people calling and saying why aren't
16 you doing anything, but she gets very little
17 information.

18 We need to get the information to her. We
19 also need to get better information to the public,
20 that prevention is always cheaper than remediation.
21 Why should people go to qualified attorneys to get
22 legal service? Why should people listen to you rather
23 than listen to their brother-in-law? You know, what
24 is the value to them of doing that, and there clearly
25 is a value to them doing that. A lot of this causes

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1 considerable harm, but people don't realize that.
2 People don't realize why they shouldn't just download
3 a form from the internet. They don't really realize
4 why should I get an attorney involved if I am going to
5 be in a real estate transaction. Why should I get --
6 if I think I am going to be going into a nursing home
7 for two years, why should I get somebody to look over
8 this contract before I sign it? People just don't
9 think about those kinds of things. That's one of the
10 things that we can do.

11 And I would say also working with other
12 people in your community. I can certainly appreciate
13 what Kim is saying about how prosecutors and police
14 aren't likely to do, you know, want to prosecute these
15 matters, but if you know, for example, that there is
16 going to be some sort of a fraudulent free lunch
17 seminar in your community and you have some contacts
18 with the local law enforcement, if a police officer
19 stops by and says, you know, I am interested to see if
20 there might be some false pretenses going on in this
21 seminar, I have got some concerns here, you know, that
22 could have an effect.

23 So we need to think about various kinds of
24 prevention things. We need to get the word out to
25 people and also to people in law enforcement, people

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1 in those areas.

2 So there are some various things that we all

3 can be doing above and beyond some of the limitations
4 that are placed on the actual enforcement by Bar
5 itself.

6 with that being said, we are going to open
7 this up to questions. I don't know how you want to
8 handle the questions.

9 CHAIRPERSON HAROUTUNIAN: Sure.

10 MR. ARD: It's up to you.

11 CHAIRPERSON HAROUTUNIAN: well, my suggestion
12 would be that if someone has a question, we have got a
13 couple of microphones over here, and please come up to
14 the microphone, identify yourself and ask your
15 question.

16 MR. GREEN: Good morning. My name is
17 Roderick Green from the 3rd circuit. I know three
18 young men who dress fairly nice and they carry
19 briefcases. They never hold themselves out to be an
20 attorney, but because of the way they carry
21 themselves, if someone approaches them and asks them
22 to get involved in some type of transaction, they will
23 never deny that they are, and then they will get
24 involved in some type of paper dealings.

25 what about the situation with someone who

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1 doesn't actually hold themselves out as an attorney
2 but acts under the apparent guise of being an
3 attorney, what's your answer to that?

4 MR. ARD: Catherine, do you want to say how
5 you would handle that if you heard that.

6 MS. O'CONNELL: That's something that I would
7 consider to be a problem. You don't have to be

8 holding yourself out as an attorney to be violating
9 the statute. By giving legal advice you are violating
10 the statute, so that's definitely a problem.

11 MR. ARD: Yeah, I mean we -- I think all of
12 us here are in agreement that you can step over the
13 line simply by giving legal advice. There is not any
14 case law in Michigan that expressly says that. I
15 mean, you know, it runs into some issues with the
16 First Amendment, obviously, that, you know, somebody,
17 somebody can stand up and say taxes are illegal, taxes
18 are unconstitutional, and they have got a First
19 Amendment right to do that.

20 If they sit down with you and say, I have
21 looked over your situation and have decided that you
22 don't have to pay any taxes, then that might be an
23 area where I think they stepped over the line, and we
24 would certainly be interested in looking at something
25 along those lines, but there isn't any case law that

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1 actually says that.

2 MR. ANDING: If I might just add a comment.
3 It's a simple example, although you didn't give us a
4 lot of facts about what the nature of the transaction
5 is, but take that simple example and now superimpose
6 over it the definition profound legal knowledge. You
7 can see the difficulty it creates just as a threshold
8 issue and the complexity that it introduces for the
9 UPL staff who have to prosecute those claims that
10 become less clear and, therefore, more complicated and
11 more expensive to prosecute.

12 I will make this pitch again and again, I

13 really believe that our best way around this problem
14 is the education of the public at large, and what
15 comes to mind, we did a few of these spots, is public
16 service spots that target particular victim groups,
17 that identifies, as Josh talked about earlier, why
18 what we do in our profession is a good thing. It's
19 good for people. It protects them from harm, and we
20 don't do enough of that, period, flat out. For some
21 reason we are afraid of taking shots because we are
22 lawyers, and I think it's -- we really need to stop
23 being defensive about that and go on the offensive and
24 talk about why what we do helps people.

25 MR. GOBBO: If I could maybe just make one

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1 comment. The scenario that you kind of presented to
2 me is kind of like the case where we see somebody who
3 is a citizen, they have a roof repair, they see the
4 discount roof service, they like the price, so they go
5 with that person, but then when there is a problem,
6 they come back and they say, why did you let that
7 unlicensed person get up on my roof?

8 So it's kind of what John is saying in terms
9 of an education process. There has got to be some
10 reason why those three gentlemen carrying those
11 briefcases are attracting customers, and if you could
12 get through that, it might resolve some of the problem
13 anyway.

14 MR. CHADWICK: Thank you. My name is Tom
15 Chadwick from the 8th circuit. I would like to talk
16 about the advertising and ask you to respond. This
17 seems to be an area where we could have some progress

18 and perhaps has been discussed by the committee. I
19 would like to identify two advertisements that I have
20 observed and heard in the past. One is a newsprint
21 add that says your will is worthless and then some
22 information below that. It could be a false claim.
23 There are other claims that are even more outrageous
24 than that one.

25 Another ad I have heard on radio is that our

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1 documents are not prepared -- we are not attorneys but
2 our documents are prepared by top attorneys. For the
3 first ad where perhaps there was a false claim,
4 perhaps we should be requiring that those claims are
5 cleaned up. Certainly in our profession attorneys are
6 not allowed to make false claims in our advertising,
7 we are not allowed to hold ourselves out as experts
8 except in very extreme circumstances. We have strict
9 rules about our advertising. Perhaps we could require
10 the same restrictions for advertising from these
11 companies that are the trust mills.

12 Secondly, I have also heard disclaimers from
13 financial institutions that past performance is not a
14 guarantee of future results. We have heard that many
15 times. Perhaps by requiring a disclaimer for these
16 advertising in their radio ads when they say they are
17 not drafted by top attorneys, also a warning to the
18 consumer that if they engage in, if they receive these
19 services that they could be subjecting themselves to
20 certain types of mistakes and that that would be
21 identified right in the radio and a requirement that
22 that be done.

23 The second idea that I have is somewhat
24 tongue in cheek, but it is win, win, win. Since these
25 companies have indicated that they are selling a

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1 product and not a service, perhaps we could require a
2 six percent sales or use tax attached to their
3 products that they sell. Thank you.

4 MR. ARD: With regard to the current law, and
5 we will certainly take -- you know, your suggestions
6 are always welcome. With respect to the current law,
7 attempting the unauthorized practice of law is not
8 actionable. It has to go through. So we would have
9 to find somebody who actually fell victim to that
10 advertisement and then go after them for that.

11 Now, probably the advertisements could be --
12 I mean, false advertising is the type of thing the
13 Consumer Protection Act was designed to attack, so
14 that might be a possibility there. Another thing is a
15 problem that you may or may not be aware of is that
16 the Bar staff itself can't do a sting operation based
17 on the way the ethical rules have been written. They
18 are supposed to be, you know, forthcoming to
19 everybody, so they can't be involved in a situation
20 where somebody says, well, you know, I am just some
21 naive consumer. Well, tell me more about this.

22 They are not supposed to be involved in that
23 kind of thing, and without any opportunity of a sting
24 operation, we have to rely on people themselves to,
25 who have fallen victim, to step forward, and that's a

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1 problem with a lot of this false advertising that's
2 going on, and if you folks will forgive me to allow
3 more people to answer questions, maybe we shouldn't
4 all give our opinions on every question, but we will
5 take another question.

6 JUDGE KENT: Wally Kent, 54th circuit. It
7 appears to me a very strong analogy to the medical
8 field where this issue has been resolved, I think in
9 large part, by drawing very bright lines. My
10 veterinary can treat my dog, my horse, but not me. My
11 wife is a registered nurse. She can change dressings,
12 but she can't suture wounds. She could probably in
13 the ordinary case figure out what kind of medication
14 should be prescribed for routine situations, but she
15 is not allowed to because she does not have
16 credentials. I think the bright line has been drawn
17 in that area because our physical safety, our very
18 lives are at risk.

19 In our profession we deal with people's lives
20 in a different way because we deal with their
21 property, their belongings or their liberty. The
22 damage, the harm that can be done is every bit as
23 terrible to the consumer and to their heirs, if you
24 will. Since I sit as a probate judge, I see some of
25 these things after the fact. But my question is very

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1 simply has this argument been made to the powers that

2 be, and, if it has, obviously they haven't listened
3 very well, what response have they made in rejecting
4 the argument.

5 MR. ANDING: Our Supreme Court heard that
6 argument as it related to Dressel to the transactions
7 that concerned typically for most people the largest
8 and more so important asset of their lives, their
9 homes, and rejected it as sufficiently important area
10 to require the sort of increased scrutiny that you are
11 talking about. Interestingly enough, from the bench
12 the Court of Appeals expressed alarm that this sort of
13 transaction would allow, could be accomplished by a
14 nonlawyer when that very reason, that it concerned an
15 asset that is perhaps the most important for most
16 people in their entire lives.

17 But you are on the right track. The whole
18 notion of harm, and I thought your comments were very
19 poignant, what we do is every bit as important and in
20 a material way sometimes more important when we are
21 protecting property and the liberty of those who are
22 in good health. And that's part of my pitch, that we
23 really, that education of the public about these
24 issues needs to be targeted, and we are not going to
25 be able to solve every problem, but we can certainly

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1 target those areas where victimization is rampant, and
2 with public service announcements, with enlisting
3 groups who represent those groups who are typically
4 targeted, AARP is a perfect example, but it takes
5 money, but it takes money.

6 MR. EDDIE: Also, this body has looked at

7 trying to form some kind of bright line definition,
8 and we have looked at putting that through the
9 legislature, but, quite frankly, the thought of that
10 terrifies us because it is often said it's like
11 sausage being made. One of my favorite quotes is
12 that's an insult to sausage makers.

13 So we do not think if we went to a
14 legislative situation we would get anything other than
15 perhaps what they got in Utah, which is criminal
16 defense work is the practice of law. Beyond that we
17 don't know what it is.

18 MS. POHLY: Linda Pohly, 7th circuit. It
19 seems clear the preparation of real estate documents
20 is not the practice of law by a title company, but
21 they are doing it. As Mr. Ard pointed out, they are
22 also preparing what look very much like adhesion
23 contracts. Those waivers of liability, you know, some
24 of them are even putting the seller's name on the
25 document as the drafter, so they are covering

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1 themselves every which way, leaving families who are
2 unwise enough to have them prepare deeds creating
3 joint interests to go to probate the worst of all
4 possible worlds.

5 The legislature apparently is not interested
6 in that. The court is not interested in that. Is the
7 Consumer Protection statute any possible remedy to
8 that situation?

9 MR. ARD: It could be. Of course, the
10 trouble with the Consumer Protect -- unless the
11 Consumer Protection Act is fixed, and there is a big

12 battle in the legislature to try to, well, to correct
13 some of the problems going on. The argument right now
14 would have to say that they are not specifically
15 authorized to do that. And in your case it's not so
16 much that they are specifically prohibited from doing
17 that, but we might be in a vague area, and I guess you
18 could argue that it would have to be, that it would be
19 their burden to prove that they are specifically
20 authorized to do this under some things like the,
21 under something, and so it may be a viable approach.

22 In some of these instances, of course, when
23 we are talking about the bucks with the Consumer
24 Protection Act, if you can show the, if you can get
25 the actual harm, if you can show what it is, otherwise

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1 it's going to be \$250, and of course if it were
2 something that could possibly be construed as
3 malpractice, that's going to be putting a lot more
4 fear into people, because there is a lot more money
5 involved. Certainly a plausible argument could be
6 made that the Consumer Protection Act would apply to
7 that.

8 MS. POHLY: If I could follow up though. The
9 Supreme Court says that they are not specifically
10 prohibited from doing it, but they may not be
11 specifically allowed under the Consumer Protection
12 Act?

13 MR. ARD: Well, the exemption is a
14 transaction or conduct specifically authorized under
15 laws administered by a regulatory board or officer
16 acting under statutory authority of this state or the

17 United States. That was the definition the
18 Supreme Court used to exempt a lot of people.

19 Now, if this is an affirmative defense and so
20 the question would be could the title companies
21 convince our court that this is specifically
22 authorized under our laws, that would be their burden
23 to show.

24 MS. POHLY: If such a case were brought,
25 could the State Bar of Michigan provide support,

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1 expertise if nothing else?

2 MR. GOBBO: If I could maybe just interject
3 something. I agree with Josh on one point, but not
4 necessarily on the second point under the MCPA. There
5 is a recent series of cases that the Supreme Court
6 decided, and the ruling was pretty broad. And,
7 basically, using these other professions that I am
8 involved with, let's say you take somebody who is
9 unlicensed in this state to do building, residential
10 building, and somebody were to bring an MCPA case
11 against them, because it fits within the regulatory
12 scope, i.e., building, the MCPA would not apply.

13 So you have a quandary, where even though you
14 would think that the person would have to be licensed
15 to be exempted from an action under the MCPA, that's
16 not what the Supreme Court in this state has said in
17 these recent series of rulings.

18 MR. ARD: It would be a tough fight, but it's
19 a potential.

20 MS. FIELD: Hi, my name is Monique Field from
21 the 30th circuit. I work with the legislature,

22 whether that's fortunate or not, especially now, I
23 would say I would probably prefer watching sausage
24 being made, and I apologize for my lateness, and maybe
25 this has been covered at some point in time, but I

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1 have heard numerous comments about educating the
2 public and educating target audiences, and I heard
3 comments as far as what the legislature does and does
4 not do.

5 One of the things that I have noticed over
6 the several years that I have worked with the
7 legislature is the lack of presence of the State Bar.
8 There are numerous people in the legislature, 138 in
9 both chambers. You have two members of this body who
10 represent leadership in both chambers on both sides of
11 the aisle. It seems to me that a responsible move
12 would be to start educating the legislature, because
13 you have people who are not attorneys making decisions
14 that impact attorneys, and you do not have legal
15 voices that are making a presence to basically educate
16 those individuals on the impact that they are having
17 on the state.

18 And so while I agree that educating the
19 public is probably paramount, I would also say that
20 getting into the legislative body, having meetings
21 with those individuals, telling them that this body is
22 important and has something to say, the impacts that
23 they are making are egregious at times is definitely
24 something we should consider.

25 (Applause.)

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1 MR. EDDIE: Hard to pick up on that, because
2 in my previous life I served nine years as a
3 commissioner, and I continue to serve on the public
4 policy board.

5 To some degree we are limited by case law
6 where we can get involved with the legislature, but I
7 will tell you this body is daily, the State Bar is
8 daily involved with the legislature. We have
9 lobbyists. We have Janet Welch, who is well-known to
10 everybody in the house. We bring in those attorney
11 members of the legislature before they ever serve,
12 educate them about our issues and problems. A vast
13 amount of your resources are spent dealing with the
14 legislature, because we understand that issue.

15 We don't always win. There are a lot of
16 other lobbyists there. One of my favorites is anybody
17 have an idea when the last time the tax was changed on
18 a can of beer? 1960, it was two cents. Do you know
19 where most of the fundraisers are held for the
20 legislature? The Beer and Wine Wholesalers. I am not
21 saying there is a connection, and I don't mean to, but
22 what I am saying is there are a lot of other lobbyists
23 there that are seeking things as well.

24 But I think the State Bar does an exceptional
25 job in lobbying. Our lobbyist is an extremely gifted

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1 woman who knows everybody over there, and we are there
2 every place we can be under the law. And that's not
3 an advertisement for the Bar. I apologize. I know
4 they are there.

5 CHAIRPERSON HAROUTUNIAN: Any other
6 questions? Let me just add one point, and that is
7 what Kim Eddie said with regard to the Bar's
8 involvement. I can tell you the last three years the
9 Bar has been pretty well involved with all of the
10 issues that we can be involved in given the
11 restrictions of the Keller decision of the United
12 States Supreme Court. Given those restrictions and
13 within those confines, the State Bar of Michigan has
14 been extremely active through the Board of
15 Commissioners and it's policy committee, and I will
16 tell you I have served on that policy committee for
17 two or three years now, and it's been pretty doggone
18 active.

19 And so when the issue comes up as to whether
20 or not to oppose, whether or not to go forward and
21 affirm a position, the State Bar is there, and we have
22 the opportunity of saying whether it should be
23 affirmed in principle, which is simply say yes and nod
24 your head, or whether to take an active position,
25 which means we are going to spend some money and have

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1 our lobbyist go and do their thing with the
2 legislature.

3 Regardless of whether it's the active role or
4 the nonactive role, the State Bar personnel, and that
5 generally has been Janet Welch and Elizabeth Lyons

6 have really done quite a job in my experience the last
7 three years with dealing with the issues and going to
8 the legislature.

9 I think, I don't know where Elizabeth is, but
10 the answer is that as of yesterday she had it right up
11 to the minute in terms of what the heck the
12 legislature was doing in terms of the tax issue. So
13 she is very much on top of these things.

14 I appreciate the comment, because it's a good
15 comment, because that's a legitimate question to
16 raise, but I just want to make sure that at least from
17 my experience I have responded to same.

18 MR. ARD: I wanted to add one other thing to
19 this as well is that in addition to looking at the
20 sort of big picture things, one of the things that we
21 could do is to look a little more at some of the
22 smaller picture things. So, for example, if there is
23 a bill in the legislature that has something to do
24 with the Occupational Code, you know, perhaps there
25 would be something to say, well, maybe we ought to

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1 extend this to attorneys as well if we think that's an
2 important, some sort of important protection.

3 I am on a committee for the Probate and
4 Estate Planning Section looking over the proposed
5 Uniform Power of Attorney Act, and one of the things
6 that I have argued in the committee is that third
7 parties ought to have sort of different rules about
8 when they can reject an instrument that is given to
9 them. That if it's drafted by a licensed Michigan
10 attorney they ought to have some sort of higher

11 standard than if it's just, you know, gotten off the
12 internet or something like that.

13 So if there are some things like that that we
14 can do, that might well help as well. It's not always
15 the big things. Sometimes it's the little things.

16 And, in closing, we want to stress again that
17 we need you to help individually and in your
18 communities and in your local bar associations. You
19 know, we need to get information to Catherine at the
20 Bar, possibly to law enforcement, but we also need to
21 get the word out to people and to other professionals,
22 and I suppose one of the things I would like to say is
23 that we need to think about this too, is that we need
24 to make sure that we are not going too far about sort
25 of stepping on somebody else's turf.

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1 So if somebody is coming to us, we don't want
2 to be giving them investment advise. You know, we
3 ought to say, Go see a professional. If we are
4 telling everybody else that when you need something
5 done in the law you need to seek professionals, we
6 need to have the same kind of attitude ourselves in
7 dealing with other people in our community.

8 CHAIRPERSON HAROUTUNIAN: Josh, a question,
9 and that is if anybody has an opportunity to, let's
10 say a bar association or a specialty bar, et cetera,
11 who would like to be able to have either yourself or
12 any of the panel members or you all come and speak to
13 them, would that be something that you would
14 entertain?

15 MR. ARD: I think we would as a committee.

16 You know, personally I would prefer not Ironwood in
17 February, but, you know.

18 MS. O'CONNELL: We have extended the offer in
19 the past, and we have actually appeared at several
20 organizations.

21 CHAIRPERSON HAROUTUNIAN: Catherine O'Connell
22 from the State Bar has indicated that this has been
23 done in the past and that invitations to the local
24 bars have been extended, but I want to make sure that
25 I say here to the Representative Assembly that if

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1 there are opportunities or if you would like to take
2 up the committee, the Unauthorized Practice of Law
3 Committee, to come into the bar association and talk.

4 MR. ARD: Also things like public access
5 television or OpEd cases in some of the local
6 publications.

7 CHAIRMAN HAROUTUNIAN: Okay. I just want to
8 make sure that that opportunity is there, so if
9 somebody says, I really would like to have a few
10 people come over and talk to us about this, and for
11 other, you know, not for people here, but I mean other
12 groups of people, that I think that that opportunity
13 should be there.

14 I want to take this opportunity to thank
15 Steve Gobbo, who is the chair of the Special Issues
16 Committee that really kind of pushed this forward.
17 Steve, thank you very much, as well as Josh Ard, the
18 chair of the Unauthorized Practice of Law Committee,
19 and John Anding, as well as Kim Eddie, and also
20 Catherine O'Connell.

21 Catherine, you may have not been on the
22 panel, per se, but your presence here and background
23 information, et cetera, is invaluable in that sense,
24 and so I want to thank all of you for being here, and
25 we have a small token of appreciation for each of you

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1 that Bob Gardella is going to pass along.

2 Prior to leaving -- and, by the way, before I
3 do that, let's give these panelists our appreciation.
4 (Applause.)

5 CHAIRPERSON HAROUTUNIAN: Prior to leaving
6 for lunch, let me ask, if I may, a show of hands of
7 those members who plan on or are intending to be on
8 the Assembly in April of 2008 and who have not had
9 their photos taken for the pictorial directory. Shows
10 of hands, please. Make sure you all see Marge
11 Bossenbery and recognize that the directory will be
12 published on the State Bar website, and, you know,
13 that way you can put names and faces and use it to not
14 only contact your fellow R.A. members but to refer
15 cases and to seek advice.

16 And, by the way, let me make sure I say this.
17 This is something that Bob Gardella, vice chair for
18 the next four hours, is moving forward with, and so I
19 share that with you, and I happen to agree, but Bob
20 is, like everything else in this life, you can only do
21 one thing many times at a time, and someone else has
22 to pick up the ball to run with it. Well, Bob is
23 picking up the ball on this, and I just want to make
24 sure I have said that, because that's the thing that's
25 important, and it is an important thing. You may say

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1 it's kind of fundamental, but, you know, sometimes
2 fundamental things don't get done unless somebody is
3 pushing it to make it happen.

4 And so I share that with you and in order to
5 make it happen what we need is to have those who are
6 going to be April 2008 members see Marge Bossenbery
7 and somebody will take your mug shot, and so all
8 right.

9 So with that, I think, unless somebody has
10 something else, we are ready to be recessed for lunch.
11 Lunch is immediately next door, so you walk out the
12 doors, make a left, and you are pretty much there. So
13 we will stand in recess until 2:00 this afternoon.

14 (Lunch recess taken.)

15 CHAIRPERSON HAROUTUNIAN: Ladies and
16 gentlemen, if you could take your seats, please. We
17 are ready to rock and roll.

18 We are honored -- if you were in the lunch
19 room, you heard Chief Justice Clifford Taylor of the
20 Michigan Supreme Court make some remarks, and he and
21 his wife, Lucille, who is also a Michigan attorney,
22 are here now. They are close to being on their way to
23 leaving to the airport to leave the area, but before
24 they left we are honored to be able to have Chief
25 Justice Clifford Taylor to be able to address the

1 Representative Assembly. Chief Justice Taylor.

2 (Applause.)

3 CHIEF JUSTICE TAYLOR: This will not be
4 lengthy. I just learned that you were meeting a
5 couple days ago, and Ed asked me to drop in and say
6 hello, and I wanted to do that. I particularly wanted
7 to comment on the 35 years that the Representative
8 Assembly has been in existence and to congratulate you
9 on the serious work that you do.

10 I wanted to also give you -- I mentioned in
11 the previous set of remarks that I think most of you
12 were there for the current financial situation of the
13 judiciary in Michigan, and I wanted to just briefly
14 touch a little bit on that as I think this group, in
15 particular this group, needs to be aware of this.

16 We are in a very, very precarious situation
17 in Lansing. As you know, the budget is not approved,
18 and the State government will indeed shut down on
19 Monday should something not eventuate that prevents
20 that. And it appears from the intelligence that we
21 can get, which is not all that much advanced over what
22 the media would inform the general public, that there
23 probably will not be a resolution. But I wanted to
24 talk to you about the status of judicial funding from
25 the State.

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1 First of all a little bit of background
2 information. Some of this may be well known to all of
3 you, but when I was a lawyer I don't know that I
4 really paid much attention to this, but you are

5 leaders of the Bar, and so I would like to try to
6 inform you of this.

7 In Michigan all of the judges of the state's
8 salaries are paid by the State, so this is the
9 probates, districts, circuits, Court of Appeals and
10 Supreme Court. Salaries are all pay. For the Court
11 of Appeals and the Supreme Court, the State pays for
12 everything else too, fringe benefits, their offices,
13 their staff, so forth.

14 However, for the circuits, district, and
15 probate judges across the state, of which there are
16 roughly 600, those fringe benefits, their offices and
17 their staff are all paid by the local governments.
18 There are some variations in how much the local
19 government pays. Sometimes they have pension plans
20 and whatnot that are supplemental to the State, but
21 what you need to understand is that the salary of the
22 judges are a State item.

23 Every judge's pay in Michigan, and they are a
24 bit different because of the different levels of pay
25 for the various types of judges, but it's a fair

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1 understanding to think of a judge as costing the state
2 taxpayers \$150,000 a year. It probably is a little
3 more than that, but this is a certainly conservative
4 figure.

5 Our budget has been year by year by year
6 coming down. The requirements, the out-go, if you
7 will, has year by year by year been going up. Over
8 the years in a process that is, I think, pretty highly
9 defensible inasmuch as it came from the trial court

10 assessment commission, which was a very well received
11 group, a method was worked out to try to determine
12 where judges are needed and where judges aren't
13 needed, and they have been making these reports for
14 quite a while. They are rather scientific. They have
15 statisticians and regressions and all that sort of
16 thing that no lawyer understands.

17 But, in any event, the upshot is they make
18 these findings, and over the years these findings have
19 been the basis for adding judges in this state, and I
20 must say that, generally speaking, the reports have
21 been assailed mightily if they ever come forward with a
22 proposal to reduce judgeships. So you have that which
23 is good for adding is not good for subtracting.

24 So in any event, into that circumstance,
25 recommendations were made by the State Court

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1 Administrator and then endorsed by the Court, and,
2 indeed, my court by a 4/3 vote endorsed more dramatic
3 reductions in the number of judgeships, again based on
4 the numerical derivations of case loads, which I
5 hasten to add again are done in a way which is
6 sophisticated, and generally the methodology is not
7 attacked. If it is attacked it's just attacked by
8 people that say I don't understand it, which really
9 isn't much of an attack.

10 So we at the Court recommended the reduction
11 of 20 trial court judgeships, and we have recommended
12 the reduction of four Court of Appeals judgeships.

13 I think these are pretty highly defensible in
14 the trial court claim, but I would like to talk

20 budgeted amount gets cut midstream because of the
21 reduction in tax revenues. The proposed tax increases
22 in the state that are, of course, very debatable and
23 controversial in Lansing, even if they are announced,
24 even if the \$500 million proposal for the House is
25 passed, there will be no additional money into the

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1 judicial branch.

2 what you have in judicial funding is an
3 interesting example of how you have an absolutely
4 fixed nut that cannot be reduced. That's trial court
5 judgeships and appellate judgeship salaries. As you
6 all know, those cannot be reduced. So when these
7 numbers start heading down, we have nowhere to take it
8 but staff, nowhere. We don't own buildings, we don't
9 have programs, you know, we just have nowhere to
10 reduce except in the staff.

11 These courts are very staff dependent by the
12 nature of how they function. Every court like this in
13 the other 49 states is staff dependent, and the reason
14 is the immense volume that comes through an appellate
15 court in a state the size of Michigan.

16 Now, my concern is that at some point we are
17 going to hit the wall unless we can generate some
18 enthusiasm somewhere to reduce judgeships so that the
19 funds which are currently being used for judges can be
20 used for the other important needs in the judiciary
21 without which the judiciary cannot function.

22 Now, it is the tendency of all lawyers and
23 certainly all judges to resist any kind of reduction
24 in judicial budgets, and I understand that and have

25 those same instincts myself, but in the post I am in

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1 as the chief officer of the judiciary, it is to me
2 that falls the duty to attempt to be a good steward
3 and to attempt to keep this branch functioning.

4 Now, the proposal which has come out of the
5 House and is being batted around would eventuate in 59
6 posts being reduced in the Supreme Court. This is a
7 huge cut, even more in the Court of Appeals. And it
8 is, thus, that it is my view, and I think it's a
9 modest view actually, that we need to very seriously
10 consider reducing judgeships by attrition. This might
11 be incentivised retirements, whatever it is, but we
12 need to get the money properly appropriated in the
13 judicial branch, point one.

14 Point two, our judges are malproportioned.
15 That is to say we have judges, more judges where we
16 don't need them and fewer judges where we do need
17 them. Michigan has a flat population. It is in
18 general moving west. Out of the southeastern corner
19 the population is shifting to Oakland, Macomb,
20 Livingston and so on, and over in this area where you
21 currently are, you have a huge increase in population
22 in Holland and Grand Rapids and this area.

23 And because we have a flat population, it
24 seems only sensible that at the very least we wouldn't
25 add judges, we would simply shift them. There is

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1 immense local resistance to this for a lot of reasons.
2 Again, these are all going to be by attrition, but
3 there is immense resistance, and I must say many
4 judges are really capable of scaring the county board
5 of commissioners into thinking that all that's going
6 to go on here if you eliminate a judgeship is an
7 increase in cost for the county.

8 The story runs as follows: If you take the
9 judge out of county X here or one of the judges out of
10 county X, you will have to hire a magistrate. Now,
11 guess who pays the magistrate, the county does, and
12 those clever guys at the State are busy in the process
13 of trying to lay off on you these judicial costs. And
14 the quick and very complete answer to that, I believe,
15 is that that is not the case, that what will happen is
16 that there is no need to hire a magistrate, that all
17 you need is a concurrent jurisdiction resolution
18 passed within the county so that judges within the
19 county can be moved around and used where they are
20 needed.

21 Some of our counties have a great need for
22 this. Genesee is such a place. We have frantically
23 busy circuit judges and not as busy district judges
24 and such.

25 So it falls to us who do the testifying and

1 so on in front of the legislature to try to convince
2 them of this, and normally this is just sort of an
3 exercise in good governance, but my concern is that we

4 have a little bit of additional component this year.
5 I just don't know if we can keep the circuits going if
6 we don't have some of these changes introduced,
7 because nobody, and I do mean nobody, is talking about
8 giving us any additional money.

9 That's sort of a somber and almost
10 disagreeable message, and I apologize for that, but I
11 would like to conclude by saying that lest anyone be
12 confused, I am not at all suggesting that Michigan has
13 a judiciary which is suspect in any way, other than
14 there are too many of them. We are blessed in this
15 state to have a very fine state court judiciary, and I
16 make no criticism for them, and I defend them
17 adamantly when that is called for. We are lucky in
18 this regard. We have been very blessed to have a
19 state where capable and serious and intelligent people
20 have been called into the judiciary, and I am pleased
21 about that. And my daily life is to review lower
22 court files, and I am always taken with the really
23 truly wonderful folks that we have serving as judges
24 in this state.

25 So we have a little bit of a difficult time

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1 now. Any help from the leadership of the organized
2 Bar and Representative Assembly would be appreciated.
3 I wanted to alert you to this and just let you know
4 what we are up to.

5 And, again, I want to close by congratulating
6 you on 35 years of existence and on attempting to
7 address the policy issues that confront the Bar of
8 this state and in a serious and thoughtful fashion.

9 Thank you very much, ladies and gentlemen.

10 (Applause.)

11 CHAIRMAN HAROUTUNIAN: I know the Chief
12 Justice has to get on that plane, so as they say, God
13 speed.

14 Let's move on to item eight on the agenda,
15 the consideration of the proposed amendments to the
16 Michigan Court Rule 2.107. The proponent is Daniel
17 Quick, a member of the Representative Assembly, but
18 also a member of the Civil Procedure and Courts
19 Committee, and you will find that in your booklets,
20 and this is essentially a revisit or an amendment to
21 an existing position that the Representative Assembly
22 took in 2005. Mr. Quick.

23 MR. QUICK: Thank you. My name is Dan Quick.
24 Let me try to live up to that as I present this.

25 A brief status update. In 2005 the

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1 Representative Assembly endorsed a change to MCR 2.107
2 that would permit, upon stipulation of the parties,
3 service by e-mail. That was taken up by the Supreme
4 Court, slightly edited, and set up for public hearing
5 yesterday.

6 In the meantime, the Civil Procedure and
7 Court Committee went back to this in light of our
8 increased experience with e-mail issues and thought
9 that a number of refinements and additions would make
10 a lot of sense and help clarify the landscape.

11 In the meantime, yesterday it came up for
12 public hearing at the Supreme Court. I had talked to
13 Anne Boomer this morning from the Supreme Court and

14 was told that it, in fact, passed. So if you look at
15 the language that's in the second page of the tab
16 that's underlined, this was the previously approved
17 language under MCR 2.107(C)(4). That language, even
18 though the order has not issued, has been adopted by
19 the Supreme Court and will become effective.

20 Now, what Ms. Boomer has told me is that they
21 will quickly and immediately consider the
22 Representative Assembly's suggestion should we endorse
23 this proposal, and the Supreme Court will look at the
24 proposed tweaks in lieu of what they adopted, or so I
25 understand it.

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1 Briefly, a lot of these changes are
2 self-evident, a few points just to point out for you.
3 Section (4)(b) is a good example of other things we
4 thought people should consider, such as how exhibits
5 should be attached and whether a paper copy should go
6 along. Subsection (C) specifies that the format ought
7 to be one in which the document being transmitted
8 cannot be altered by the recipient, for example if it
9 is sent in a PDF format.

10 One major clarification is existence of
11 subsections (F) and (H) where we specify that service
12 by e-mail under the rule is treated as service by
13 delivery as opposed to service by mailing under
14 2.107(C), and that service by e-mail is complete upon
15 transmission, not upon receipt, which some people
16 raised as kind of an academic question when you send
17 things via e-mail.

18 Overall I do not think that any of these

19 changes are in any way inconsistent with the spirit of
20 the proposal that was previously adopted by the
21 Representative Assembly, simply brings a little bit
22 more experience to bear on the matter, and I would ask
23 on behalf of the committee that you endorse this and
24 we can send it on to the Supreme Court for their
25 consideration.

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1 CHAIRPERSON HAROUTUNIAN: Mr. Quick, I take
2 it you are moving that the MCR 2.107(C)(4) that
3 modifies a previous amendment supported by the
4 Representative Assembly be adopted at this time, is
5 that correct?

6 MR. QUICK: So moved.

7 CHAIRPERSON HAROUTUNIAN: Is there support?

8 VOICE: Support.

9 CHAIRPERSON HAROUTUNIAN: Discussion? Please
10 give your name and judicial circuit.

11 MR. ARD: Josh Ard with the 30th just joining
12 you this morning. Sorry to mention this now, but
13 there is one problem that has occurred in other
14 courts, and that is with e-mail being blocked by a
15 spam blocker, and in the court where that happened the
16 judge said, That's your fault. If you didn't have
17 your spam blocker system to put these people on the
18 white list, you can't get away with saying you didn't
19 receive it, and that's something that doesn't seem to
20 be addressed in this proposal, but I can bet you it's
21 going to come up.

22 MR. QUICK: I submit that it was anticipated.
23 If you look in section (4)(a), this is a new

24 provision. It requires that the e-mail address is the
25 same one which is currently on file with the State Bar

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1 of Michigan, the rationale there being that those
2 e-mails are used customarily and shouldn't in the
3 normal course hopefully hit people's spam blockers.

4 MR. ARD: Well, it's probably going to
5 happen. There should be an affirmative duty maybe
6 that you put the court and the other litigants on your
7 white list.

8 CHAIRPERSON HAROUTUNIAN: I think what
9 Mr. Quick was indicating, that in fact the e-mail
10 that's given to the State Bar is the e-mail that is
11 required under this, I will say amendment to what we
12 have previously adopted, and that may help. Now, on
13 the other hand, it may not be perfect, and I don't
14 disagree with that.

15 Any other discussion with regard to
16 2.107(C)(4), the amendments set forth there to the
17 prior position taken by the Representative Assembly?

18 MR. OLSON: Michael Olson of the 44th.
19 Mr. Quick, if you could indicate the reason for the
20 selection of the 4:30 p.m. time in section (4)(f).

21 MR. QUICK: The general rationale is that
22 there was a desire, unlike the federal ECF system,
23 which runs 24/7, to avoid a situation where somebody
24 drops something on somebody via e-mail at 11:59 p.m.
25 and that constitutes service as of that day. Since

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1 service via e-mail is service by delivery, we thought
2 a 4:30 time was as good as any, and people might
3 reasonably pick 4:45 or 5:00 or some other time, but
4 we picked 4:30 as a cutoff time so if you send an
5 e-mail later in the evening, then that's going to
6 count as delivery the following day.

7 MR. LOOMIS: Daniel Loomis, 35th circuit.
8 Chief Justice Taylor in his comments, page E6, brought
9 up the fact that Dickinson, Gogebic, Iron, and
10 Menominee Counties are in a different time zone. He
11 suggested that the time be local court time. Was that
12 considered? Why was that not adopted?

13 MR. QUICK: I don't know the answer to that
14 question in terms of what happened yesterday. I know
15 that the proposed rule, Section (4)(c), includes a
16 4:00 eastern time provision, so I don't know what, if
17 any, change may have been made to that yesterday at
18 the public hearing. My brief conversation with
19 Ms. Boomer suggested that it was passed as submitted,
20 and there was no opposition, but I can't say that for
21 certainty, so I am unclear how that was treated
22 yesterday during the public hearing.

23 CHAIRPERSON HAROUTUNIAN: Yes.

24 MR. KOENIG: Alan Koenig from the 9th
25 circuit. Mr. Quick, I noticed in the subpart (G)

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1 where it's talking about withdrawal, the only ways you
2 can withdraw once you have stipulated to do service

3 this way is by stipulation of the opposing party or by
4 filing motion with the court. It would seem it me
5 that in certain circumstances a party ought to be able
6 to withdraw on their own accord with proper notice.
7 It may arise in the case of a sole practitioner who
8 for one reason or another moves offices or an ISP is
9 changed or something to the effect that you need a
10 hard copy, and if you have an obstreperous opposing
11 counsel that would not stipulate in that circumstance,
12 why should you have to go file a motion to get a hard
13 copy?

14 MR. QUICK: Well, in your scenario I would
15 hope that such obstreperous counsel gets heartily
16 sanctioned by the court. I do think the reason it was
17 set up this way is it avoid potential gamesmanship
18 with somebody withdrawing from the acceptance of
19 e-mail service as some sort of tactic within
20 litigation, and so it was set up to permit it either
21 by stipulation of the courts. I am sharing with you
22 the rationale. I guess I can understand the scenario
23 that you lay out, the committee looked the other way
24 and took that other consideration as I think more
25 paramount.

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1 MR. KOENIG: I indicate my opposition on that
2 basis. I would suggest a third alternative with
3 timely notice either by mail or personal, be it seven
4 days, nine days, the normal notice that you could opt
5 out without having to get a stipulation or go to court
6 and file another motion.

7 CHAIRPERSON HAROUTUNIAN: Are you proposing

8 an amendment?

9 MR. KOENIG: I am. If we could do it in six
10 words.

11 CHAIRPERSON HAROUTUNIAN: Six words, yes.

12 MR. KOENIG: I would indicate that we add to
13 subpart (G) "or by timely personal or mail service."
14 That may be seven words.

15 CHAIRPERSON HAROUTUNIAN: How about "or by
16 time/mail service." "Personal/mail service." That
17 would be by either party, correct?

18 MR. KOENIG: By either party, and the
19 suggestion is made that it may need to say first
20 class.

21 CHAIRPERSON HAROUTUNIAN: I don't know if you
22 can do that in six words, which means you have to
23 write it out.

24 MR. KOENIG: I will do that. Thank you.

25 JUDGE KENT: Wally Kent, 54th circuit. I am

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1 technologically impaired, so I am not sure that I can
2 comment as knowingly as I should, but I am concerned
3 about the spam blocker. I run into that periodically.
4 I don't think that the address the recipient has on
5 file with the Bar is going to make any difference,
6 because it's the address of the sender, not the
7 sendee, if I have got that correct, whose transmission
8 is being blocked. Is there any reason -- furthermore,
9 there is a problem, I think, that hasn't been
10 addressed. When the litigant who is sending the mail
11 is pro per, they are not going to be registered with
12 the Bar, and so it's going to be difficult, if not

13 impossible, to know whether or not their mail will be
14 blocked until it's been blocked.

15 Is there any reason why we shouldn't require
16 a follow-up hard copy, not certified or anything of
17 the nature, but simply a courtesy follow-up hard copy,
18 in order to ensure that there has not been an
19 ignorance resulting from failure of the e-mail to get
20 through?

21 MR. QUICK: I mean, I think the committee --
22 you are talking about ongoing to have an obligation,
23 to have an obligation to mail things in addition to
24 e-mailing them, which I think avoids one of the
25 perceived benefits of serving by e-mail, which is to

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1 kill less trees and to permit people to have things
2 stored electronically and receive them that way. So I
3 am not sure that that's -- I think from the
4 committee's view that would undermine a little bit of
5 the spirit.

6 I do note that under Section (4)(b) there is
7 a general proviso that the parties shall set forth in
8 the stipulation all limitations and conditions
9 concerning e-mail service, including, but not limited
10 to, and as already two members of the Assembly pointed
11 out this issue of spam blocker. Perhaps that's one
12 that could easily be considered by the parties under
13 that provision with the existing language given that
14 it's including, but not limited to. That's just one
15 idea.

16 Yeah, thank you, Judge. And that was the
17 reason you raised the issue of in pro per parties.

18 The language is phrased in Section (4) in the first
19 sentence there that it's some or all of the parties
20 represented by attorneys, so it was specifically
21 designed to avoid any additional complications
22 presented by in pro se litigants.

23 MS. RADKE: Victoria Radke, 47th judicial
24 circuit. Go back to sub (g). The gentleman that
25 spoke a little while ago was having a problem with the

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1 six-word limit. I believe that that can be responded
2 to by saying or by, whatever we started with, by mail,
3 if you just put under the Court Rule, and then cite
4 the Court Rule that deals with first class mail, I
5 think you will get in under the six-word limit. I
6 don't have my Court Rules with me today, so I can't
7 give you the cite for that particular service of
8 process rule, but that might get us in under the
9 six-word limit to offer a friendly amendment to (g).

10 CHAIRPERSON HAROUTUNIAN: And that would be,
11 Victoria, that would be in effect the words "or by
12 mail under MCR 2." -- is it 105 or is it 107? I don't
13 know. 2.107(C), "or by mail under 2.107(C)." I think
14 that's a capital C. It's a capital C, Nancy.

15 Is there support for the amendment?

16 VOICE: Support.

17 VOICE: You should add MCR before that.

18 CHAIRPERSON HAROUTUNIAN: Yeah, agreed.

19 Okay. It's been supported. Discussion on
20 the amendment.

21 MR. QUICK: Maybe the moving party would
22 accept a friendly amendment. For me to do it would

23 probably be beyond six words. I am a little concerned
24 by that language. I am not sure it is entirely clear.
25 Maybe we could just say "or by any party by providing

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1 seven days written notice." Is that more clear?

2 CHAIRPERSON HAROUTUNIAN: Any other comments
3 on the amendment?

4 MR. BUCHANAN: Rob Buchanan from the 17th
5 circuit. I agree with Mr. Quick's last adjustment of
6 the language, because I think this provision, this
7 particular paragraph, deals with time of the
8 withdrawal. It's not really with the manner in which
9 it's being withdrawn, so I think it's important that
10 we avoid words like timely or something that there is
11 discretion as to what it means. In this textual-less
12 age I think we have to have actual numbers as to how
13 many days before.

14 VOICE: Seven days or six.

15 MS. BROWN: You want seven?

16 CHAIRPERSON HAROUTUNIAN: Seven.

17 Let's go back. Two things. Number one,
18 Victoria, I think you moved that, and my question is
19 do you accept that as a friendly amendment?

20 MS. RADKE: I guess it would be a friendly
21 amendment to the friendly amendment. We are still
22 over then the six-word limit, and that still creates a
23 problem.

24 CHAIRPERSON HAROUTUNIAN: So let's address
25 the six-word limit. Now, do I have a motion to

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1 suspend the rules with regard to this amendment so
2 that we can move past it? Is there a motion?

3 VOICE: So moved.

4 CHAIRPERSON HAROUTUNIAN: Is there support?

5 VOICE: Support.

6 CHAIRPERSON HAROUTUNIAN: Any discussion?

7 All those in favor say aye.

8 MS. MURPHY: I can do that in less than six
9 words. Discussion, I can do that in less than six
10 words.

11 CHAIRPERSON HAROUTUNIAN: I understand, but
12 wait. The motion is on the floor, it's been seconded.
13 I have just called for a vote. All those in favor of
14 the motion to suspend the rules to allow discussion on
15 this point so we can get past this six-word rule, say
16 aye.

17 Opposed no.

18 The ayes have it.

19 Now let's go back to the issue of what we
20 have there, and is that acceptable to you, Victoria?

21 MS. RADKE: That will work --

22 CHAIRPERSON HAROUTUNIAN: who supported that
23 particular motion that you made?

24 MS. RADKE: It was a friendly amendment to
25 the previous party's request for the change.

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1 CHAIRPERSON HAROUTUNIAN: Let me come back

2 here. You said that you could do this in six words.
3 Come back and tell us who you are.

4 MS. MURPHY: I am Susan Murphy from the 6th
5 circuit. You insert after "e-mail service," comma,
6 "by seven-day first-class written notice, or leave."

7 I have got it typed one, two, three, four,
8 five, six. First-class is hyphenated, so if it counts
9 as two it's not. By seven-day first-class written
10 notice.

11 CHAIRPERSON HAROUTUNIAN: Let me come back
12 and let me indicate that I want to rule that out of
13 order and for this reason, we already suspended the
14 rules to be able to go beyond six words, so my
15 suggestion is we work with what we have, and that is
16 in effect an amendment on the floor at this point. Do
17 we have any discussion on that amendment?

18 MS. RADKE: If the e-mail is only between the
19 attorneys, then the use of the word party, I believe,
20 is out of line. If this whole, the stipulation is
21 between counsel, then using the word "party" here is
22 not appropriate. If it's "parties," that's fine. I
23 would accept that.

24 MR. QUICK: The rule is written currently
25 with the word "parties," so I thought we should be

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1 consistent.

2 MS. RADKE: Okay.

3 CHAIRMAN HAROUTUNIAN: Any other discussion
4 on the amendment?

5 MR. BARTON: Bruce Barton, 4th circuit. I
6 wonder if we have a definition of written notice. Is

7 notice by e-mail sufficient or must it be by mail?
8 CHAIRPERSON HAROUTUNIAN: Are you suggesting
9 that the words "by mail" be added?
10 MR. QUICK: Or to take the other suggestion
11 of insert the word "first class."
12 MR. BARTON: To clarify, I think we have to
13 say postal mail, or something of that nature.
14 First-class mail, fine.
15 CHAIRPERSON HAROUTUNIAN: Victoria.
16 MS. RADKE: I am reading as fast as I can.
17 Thank you, Mr. Chairman. That's acceptable.
18 CHAIRPERSON HAROUTUNIAN: Any other
19 discussion on the amendment? Yes.
20 MR CROSS: Cecil Cross, 6th district. As I
21 read (g), and we have had a lot of discussion, the
22 purpose of (g) is to allow withdrawal of either party
23 from the stipulation. It occurs to me as I read this
24 that that can be accomplished by saying "a party may
25 withdraw from a stipulation for service by providing

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1 seven days written notice by first-class mail to the
2 other party." why do we need to have all the rest of
3 that in there if the purpose is to allow a way to
4 withdraw? why do we need the rest, all the rest of
5 that that's in there. we have changed the entire
6 purpose of (g) or we have allowed three or four
7 different ways of doing it.

8 It appears to me that the most logical,
9 simple, direct way is to say "either party can
10 withdraw with seven days notice."

11 MR. QUICK: I think there was a desire to

12 have the party be able to do it immediately upon
13 stipulation or at least to provide for a scenario
14 under which judicial blessing is required, and so to
15 have approval of the court in there is an option as
16 well.

17 MR. CROSS: That's defeated with the "or."

18 MR. QUICK: I always like to give judges the
19 potential role in the decision.

20 MR. CROSS: It's still defeated with the
21 "or."

22 CHAIRPERSON HAROUTUNIAN: The question is, I
23 think the first issue is whether or not the motion
24 passes. If it passes, you can then come back and --

25 MR. CROSS: I understand. I am stating my

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1 position that this should be defeated because it
2 defeats the purpose of (g), if that is the purpose, to
3 have judicial review, and if the purpose is to just
4 allow withdrawal, you don't need all that verbiage.
5 You can just go with the statement that's been added
6 as a friendly amendment.

7 MR. QUICK: And this gets back to why the
8 committee did not include this as an option
9 originally, because there again, I think, was a
10 concern of a scenario under which parties trying to,
11 you know, conducting service by e-mail over a long
12 period of time then wants to withdraw. If all parties
13 agree, as they should 99.9 percent of the time, great,
14 so maybe there is some legitimate issue there about
15 now the switch from e-mail to mail service and
16 somebody trying to gamesmanship out of that, which is

17 why the other option was to deal with the court on
18 terms and conditions the court deemed proper. So I
19 think that's why this whole unilateral withdrawal
20 option was not included by the committee in the first
21 place.

22 MR. NEUMARK: Frederick A. Neumark, 6th
23 circuit. I agree with the past speaker. It just
24 seems to me that if a party wishes to withdraw from
25 this service agreement by e-mail, that party should

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1 have the absolute right to withdraw upon proper
2 notice. I don't see why in the case where you do have
3 a scrupulous, or an unscrupulous I mean, attorney
4 sending e-mails at 4:59 or 4:29 or whatever the time
5 limit may be all the time or doing things that
6 shouldn't be done, why the person who is the recipient
7 of those kinds of things shouldn't say, hey, you have
8 messed up, you have ruined our agreement, and I am
9 going to give you seven days notice and let's forget
10 it. I don't see why stipulating means that you have
11 to go to court to unstipulate. And I would propose an
12 amendment that --

13 CHAIRPERSON HAROUTUNIAN: We can't take an
14 amendment now.

15 MR. NEUMARK: Okay. I will get back.

16 CHAIRPERSON HAROUTUNIAN: No problem.

17 Any other discussion on this amendment?

18 Seeing none, we are voting on the amendment
19 that's sitting in red on the screen.

20 All those in favor of the amendment say aye.

21 Those opposed say no.

22 All those abstaining say yes.
23 The noes have it. The motion is defeated.
24 The amendment is defeated.
25 Any other discussion? Yes.

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1 MR. NEUMARK: Frederick A. Neumark,
2 6th circuit. I would propose an amendment. I believe
3 it's in order at this time.

4 CHAIRPERSON HAROUTUNIAN: Yes.

5 MR. NEUMARK: That we get rid of everything
6 in (g) from by e-mail, by stipulation of parties, and
7 then we add "upon 7-day notice" at the end. Get rid
8 of everything starting with "by e-mail" all the way
9 through, and then add by 7-day notice to the other
10 party or parties or by e-mail. Okay, written or by
11 e-mail. And then get rid of everything else. Yeah,
12 you have to get rid of for service too, I am sorry. A
13 stipulation for service. Whatever way is cleaned up.
14 Okay, that's fine. Adding 7-day, yeah, notice,
15 written or by e-mail.

16 CHAIRPERSON HAROUTUNIAN: So it says a party
17 may withdraw from a stipulation for service by e-mail.
18 Is there supposed to be a comma there? Oh, by e-mail
19 by 7-day notice or days notice, written or by e-mail.

20 MR. NEUMARK: Written or by e-mail. Make
21 that upon 7-day notice written or by e-mail. It would
22 be upon 7-day notice.

23 CHAIRPERSON HAROUTUNIAN: How about 7-day
24 written or e-mail notice.

25 MR. NEUMARK: That's good too, Ed.

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1 CHAIRPERSON HAROUTUNIAN: It's not mine, it's
2 the parliamentarian.

3 MR. NEUMARK: I agree with that 7-day.
4 Changing notice --

5 CHAIRPERSON HAROUTUNIAN: E-mail notice.

6 MR. NEUMARK: Seven-day written or e-mail
7 notice, period.

8 CHAIRPERSON HAROUTUNIAN: Is there support?

9 VOICE: Support.

10 CHAIRPERSON HAROUTUNIAN: Any discussion?

11 JUDGE KENT: Wally Kent, 54th circuit. I
12 would still like, and I am not speaking for the bench,
13 but I would like to have a chance for parties to come
14 before the court if they feel aggrieved by this and
15 let the court rule on it. Can we put that in there,
16 or is that in violation of the spirit?

17 CHAIRPERSON HAROUTUNIAN: I think it goes
18 against the amendment because --

19 JUDGE KENT: I am not offering an amendment,
20 I truly am not, but I am just curious if it violates
21 the spirit to let the court rule on if one party or
22 the other feels aggrieved by the act of withdrawing
23 from e-mail service.

24 CHAIRPERSON HAROUTUNIAN: I think part of the
25 motion on the floor is to add the words, but to delete

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1 the words "or leave of court on terms and conditions
2 the court deems proper," and, I mean, that's part of
3 the motion that's on the floor. So I think to --

4 JUDGE KENT: I am out of order.

5 CHAIRPERSON HAROUTUNIAN: Yes, that's what I
6 am trying to say, you are out of order.

7 MR. POULSON: Barry Poulson, 1st circuit. I
8 think the maker of the motion said "upon 7 days,"
9 which hasn't yet appeared on the screen, so I offer as
10 a friendly amendment "upon" to the by 7.

11 MR. NEUMARK: I said "upon."

12 CHAIRPERSON HAROUTUNIAN: Any other
13 discussion?

14 MS. STANGL: Terry Stangl from the 10th
15 circuit. I was thinking about the overall context of
16 this motion, which is a stipulation that the parties
17 are entering at the beginning of the case when they
18 want to do this, and after listening to the idea that
19 in some circumstances you might want to have the court
20 there as a backup, one way of doing that would be to
21 add the phrase "or other circumstances agreed by the
22 parties" so that at the time people are agreeing to
23 the entire framework, this is the minimum that they
24 have to include, but you are not foreclosed from
25 agreeing to some other way, such as a faster time

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1 frame or a stipulated method, because this whole
2 context is parties have to do a stipulation where they
3 lay out all the conditions for e-mail service. So my,
4 I guess, friendly amendment would be to add at the
5 end, let me think here, "or by other means agreed by

6 the parties," something to that effect, or stipulated
7 by the parties.

8 So that if they wanted, for example, say we
9 have to take it to the court under some circumstances
10 or if we want to allow ourselves to stipulate to less
11 than seven days, we can do that, because this is the
12 required language the way it's written.

13 CHAIRPERSON HAROUTUNIAN: So it's "or by
14 other means stipulated by the parties."

15 MS. STANGL: Yes.

16 CHAIRPERSON HAROUTUNIAN: Fred, is that
17 acceptable to you?

18 MR. NEUMARK: I think the parties can agree
19 to anything they want to. I don't know if that's
20 necessary, but I will accept it. That's fine.

21 CHAIRPERSON HAROUTUNIAN: Okay. Any other
22 discussion on the amendment?

23 MR. BUCHANAN: Robert Buchanan from the 17th
24 circuit. I would move to table this and let the
25 Drafting Committee work out the language and at the

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1 end of the meeting we can maybe bring it up again, but
2 I think there is other important things to get on the
3 agenda, that instead of spending this time drafting,
4 it's probably better for the Drafting Committee to
5 work something out.

6 VOICE: Support.

7 CHAIRPERSON HAROUTUNIAN: It's been moved to
8 table. Is there a support?

9 VOICE: Support.

10 CHAIRPERSON HAROUTUNIAN: No discussion on

11 the motion to table. Takes a two-thirds vote to
12 table.

13 All those in favor of the motion to table to
14 have the Drafting Committee -- tabling it to another
15 time of today's meeting, is that, Rob, what you had in
16 mind, or tabling it completely?

17 MR. BUCHANAN: No, tabling it so the Drafting
18 Committee can now take it and draft language so we can
19 move forward and at the end of the meeting take it up.

20 CHAIRPERSON HAROUTUNIAN: All those in favor
21 of the motion say aye.

22 Those opposed say no.

23 The motion does not pass.

24 We are back with the amendment. Yes,
25 Mr. Morgan.

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1 MR. MORGAN: John Morgan, 3rd circuit. There
2 is another motion that could be brought, and that's to
3 refer to the Drafting Committee. That is not what was
4 proposed. There was a motion to table without date
5 specified. Consequently, if what they want, whoever
6 it is, I would remind the chairperson and the
7 parliamentarian that it would be affected, I believe,
8 by a motion to refer to committee and to designate the
9 Drafting Committee in the motion.

10 CHAIRPERSON HAROUTUNIAN: Are you so moving,
11 or no?

12 MR. MORGAN: No, I don't care what they do.

13 CHAIRPERSON HAROUTUNIAN: Accepted. Any
14 other discussion on the amendment? Hearing none --
15 Mr. Barton.

16 MR. BARTON: Just a general comment.

17 CHAIRPERSON HAROUTUNIAN: Please identify
18 yourself for the record.

19 MR. BARTON: I am sorry, Bruce Barton, 4th
20 circuit. General comment on the area we are in. If
21 we make it too difficult to get out of a stipulation
22 for e-mail service, nobody is going to do it anyway.
23 It seems to me that as an attorney I want the
24 opportunity to back off a stipulation for e-mail
25 service if, in fact, I have problems in a particular

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1 case and particularly with that service and take that
2 in the context of the discussion earlier that some of
3 this for some of us inadvertently is going to come in
4 spam, and we won't get that notice. If that's a
5 possibility at all, we certainly should have the right
6 to back off a stipulation.

7 CHAIRPERSON HAROUTUNIAN: Okay. Yes.

8 MS. KRISTA HAROUTUNIAN: Krista Haroutunian,
9 6th circuit. I didn't know if it would be in any way
10 helpful to say, instead of "upon 7-day written" to say
11 "upon 7-day mail" or 7-day -- I mean, written could
12 be -- is that bad? I am just saying is it a point
13 that needs to be shifted or is it okay the way it is
14 for basic understanding? That was my comment.

15 MR. NEUMARK: I accept by mail --

16 CHAIRPERSON HAROUTUNIAN: On 7-day --

17 MR. NEUMARK: -- instead of written. That
18 doesn't change the nature of it.

19 CHAIRPERSON HAROUTUNIAN: Mail or e-mail
20 notice.

21 MR. NEUMARK: Yeah, that's fine.
22 CHAIRPERSON HAROUTUNIAN: Accepted. Any
23 other comments?
24 MR. CHADWICK: Tom Chadwick from the 8th
25 circuit. I would move the previous question and ask

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1 for a vote to immediately vote on this amendment.
2 CHAIRPERSON HAROUTUNIAN: The question has
3 been called. Is there support?
4 VOICE: Support.
5 CHAIRPERSON HAROUTUNIAN: All those in favor
6 of the motion, which is the question to be called,
7 that is that debate end, all those in favor say aye.
8 Opposed no.
9 The ayes have it. We are now on the main
10 question, which is the amendment itself.
11 All those in favor of the amendment say aye.
12 Though opposed no.
13 Those abstaining say yes.
14 The ayes have it. The motion is adopted.
15 Now we are on to the initial issue, which is
16 the Representative Assembly adopts the alternative
17 version of the amendment to MCR 2.107(C)(4) as
18 proposed by the Civil Procedure and Courts Committee.
19 That's the issue. Any other discussion?
20 MR. HERRMANN: Fred Herrmann, 3rd circuit.
21 with respect to (f) and (h), my concern, particularly
22 with (h), is if the person making service has a due
23 date on the day of which service is made via e-mail
24 and it is later learned that there was a problem with
25 the recipient's e-mail under (h), I want to ensure

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1 that service is still deemed to have been timely made
2 by the person who made the service despite a problem
3 with the recipient's e-mail, and I don't think that's
4 addressed elsewhere, but I would pose that question,
5 and I do have a proposed written amendment because it
6 exceeds six words.

7 MR. QUICK: I think the concern is what was
8 intended by subsection (h), which is that it's
9 completed upon transmission unless you have actual
10 knowledge that the other side, that it didn't get
11 through to the other side. So it's upon transmission,
12 meaning when you press the send button.

13 MR. HERRMANN: My concern remains. It's
14 still unclear if I effect service by e-mail and leave
15 my office and at midnight get a kickback and learn
16 that it didn't go through, was my service, which was
17 otherwise due on that date, now untimely because I got
18 such a kickback from the recipient's e-mail, and I
19 don't think as drafted it addresses that concern
20 fully.

21 CHAIRPERSON HAROUTUNIAN: what's your
22 amendment?

23 MR. HERRMANN: I have it written out here.

24 CHAIRPERSON HAROUTUNIAN: Come on down.
25 So where are the changes?

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1 MR. HERRMANN: The changes would be to take
2 the existing first clause of (h) and move it up to the
3 beginning of (f) to keep the intention that service is
4 complete upon transmission, except with the 4:30
5 exception, and then to have (h) read as proposed,
6 which basically keeps service by e-mail intact, and
7 the only additional obligation is to on the next
8 business day also effect service by mail if you are
9 having problems with the recipient's e-mail and to
10 strike "attempted," because that suggests that service
11 is not complete if there is a kickback from the
12 recipient's e-mail. "Nest" should be "next."

13 CHAIRPERSON HAROUTUNIAN: Is that your
14 motion?

15 MR. HERRMANN: That's my motion, my proposed
16 amendment.

17 CHAIRMAN HAROUTUNIAN: And let's just make
18 sure what it is. Let's go back to (f), please, Nancy,
19 just to see what it is so everybody understands what
20 it is.

21 The "A" is not stricken, right?

22 That's your motion?

23 MR. HERRMANN: That's my motion.

24 CHAIRPERSON HAROUTUNIAN: Is there support?

25 VOICE: Support.

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1 CHAIRPERSON HAROUTUNIAN: Discussion.

2 MR. POULSON: Barry Poulson, 1st circuit, and
3 relying on my colleagues, if the effect service by
4 mail could possibly accept a friendly amendment,

5 effect service by quickest way, it would allow you to
6 carry the notice over, fax it, send it, mail it, dog
7 team, and would allow you that option.

8 Obviously you have got a burden because you
9 learned that it didn't get there, you have to solve
10 that, but there is lots of ways to solve those things
11 besides only mail, which is going to take one or two
12 days. So if they will accept perhaps an amendment,
13 shall also effect service by mail or other fast way or
14 quickest way. I would leave it to the Drafting
15 Committee. By mail or other quick way. That's not
16 very precise. But there is a hole there even so.

17 CHAIRPERSON HAROUTUNIAN: Understood, but I
18 am going to rule the friendly amendment out of order
19 unless somebody has more specific words. Victoria.

20 MS. RADKE: Victoria Radke, 47th judicial
21 circuit. Back to (f), please, Nancy.

22 I still believe that my colleague who earlier
23 commented about eastern time is correct. I think the
24 Court Rule should say local court time, because we do
25 have counties in Michigan -- yes, I know they are the

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1 Upper Peninsula and some of you don't think we are in
2 Michigan -- but it should say local court time. So if
3 I am in Escanaba but I have a central time zone case,
4 then we should be using court time.

5 CHAIRPERSON HAROUTUNIAN: Motion was made
6 by -- yes, Fred. Do you accept that as a friendly
7 amendment, local court time?

8 MR. HERRMANN: I have no objection to that.
9 I guess only as a point of order, I don't think it

10 relates to my proposed amendment, because my
11 alteration in (f) merely consisted of inserting
12 "service by mail is complete upon transmission" from
13 the original page. I really wasn't changing (f).

14 CHAIRPERSON HAROUTUNIAN: I agree with you, I
15 don't think it's germane, although you can certainly
16 amend it later.

17 Any other comments with regard to the
18 amendment? Rob.

19 MR. BUCHANAN: Rob Buchanan, 17th circuit. I
20 guess the only concern I have with the amendment is it
21 now shifts the burden so that the sender who has
22 ineffective service has the benefit of service being
23 effective upon transmission, whereas the recipient who
24 doesn't get it until it arrives some later date by
25 mail is deemed to have received it earlier, so that's

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1 my only concern with it is the one that gets bounced
2 has the benefit of having it effective on the day,
3 whereas the recipient who may not see it for a day or
4 week later is deemed to have received it earlier.
5 That's the concern.

6 CHAIRPERSON HAROUTUNIAN: Understood. Any
7 other discussion? Seeing none -- okay.

8 MR. HILLARD: Marty Hillard, 17th circuit. I
9 understand Mr. Herrmann's concern and share it. I am
10 not sure if this fixes it though, because if you are
11 requiring that service be made on the next day, there
12 is situations where you may not learn until after the
13 next day that it didn't go through but your time is
14 already past. Similarly, I don't know how to fix it,

15 because upon learning it didn't go through,
16 potentially games could be played there too, so I
17 think it's a problem. I am not sure this fixes it,
18 but I don't have a fix.

19 CHAIRPERSON HAROUTUNIAN: Any other
20 discussion? Yes, Steve.

21 MR. GOBBO: Stephen Gobbo from the 30th
22 circuit. This is probably more informational than
23 anything else and has nothing to do with the current
24 proposed revisions. You have the Michigan Freedom of
25 Information Act which has certain language in it, and

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1 that's in Public Act 1976 P.A. 442, and it provides
2 for the ability to send something electronically or by
3 fax, but it's not deemed to have been received until
4 the following business day regardless of the time that
5 it's sent. So I don't know if that helps in terms of
6 looking at an alternative to some of this, because it
7 certainly would provide some additional time, put some
8 pressures on people filing electronically to file it a
9 day before, but it would certainly allow for some type
10 of, you know, recovery if you have got a bounce back
11 E-message that it didn't go through or if the server
12 is down or what have you so that you could still
13 effectuate service through some other means in a
14 timely fashion on the following day. So I just offer
15 that as information.

16 CHAIRPERSON HAROUTUNIAN: Thank you, Steve.

17 MR. RAINE: I don't have comments on this
18 particular amendment either. I have just a general
19 comment. This original amendment to the Court Rule as

20 it was proposed two years ago, the spirit of the
21 intent of this amendment, which my understanding was
22 already passed yesterday, correct, was that there was
23 no prior Court Rule that would allow attorneys, even
24 if they want to, to exchange things via e-mail because
25 they still had a Court Rule requirement to have

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1 service of process by paper.

2 It seems to me that the one that was passed
3 yesterday is adequate as it was passed and there is no
4 need for this amendment because any of the parties
5 that are stipulating are free to stipulate to whatever
6 they want. They can wordsmith it all they want like
7 we are trying to do here and include changes to the
8 eastern time zone or local court time or anything they
9 want, so I would oppose the amendment overall.

10 CHAIRPERSON HAROUTUNIAN: Any other
11 discussion? Ready for the vote?

12 All those in favor of the amendment say aye.

13 Those opposed say no.

14 Defeated.

15 Any other amendments on this or comments,
16 discussion with regard to 2.107(C)(4)? Yes.

17 MR. OLSON: Michael Olson, 44th circuit. I
18 would echo the comments of the last speaker, in the
19 alternative would offer a written amendment to (4)(f),
20 which would say "an e-mail transmission sent after
21 4:30 p.m. local time," removing "eastern time," and
22 then adding the language, "or another time agreed to
23 by the parties or ordered by the court shall be deemed
24 to be served," and I will submit that.

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1 language that is acceptable?

2 MR. OLSON: Thank you.

3 CHAIRPERSON HAROUTUNIAN: Is there support?

4 VOICE: Support.

5 CHAIRPERSON HAROUTUNIAN: Okay. Any
6 discussion?

7 Seeing none, all those in favor of the
8 amendment say aye.

9 Opposed no.

10 The noes have it. The amendment fails.

11 Main motion. Any other discussion? All
12 those in favor say aye.

13 Opposed no.

14 The ayes have it. The motion passes.

15 Mr. Quick.

16 MR. QUICK: On the following page you will
17 see in 2005 a one-sentence amendment to 2.107(g) which
18 this body adopted. It deals with a scenario under
19 which a judge accepts filings in lieu of the court
20 clerk office. This is already in the Court Rule. The
21 added sentence reads, "the date the pleadings are
22 filed, which includes receipt by mail, shall be noted
23 on the docketing statement if different from the date
24 the pleadings are docketed."

25 The proposed language in the sentence below

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1 simply tries to clarify. There is no such thing as a
2 docketing statement in the circuit courts of this
3 state. There is a register of actions is the
4 appropriate terminology, and then there was a little
5 word slipping that went on there, but that's really
6 the function of that change, and so we suggested that
7 modification to what we did two years ago be adopted,
8 and I so move the Representative Assembly.

9 CHAIRPERSON HAROUTUNIAN: Is there a support?

10 VOICE: Support.

11 CHAIRPERSON HAROUTUNIAN: Any discussion?

12 Seeing none, all those in favor of the motion
13 say aye.

14 Opposed no.

15 The ayes have it. Mr. Quick, thank you.

16 (Applause.)

17 CHAIRPERSON HAROUTUNIAN: We are at a point
18 in the agenda when we would consider the final report
19 on the State Bar of Michigan Task Force on the
20 Attorney-Client Privilege. Let me call upon Diane
21 Akers and John Allen, who are the co-chairs of the
22 State Bar of Michigan Task Force on the
23 Attorney-Client Privilege, and also let me call upon
24 Barbara McQuade, who is a member of the Representative
25 Assembly and also here on behalf of Steve Hiyama, a

1 United States attorney, for purposes of any -- there
2 was a minority report that was filed with regard to
3 this in the materials, and Barb is here to comment in

4 that regard.
5 why don't we do this. The question is
6 whether to have the -- and this is a little bit
7 different, John, than I had mentioned to you earlier,
8 which was let's perhaps have a conversation with
9 regard to all the proposals and then let's take them
10 one at a time, there are five, and to go through them
11 at that time. But let's have the conversation now,
12 and I am going to turn it over to John, Diane, and
13 Barbara.

14 MS. AKERS: Thanks very much. We have put in
15 our --

16 VOICE: Turn on the microphone.

17 CHAIRPERSON HAROUTUNIAN: You have to flip
18 the switch. There you go. That's it.

19 MS. AKERS: Thanks. We put in our written
20 report a summary of what the task force has been doing
21 over the last year and a half, and to begin our
22 discussion I would just like to emphasize a few
23 points.

24 One is we were very surprised and in a way
25 gratified at the interest in this issue that we found

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1 among the Bar. John and I did a lot of speaking to
2 local and special interest Bar groups around the state
3 over the last year and a half, and I can tell you
4 that, first of all, everywhere we went many, many,
5 many lawyers were extremely surprised to learn that
6 for a number of years the Department of Justice policy
7 has been to request that organizations waive their
8 attorney-client privilege in order to avoid criminal

9 indictment themselves, and I could tell you that
10 personally as someone who represents businesses in
11 litigation the risk of criminal indictment isn't
12 really a choice for the business and a business will
13 feel compelled to waive its privilege. And everywhere
14 that John and I went the feedback that we got from the
15 lawyers that we talked to was this was a matter of
16 great concern.

17 Another point I would like to stress is that
18 this occurred among a wide range of lawyers, not just
19 people like me who represent businesses, and so, for
20 example, I can see when a bank is part of, for
21 example, an investigation, a potential wrongdoing, and
22 prepares a report of what it has asked its attorney to
23 look into and report back on potential problem areas.

24 That kind of a report being turned over to a
25 prosecutor in order to gain more favorable treatment

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1 would constitute a waiver of the privilege for all
2 purposes, and for a large business the result may well
3 be that that business will not do a thorough
4 investigation or if they do an investigation they may
5 not put it into writing so they don't create evidence
6 that in the future may come back it bite them and in
7 the end will have the effect of deterring law
8 enforcement, not enhancing law enforcement, and that
9 sort of is the perspective I had when we started, but
10 what we found is no matter what the area of practice
11 was of the lawyers, this policy had an effect on them.

12 And so, for example, the probate Bar was
13 extremely interested because they frequently represent

14 fiduciaries and trustees and other people who have to
15 look out for third parties and investigate wrongdoing,
16 and, of course, as trustees they may be involved in
17 banks and other financial institutions.

18 The Family Law Section was extremely
19 interested because in a situation where you don't
20 anymore have a large business, you have perhaps a
21 business owned by a married couple and they have to
22 split it up when they are going to divide their assets
23 in the divorce, and they want to call their lawyer and
24 just plain ask a question about the business that the
25 two of them were running. People believe that talking

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1 to your lawyer might mean that the information you
2 convey is available to virtually anyone because you
3 have waived the privilege if it is turned over to a
4 prosecutor or that your lawyer might be compelled to
5 give that information to somebody else. In the end
6 people won't talk to their lawyers, and that is the
7 concern that we found.

8 So that you are clear, the presentations that
9 we made, the articles that were published did not
10 specifically refer to the recommendations that we have
11 included and presented to you today, but certainly the
12 concepts that we put into our report and that underlie
13 the recommendations were the subject of our
14 discussions and the articles and many activities that
15 we undertook.

16 I would also like to say we were very pleased
17 at the participation from the United States Attorney's
18 Office, and both in the Eastern and western districts

19 the U.S. attorneys have met with us and have also
20 taken a very thoughtful, we think, approach to this
21 issue, and so we are very grateful to them for their
22 contributions and for Ms. McQuade's participation
23 today.

24 John, if you want to make any other comments.

25 MR. ALLEN: First of all, I want to say thank

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1 you to Diane, who certainly pulled the heaviest oar on
2 this project. Our task force was appointed now almost
3 two years ago by then State Bar President Tom Cranmer,
4 who asked me to assist. Tom and I were fraternity
5 brothers at Michigan, but the statute of limitations
6 has run on most of that. Kim Cahill also has been an
7 enthusiastic supporter of this project, and all those
8 listed as members of the task force made very
9 significant contributions.

10 I also want to thank you folks today for
11 taking the time to do this. You spend a lot of time
12 here in very detailed matters, as you have just been
13 through the last many minutes, and it's an important
14 part of your time, and we really appreciate the
15 attention you have given it.

16 To us it is not so much the privilege as a
17 privilege as something exceptional in the law of
18 evidence sense. In fact, in going through this and
19 serving on the ABA task force of the same model for
20 about two and a half years now, I wish we could change
21 the name of it. Privilege is not a very good name. I
22 wish it were confidentiality or some other word that
23 more correctly identifies its purpose of being our

24 greatest engine of law enforcement. That's one thing
25 where the U.S. Attorney's Office and the federal

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1 agencies, we all agree we are looking for the greatest
2 degree of law enforcement, a respect for the rule of
3 law.

4 And I would ask you to remember back for some
5 of us a long time ago when we first started to
6 practice law and you had that first meeting with the
7 person who came in to see you as a client or a
8 prospective client and they sat down and told you
9 things that they would share with nobody else on the
10 planet, and after they got done telling you those
11 extraordinary secrets, they would ask your advice on
12 how the law might apply, and you would give them that
13 advice, and in 99.9 percent of the time they would go
14 out and they would obey the law, even though it was to
15 their disadvantage, even though it cost them money,
16 even though it wasn't what they wanted to do.

17 That is the function of the privilege in a
18 free society, and that is why free societies allow an
19 attorney-client privilege. All societies don't, but
20 our society knows and has recognized since the age of
21 Elizabeth I, if the people are allowed to go in
22 secret, in confidence, and give information to a
23 lawyer and receive advice from a lawyer, they will
24 almost always go out and take that advice, they will
25 do their best to obey the law without the U.S.

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1 Attorney's Office involved, without the prosecutor,
2 without the government, and because of that
3 extraordinary value that is placed on society by that
4 confidentiality, it is given a privilege in the law of
5 evidence.

6 But there are ways in which that can be
7 invaded and assaulted, and that is the focus that we
8 had with our group, and I hope it's the focus that you
9 will have in going through the recommendations.

10 Very briefly, the recommendations are really
11 not all that complicated. Numbers one and two are
12 virtual replications of the ABA positions already
13 accepted by the ABA House of Delegates, and I think
14 all of which were probably voted on favorably by your
15 ABA delegates as ABA policy. We would like them to be
16 the policy of the State Bar of Michigan too.

17 Recommendation three concerns issues
18 regarding subpoenas to lawyers and law firms from
19 nonclients but about client representations and
20 engagements, essentially when a third party comes in
21 and wants your client file, and certainly not
22 prohibiting that but putting it under the same rules
23 that we now use under the judicial rubric of Hickman
24 versus Taylor for discovery of work product.

25 Recommendation four has to do with the issue

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1 of inadvertent waiver and is modeled on Federal Rule
2 of Evidence 502(B), which is now going through a

3 process of approval, although it does have some
4 variations which we will explain in detail.

5 Recommendation five has to do with an
6 opposition to the concept of selective waiver that is
7 waiving under a written agreement, usually with a
8 governmental agency, which is, I think, looked upon by
9 many folks, and I think you will hear the U.S.
10 Attorney tell you in a minute has a very beneficial
11 policy, but after careful consideration the task force
12 concluded that it was not a good idea. We recommend
13 against it and asked this State Bar to take a position
14 opposed to it. Thank you.

15 MS. MCQUADE: And I just wanted to give the
16 other perspective. You know, when I was asked by
17 Steve Hiyama, who served on the task force from the
18 U.S. Attorney's Office, to come and speak in
19 opposition to the majority defending the
20 attorney-client privilege, I asked if I couldn't
21 instead speak maybe against apple pie, motherhood,
22 something less controversial.

23 I do want to thank Tom Cranmer for including
24 federal prosecutors in this process, because we do
25 have a different perspective, and everybody thinks

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1 that the attorney-client privilege is a very important
2 and valuable doctrine. Nobody disagrees with that,
3 but that's not what this is about.

4 This is a very narrow issue, and, of course,
5 the law has always recognized that there are other
6 countervailing interests, like the crime fraud
7 exception, and our concern with three of these five

8 recommendations is that they do not at all take into
9 consideration those countervailing interests. And I
10 think that we as lawyers have a duty not only to our
11 profession but also to the public to do all we can to
12 protect the public from corporate crime, environmental
13 crimes, corporate fraud and the like, and, as our
14 first president, Roberts P. Hudson, of course, said
15 famously that no organization of lawyers can long
16 survive which has not for its primary object the
17 protection of the public, which is what we are seeking
18 to do here. And so we are opposed to recommendations
19 one, two and five.

20 I think it's important to understand what it
21 is we are talking about. The Department of Justice
22 policy at issue is something called the McNulty memo.
23 If you have read your materials, there is a discussion
24 of it. The McNulty memo recognized, quote, that the
25 attorney-client privilege is one of the oldest and

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1 most sacrosanct privileges under U.S. law. It's
2 important to understand that we are not talking about
3 individual client's privilege. This is privilege of a
4 corporation, and because it's an artificial construct,
5 it makes it difficult to address the issue and to
6 separate it, I think, from individuals.

7 The issue arises in a very narrow context
8 and, in fact, has never arisen in the state of
9 Michigan. The majority report notes, quote, it was
10 aware of no instances in Michigan in which a federal
11 prosecutor had stated or even implied that a business
12 should or must waive its privilege to avoid

13 unfavorable treatment.

14 The issue is whether a corporation can
15 receive favorable consideration during a criminal
16 investigation by voluntarily providing investigators
17 with the factual information resulting from an
18 internal investigation, which may include some
19 information that would ordinarily be protected by the
20 attorney-client privilege. Because these
21 investigations are typically conducted by lawyers, the
22 memos, the conclusions, the witness statements that
23 they generate are privileged.

24 When an individual comes to the investigators
25 and says I want to cooperate, they are required to sit

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1 down and provide all the information they know, and
2 the same thing is being asked of corporate defendants.
3 You must, if you want to receive favorable
4 consideration, you should provide all the information
5 that you know. And just because that stuff is
6 privileged because it was conducted by a lawyer
7 shouldn't give you a different standard than we hold
8 individuals to.

9 Corporations will on their own, because they
10 are good corporate citizens or because it makes good
11 business sense, when they learn that some of their
12 officers, directors, or employees are engaged in
13 misconduct will typically conduct their own internal
14 investigations and will come to the U.S. Attorney's
15 Office and say, we would like to share with you the
16 results of our internal investigation, and we hope you
17 will consider that favorably when you are making any

18 charging decisions, and we are usually very thankful
19 to do that. And it is not the case that the
20 prosecutor is just too lazy to go do the work
21 themselves. These investigations are massive.

22 Corporate accounting scandals, Enron, Arthur
23 Andersen, Exxon Valdez, investigating these kinds of
24 cases can take years, and with the statute of
25 limitations that could bar prosecution forever without

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1 receiving some of this information, it's extremely
2 valuable to have the information and an insider's
3 perspective to explain it to the prosecutors.

4 I should also note that we are not talking
5 about the very most sensitive kinds of attorney-client
6 communications, seeking the advice of counsel and
7 opinions of lawyers. We are talking about factual
8 reports, documents, the results and products of an
9 internal investigation that's conducted by a
10 corporation when misconduct arises.

11 And even this, under the McNulty memo, is
12 only one of nine factors that prosecutors ought to
13 consider when deciding whether to bring criminal
14 charges against a corporation, but the majority
15 position would say that this can never be a factor to
16 be considered.

17 It's not a prerequisite. There is not a
18 demand made but a request or sometimes voluntary
19 receipt of this information which the U.S. Attorney's
20 office believes is necessary to protect the
21 shareholders, employees, and public.

22 It's our perspective that corporations kind

23 of want to have it both ways. They want to receive
24 some benefit, but at the same time not provide the
25 same cooperation that individuals would be expected to

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1 do. If you don't want to turn over your stuff, that's
2 fine, you don't have to waive the privilege, but you
3 don't get some sort of benefit by refraining from
4 doing so, so that's what this is about.

5 The three recommendations that we would
6 oppose then are one, two and five. Three and four we
7 have no problem with. One, which speaks sort of
8 generally in favor of protecting the attorney-client
9 privilege, again, our opposition only is that it is
10 categorical. It says that this should never be done,
11 and it fails to recognize that there may sometimes be
12 a legitimate countervailing interest in investigating
13 culpable corporate directors and officers in
14 protecting the public.

15 We oppose recommendation number two. There
16 is part of it there I want to clarify that the McNulty
17 memo does say that prosecutors may not take into
18 account whether corporations are paying legal fees for
19 employees under investigation. That may be done, and
20 that is perfectly permissible, but it fails to
21 consider whether corporate officers and directors are
22 seeking to impede an investigation by sharing
23 information with those who are under investigation.
24 For that reason we oppose recommendation two.

25 And then finally would oppose recommendation

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1 five, which is the concept selective waiver. One of
2 the concerns I have heard from the majority is that,
3 sure, you know, we want to tell you what we have done,
4 but we just don't want to disclose our privileged
5 information to the world, and it would seem to me that
6 selective waiver would be the way to alleviate that
7 concern.

8 You can waive it with respect to sharing it
9 with criminal investigators, but you are protecting
10 your privileged communication from other disclosure.
11 It would seem to me that if corporations generally
12 want to cooperate but are concerned about protecting
13 their privileged information from the world that
14 selective waiver is the way to do that, and so,
15 therefore, we would ask you to reject recommendation
16 five as well.

17 CHAIRPERSON HAROUTUNIAN: I think the way we
18 should approach this is, number one, to ask if any
19 members of the Assembly have any questions for any of
20 the panelists, and then the next step in my judgment
21 would be to go ahead and take, there are five
22 positions, to take each of the five and to deal with
23 each of them. Any questions? John.

24 MR. ALLEN: Can I just offer one
25 clarification in the description by the Assistant U.S.

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1 Attorney, number one was regarded as something which

2 would bar or ban the seeking of waivers or for that
3 matter the giving of them, and I would just call the
4 Assembly's attention to the final paragraph which says
5 it would oppose a routine practice by government
6 officials of obtaining those waivers. So it's not the
7 intent of the task force, nor do I think it was ever
8 our intent, to ban entirely the practice of waivers
9 taking place, it was more the matter of them becoming
10 coercive implicitly by being asked for on a routine
11 basis.

12 And the Assistant U.S. Attorney is correct
13 that both in the Eastern District and the Western
14 District of Michigan, our best research and inquiry,
15 including a lot of cooperation from the U.S.
16 Attorney's offices, confirms that these are not
17 routine practices here, but they are elsewhere, and no
18 lawyer is an island. When our clients read about
19 other lawyers testifying against their clients of
20 other client files being turned over or other clients
21 waiving their privilege, we believe it affects that
22 culture of waiver and the way clients regard privilege
23 here also.

24 MS. AKERS: I would like to clarify just one
25 other point as well. The underlying information, of

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1 course, is available to the prosecutor. When you talk
2 about attorney-client privilege, all you are taking
3 about is the confidential communication between the
4 lawyer and the client, and so, of course, the
5 underlying facts would always be available to the
6 prosecutor. All we are talking about is the

7 confidential communication or the attorney work
8 product.

9 MS. MCQUADE: To further clarify, however, if
10 the attorneys conducted the investigation, then the
11 reports, witness statements, et cetera, generated from
12 that investigation would be considered attorney work
13 product and I would submit would be included.

14 CHAIRMAN HAROUTUNIAN: Any questions from
15 members of the Representative Assembly to the
16 panelists? Okay.

17 Seeing none, the proposed resolution number
18 one, preservation of the attorney-client privilege and
19 work product. I presume John Allen, Diane Akers -- is
20 there a motion that proposed resolution number one be
21 adopted by Representative Assembly?

22 VOICE: So moved.

23 CHAIRPERSON HAROUTUNIAN: Is there support?

24 VOICE: Support.

25 CHAIRPERSON HAROUTUNIAN: Any discussion?

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1 MR. MILLS: John Mills, 6th circuit. I would
2 like to propose a friendly amendment to the first
3 paragraph, first line of the first resolution, and the
4 amendment would be to eliminate the word "strongly."
5 That's the only place it appears in all five
6 resolutions. First of all, it's not needed, but
7 secondly, it implies strong support for that part of
8 the resolution but only regular support for any other
9 part of the resolution and gives less emphasis to the
10 other parts which we would support or oppose.

11 CHAIRPERSON HAROUTUNIAN: You would move to

12 delete the word "strongly"?

13 MR. MILLS: Correct.

14 CHAIRPERSON HAROUTUNIAN: Is there support?

15 VOICE: Support.

16 CHAIRPERSON HAROUTUNIAN: On the motion to

17 delete the word "strongly" is there any discussion?

18 All those in favor of the motion say aye.

19 Opposed no.

20 Abstentions say yes.

21 The ayes have it. Motion carries.

22 Yes, wally.

23 JUDGE KENT: wally Kent, 54th judicial

24 circuit. My comments would apply not only to this but

25 to the other resolutions as well. Be on my soap box

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1 for just a moment.

2 Underlying all of this is an attempt to

3 coerce information which is privileged. It may not be

4 incorporated in the Constitution, per se, but our

5 Fifth Amendment privilege against self-incrimination

6 at root is protected by the lawyer-client privilege,

7 and make no mistake about it, to the extent that

8 people are coerced into giving up that privilege, they

9 are coerced into testifying against themselves.

10 we may be looking at corporations being

11 compelled to get information, but it's people that

12 serve time. The invasion of the privilege, I think,

13 constitutes every bit as much of a constitutional

14 violation as warrantless searches under the auspices

15 of the Homeland Security Act, and to the extent that

16 either these compulsions and coercions are allowed or

17 those searches are allowed, the blanket of the
18 protection that we are offered by our Constitution is
19 being moth-eaten. I violently oppose either effort
20 and am in absolute support of every one of these
21 resolutions.

22 CHAIRPERSON HAROUTUNIAN: Thank you. Any
23 other discussion with regard to resolution number one?
24 Seeing none, all those in favor of resolution
25 number one say aye.

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1 Opposed no.
2 Any abstentions say yes.
3 The ayes have it, the resolution carries.
4 Resolution number two, the attorney-client
5 privilege/governmental investigation and prosecution,
6 is there a motion from the floor to adopt?
7 VOICE: So moved.
8 CHAIRPERSON HAROUTUNIAN: Is there support?
9 VOICE: Support.
10 CHAIRPERSON HAROUTUNIAN: Motion is on the
11 floor. Any discussion?
12 Seeing none, all those in favor of the motion
13 say aye.
14 Opposed no.
15 Abstentions say yes.
16 The ayes have it. Motion carries.
17 Proposed resolution number three, discovery
18 in client representation and MCR 2.302(B). Is there a
19 motion from the floor that the Representative Assembly
20 adopt?
21 VOICE: So moved.

22 CHAIRPERSON HAROUTUNIAN: Support?
23 VOICE: Support.
24 CHAIRPERSON HAROUTUNIAN: It's on the floor.
25 Any discussion?

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1 Seeing none, all those in favor say aye.
2 Opposed no.
3 Any abstentions say yes.
4 The ayes have it. It carries.
5 Proposed resolution number four, inadvertent
6 waiver of the attorney-client privilege. Is there a
7 motion from the floor to adopt?
8 VOICE: So moved.
9 CHAIRPERSON HAROUTUNIAN: Support.
10 VOICE: Support.
11 CHAIRPERSON HAROUTUNIAN: It's on the floor.
12 Any discussion?
13 All those in favor of the motion say aye.
14 Opposed no.
15 Abstentions say yes.
16 Motion carries.
17 Proposed resolution number five, selective
18 waiver of the attorney-client privilege. Is there a
19 motion from the floor to adopt?
20 VOICE: So moved.
21 CHAIRPERSON HAROUTUNIAN: Support?
22 VOICE: Support.
23 CHAIRPERSON HAROUTUNIAN: It's on the floor.
24 Any discussion?
25 MR. LARKY: Mr. Chair.

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1 CHAIRPERSON HAROUTUNIAN: Mr. Larky.

2 MR. LARKY: Sheldon Larky, 6th circuit. I
3 would like to basically read a couple paragraphs that
4 I sent to our chairs a couple weeks ago. I am going
5 to vote yes in favor of this motion, but I want the
6 Assembly to know how I felt after I read these five
7 proposals, and I wrote to Diane and John, I said this.

8 If there was a Nobel Prize for the protection
9 of rights, you and your task force should receive it.
10 I further wrote that every attorney in Michigan and,
11 frankly, every client owes you two as chairpersons an
12 immense debt of gratitude for your work, time,
13 efforts, and talent in producing your report and
14 recommendations. Because of you two and your task
15 force members, I am proud to say that I am an attorney
16 who wants to protect client confidences to the day I
17 am dead.

18 CHAIRMAN HAROUTUNIAN: Thank you, Mr. Larky.
19 Yes.

20 MR. LOOMIS: Daniel Loomis, 35th circuit. I
21 believe we allow selective waivers in other areas. I
22 work as a domestic relations referee and I look at
23 counselors' reports, and there are waivers so that
24 those can come to my attention.

25 I think if these are narrowly drawn waivers,

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1 I think we ought to honor those, because we can see
2 that there are legitimate purposes where this
3 information ought to be shared, but it ought to go no
4 further. I don't understand why we can't allow for
5 selective waivers.

6 CHAIRMAN HAROUTUNIAN: John.

7 MR. ALLEN: Mr. Loomis, a little bit over two
8 years ago when I began work on the ABA's national task
9 force on attorney-client privilege, I felt exactly the
10 same way you do. I thought selective waiver looks
11 like a neat solution to all these problems. Let's
12 just let people enter into a little, narrow, topical
13 waiver and let them turn over to the government what
14 they want on a voluntary basis but not let it be used
15 elsewhere and that would solve all our problems.

16 well, it didn't solve all the problems or at
17 least two that came up immediately. One is a case
18 called In Re: Columbia HCA Health Care, in the 6th
19 circuit at least, which says once you waive the
20 attorney-client privilege for one person for one
21 purpose you waive it to all persons for all purposes,
22 so you can't single out to whom you are going to do it
23 or who is going to receive it, at least under the law
24 of the 6th circuit, and I do believe there is probably
25 some consistent Michigan law also, at least as to

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1 attorney-client privilege. I can't speak to
2 counselors or the dozens of other privileges that
3 exist. That was one problem. Maybe we could change
4 that with a statute or another Court Rule.

5 The more important problem, though, came, a

6 representative from the Department of Justice sits in
7 all of the ABA task force meetings, just as DOJ
8 representatives were at our meetings too, and we -- in
9 fact, Larry Thompson also, who drafted the predecessor
10 of the McNulty memorandum, was called the Thompson
11 memorandum, he sits in our meetings too, except
12 Mr. Thompson is now the general counsel of Pepsico,
13 and he doesn't feel the same way about these corporate
14 investigations as he did back when he was the second
15 man in charge at DOJ.

16 But our DOJ representative was there, and one
17 thoughtful lawyer had the presence of mind to ask this
18 person if selective waiver is adopted as a federal
19 policy and a matter of law, in what instances would
20 you demand one in your investigations? And his
21 response was, Every single time. Why wouldn't we? If
22 there were no danger, it was a no-brainer to do it.

23 And although we haven't seen a blanket or
24 ubiquitous type waiver request by federal agents in
25 the state of Michigan, I can tell you that we have

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1 very consistent and numerous reports of state agencies
2 coming in, the typical Medicaid fraud investigation,
3 to the attorneys representing, it may be more or
4 comparatively a mom and pop shop, all right, who is
5 providing services and being reimbursed by Medicaid
6 for health care, home care, whatever, and starting out
7 the first meeting by saying we want an attorney-client
8 privilege waiver, we want to interview your lawyer,
9 and we want to see all his or her files, and if you
10 aren't willing to do that, then we are going to issue

11 a bar order today, because we don't have enough money
12 to investigate these things anymore, and we would like
13 to have the advantage of what your lawyer knows.

14 That is the problem with selective waiver, is
15 that once it is endorsed as a policy it would become
16 the standard everyday rule, and that is the danger
17 that I think the task force sees that it presents and
18 the reason that they took the position they did in
19 this recommendation.

20 But we quickly tell you this is a very
21 controversial topic. You can find many, many interest
22 groups. Bankers, for instance, do selective waiver by
23 federal statute with federal bank regulators, but, of
24 course, bank regulators can come in and look at all
25 their lawyer's files anyhow by the particular

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1 regulations that they live under.

2 Ours was more geared to not making it a
3 general policy applicable to everybody all the time.

4 MS. MCQUADE: If I may respond, all this is
5 saying is that we oppose the whole concept. I submit
6 that it's a great concept and that there is federal
7 evidence 502(C) there has been discussion on, which
8 would give authority that would overrule the Columbia
9 case, because in Columbia there was no legal authority
10 to base a selective waiver on. If there were some
11 sort of court rule, federal rule of evidence, et
12 cetera, then there would be a basis for doing so.

13 And this idea that, you know, we would demand
14 it in every case, it's never been demanded before ever
15 in Michigan, so I think that's sort of one of those

16 parade of horrible ideas. To me this seems like the
17 perfect solution. You want credit for cooperation,
18 you have got to give something in exchange, just as
19 individuals do. If you don't give it, that doesn't
20 mean an automatic indictment, but it's something
21 helpful that goes into that nine-factor list of things
22 that prosecutors ought to consider when deciding
23 whether to bring charges, and to me it seems like a
24 perfect solution.

25 MS. AKERS: One other point that I would make

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1 about Federal Rule 502 rule of evidence and other
2 types of rules of evidence is that it would only
3 pertain to admissibility of evidence and it would not
4 pertain to discoverability, and so as a litigator I am
5 far more concerned about the fact that if my client
6 turned something over to the prosecutor, and even as
7 in the health sup case, even if the prosecutor and
8 the client say we agree this is only being given for
9 law enforcement purposes and it's only this selective
10 waiver, nevertheless that doesn't work under health
11 sup, and so even if that information would not be
12 admissible at trial, it still would be discoverable,
13 which means the privilege is destroyed.

14 MR. ALLEN: About the Federal Rule of
15 Evidence 502, there is a proposal to amend it. It's
16 been before the Federal Conference. At the Federal
17 Conference the selective waiver submission of that
18 rule is struck out for the very same reasons that
19 Diane and I have just talked about.

20 So the Federal Rule will not have it, but

21 Diane is correct, even if it did, it wouldn't help you
22 any in a state court prosecution or in different
23 nonfederal jurisdiction.
24 CHAIRPERSON HAROUTUNIAN: Any other
25 discussion?

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1 Seeing none, all those in favor of the motion
2 say aye.
3 Opposed no.
4 Those abstaining say yes.
5 The ayes have it, the motion carries.
6 Mr. Allen, Mr. Akers, Ms. McQuade, I want to
7 thank you very much for your --
8 (Applause.)
9 MR. ALLEN: Ed, I didn't think this was going
10 to be shorter than the one on electronic service.
11 CHAIRPERSON HAROUTUNIAN: You know, that's
12 the thing with regard to the Representative Assembly,
13 you just never know, you just never know. And that's
14 the beauty of it.
15 And we have some small token of appreciation.
16 Bob will pass it out to you and get them over to you.
17 Our next order of business is the election of
18 the clerk of the Representative Assembly and, Victoria
19 Radke, do I see your hand up?
20 MS. RADKE: You certainly do, Mr. Chair. I
21 am Victoria Radke from 47th judicial circuit. It's my
22 privilege and great honor to put forth the name of
23 Elizabeth Johnson of the 3rd circuit for the position
24 of clerk of the Representative Assembly for 2007/2008.
25 CHAIRMAN HAROUTUNIAN: And, Susan Licata

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1 Haroutunian, did I see that you raised your hand ready
2 to support that?

3 MS. SUSAN HAROUTUNIAN: Support.

4 CHAIRPERSON HAROUTUNIAN: Any other
5 nominations?

6 If not, all those in favor of the nomination
7 of Elizabeth Moehle Johnson for clerk of the
8 Representative Assembly please say aye.

9 Opposed no.

10 The ayes have it, congratulations.

11 (Applause.).

12 CHAIRMAN HAROUTUNIAN: We are getting close,
13 team.

14 I would like to ask our vice chair, Bob
15 Gardella, to come forward for purposes of an
16 introduction, and I will have in a couple minutes,
17 shortly, some additional comments, but nevertheless,
18 here is Bob Gardella, the vice chair, soon to be chair
19 of the Representative Assembly.

20 VICE CHAIR GARDELLA: Thank you,
21 Mr. Chairman.

22 (Applause.)

23 VICE CHAIR GARDELLA: It's a pleasure today
24 to introduce Justice Michael Cavanagh. He has been
25 here waiting patiently for us as we debated the

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1 issues, and hopefully some of our arguments were
2 enlightening and very interesting I am sure for him.
3 we appreciate him being here to both speak to us today
4 and also to administer the oath of office to myself.

5 Justice Cavanagh, I think everybody in the
6 room knows him. You may not know all of his
7 background, and I wanted to go over some of the
8 highlights of his background.

9 Justice Cavanagh received his bachelor's
10 degree from the University of Detroit and his law
11 degree from the University of Detroit. He began his
12 career as a law clerk for the Michigan Court of
13 Appeals in 1967. He eventually worked his way to
14 Lansing from where he was raised in the Detroit area,
15 and he began working for the city of attorney for the
16 City of Lansing. He thereafter was appointed the city
17 attorney, the top dog in the office there, and he
18 served there until 1969.

19 He then became a partner in the law firm of
20 Farhat, Burns & Story, P.C. in Lansing, and after that
21 he was elected as a Lansing district court judge.
22 After that he was elected to the Michigan Court of
23 Appeals, and he served there from 1975 to 1982. He
24 then ran for election to the Michigan Supreme Court,
25 and thereafter has been elected, reelected in 1990,

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1 1998, and last year in 2006.

2 He is the most senior member of the Michigan
3 Supreme Court, but I also want to add that at one time
4 he was the youngest member of the Michigan Court of

5 Appeals, I wanted to get that in, and he also has
6 served as Chief Justice of the Michigan Supreme Court
7 for two two-year terms.

8 I wanted to also point out that Justice
9 Cavanagh is the son of a factory worker and a teacher
10 who moved to Detroit from Canada. Justice Cavanagh in
11 years past worked on one of the Great Lakes freighters
12 during the summers to help pay his tuition at the
13 University of Detroit, and during his years in law
14 school he was employed as an insurance claims adjuster
15 and also worked for the Wayne County Friend of the
16 Court as an investigator. So you can see the wide
17 variety of occupations he has had within the legal
18 system and also the business sector.

19 It's also noteworthy to point out that
20 Justice Cavanagh also was instrumental in making sure
21 that the Hall of Justice for the State of Michigan in
22 Lansing became a reality. Without him it probably
23 would not be there. Many other people helped, but he
24 helped guide it and make it the wonderful place that
25 it is to show the distinction for our branch of

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1 government.

2 And when the Board of Commissioners had a
3 luncheon with the Supreme Court members earlier this
4 year, he graciously guided us on a tour of the
5 building, and it is a wonderful place, and it's a very
6 educational place, and you should all know that if any
7 of your family members, your children, grandchildren
8 want to go on an educational experience, I think it
9 would be very moving for them even to take a half an

10 hour to show them the court and show them how your
11 occupation is linked to them, because some of the
12 displays and exhibits they have there are very
13 meaningful, they are interactive, and I think that
14 your family members would get a lot out of it to maybe
15 understand your profession much more.

16 Justice Cavanagh and his wife, they are
17 parents of three children and have two grandsons and
18 they currently reside in East Lansing, and I would
19 also add that Justice Cavanagh has known my mother's
20 family for quite a number of years going back I think
21 to his childhood, and so it's a pleasure for me to
22 welcome Justice Cavanagh to the Representative
23 Assembly, and I would invite him to approach here.

24 (Applause.)

25 JUSTICE CAVANAGH: Thank you, Bob. That was

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1 a great intro. It must have been an outdated resume,
2 because I have got three grandchildren now. I have
3 got a granddaughter Georgia Grace, who our youngest
4 daughter Megan, also a lawyer, gave birth to about 13
5 months ago.

6 And Bob mentioned my connection with his
7 family, and he is right. I went to grade school in
8 Detroit with his mother and spent many a long summer
9 night on their back porch pitching woo to her younger
10 sister, Bob's late Aunt Julie, and I would keep
11 looking for faces at the window to see exactly what we
12 were doing on that swing on that back porch.

13 But it's a pleasure to be here on the
14 occasion of the 35th anniversary of the Representative

15 Assembly. I would extend congratulations to all of
16 you for devoting your valuable time, effort, and
17 intellect to the important work of this body. Your
18 collective actions over years have helped to position
19 the State Bar as a crucial voice in matters of
20 significance to our justice system. I am also pleased
21 that two members of the judiciary find the time to
22 contribute their perspective to this important work,
23 Judge Wally Kent and Roy Mienk.

24 The 1971 State Bar Study Committee that
25 recommended the creation of the Representative

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1 Committee commented that they hoped the Representative
2 Assembly would be a highly visible form in which
3 meaningful debate and consideration of important
4 policy issues will be readily communicated to and
5 noted by both the members of the Bar and the general
6 public.

7 And I believe that the Assembly has lived up
8 to those expectations. I know, because you transcribe
9 your meetings and transcriptions are available to all
10 members online, that vigorous debate does take place
11 and recommendations are pondered and carefully
12 considered. Your transcripts also reveal the
13 personalities of some of your most engaged members.
14 Is Matt Abel here today? Shel Larky. Veronique Liem.

15 But reading the transcripts doesn't give you
16 a full flavor of the Representative Assembly
17 experience. Who would know, for example, about Ed
18 Haroutunian's ponytail?

19 But the work you do can greatly simplify the

20 work we on the Supreme Court have to do when we
21 consider the issues you raise, and you can understand
22 that we appreciate all the help you can give us given
23 the size and complexity of our administrative
24 responsibilities, not to mention our primary job
25 deciding cases.

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1 Reading our decisions, I am sure you can see
2 that the path to a final decision is not always an
3 easy one, but you may wonder what takes us so long on
4 the administrative side of our agenda. Specifically
5 why it takes so long to get to some of your
6 recommendations. I guess the short answer is simply
7 this, the magnitude of our workload and the need for
8 the most careful consideration of the important
9 proposals that you send to us.

10 As those of you know who were involved in the
11 Assembly's consideration of the ethics 2000 rewrite of
12 the Model Code of Professional Conduct, which is still
13 before us now four years since you sent your first
14 recommendation our way, there are literally dozens of
15 important and complex decision points in the ethics
16 package, and the Court is working diligently to digest
17 the Assembly's and the ABA's work in bite-sized
18 chunks.

19 Similarly, the Assembly's very substantial
20 work on the Supreme Court's publication of proposed
21 jury reforms has provided us with very important input
22 as we deliberate next steps, input that can only come
23 from the practicing Bar. Whatever the subject you
24 address, please be assured that your work is accorded

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1 judgment of a very diverse cross-section of the legal
2 profession.

3 The Court has acted on nearly all the
4 proposals submitted by the State Bar, and we are
5 continuing to weigh the merits in several of them.
6 You should know that there is a very good working
7 relationship between the court's administrative
8 counsel's office and the State Bar, and I am very sure
9 that will continue.

10 But I thought you might be interested in the
11 status of several of the proposals that the court is
12 considering.

13 Administrative file 2004-08. This file was
14 open when the State Bar submitted a request to the
15 court to consider a major rule regarding
16 multi-jurisdictional practice, including the issue of
17 pro hac vice admissions. The proposal was published
18 for comment and was on the May 2007 public hearing.
19 The court decided to pursue at this time only the
20 concept of pro hac vice admission, and the file is
21 still scheduled to be reconsidered by the court in the
22 near future.

23 Admin 2005-31. This file relates to updates
24 and clarification of MCR 3.602, which is the
25 arbitration court rule. This proposal has been

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1 published for comment, and as a matter of fact was an
2 item before us on yesterday's public hearing agenda.

3 Admin 2005-38, the State Bar asked us to open
4 this file which would allow emeritus members of the
5 bar to practice in the limited way in which law
6 students and recent law graduates are allowed to
7 practice, with supervision by an experienced attorney.
8 When this was first brought before the court earlier
9 this year several members expressed concerns based on
10 whether the attorney discipline system would have
11 jurisdiction over them if they violated the rules.
12 The court invited Janet Welch to submit a memorandum
13 on some specific issues, and she did so earlier this
14 summer. So this will be reconsidered by the court I
15 am sure before the end of this year.

16 Admin file number 2005-41. The bar asked the
17 court to open this file to codify that certain records
18 of the Bar are considered confidential. This proposal
19 was published for comment, and the day before the
20 public hearing held in January of 2007 the Bar asked
21 the court to refrain from taking action because it was
22 negotiating some alternate language with the attorney
23 for the Michigan Press Association. This matter will
24 also be reconsidered before the end of the year.

25 Admin 2007-12. This file allows parties in a

1 traditional case to exchange pleading electronically.
2 This matter was also heard at yesterday's public
3 hearing. After this proposal was published for

4 comment, however, the Bar submitted a more elaborate
5 comprehensive set of rules known as E-discovery, which
6 is yet another admin file 2007-24, and we will move on
7 this secondary proposal once we have resolved that
8 initial one.

9 So today you have been grappling with another
10 important comprehensive set of recommendations
11 concerning the protection of the attorney-client
12 privilege against recent challenges. You know, we
13 live in a world where public understanding of the
14 underpinnings of the privilege is very low and the
15 confidentiality that the attorney-client relationship
16 protects is constantly under threat. The
17 Representative Assembly plays a very critical role in
18 helping us assess the appropriate balance between law
19 enforcement objectives and the necessity for
20 confidentiality to protect the quality of the service
21 that you lawyers provide to your clients.

22 So, again, thank you for allowing me to play
23 a role in this milestone. I almost said millstone.
24 Happy anniversary to the Representative Assembly, and
25 I wish you many more returns. Thank you.

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1 (Applause.)

2 CHAIRPERSON HAROUTUNIAN: I think we are
3 ready for the swearing in of Bob Gardella by Justice
4 Mike Cavanagh. Maybe. Gina Gardella, would you come
5 forward, please.

6 JUSTICE CAVANAGH: Bob wanted me to suit up
7 for this. Photo ops.

8 Raise your right hand. Bob, do you solemnly

9 swear that you will support the Constitution of the
10 United States and the Constitution of the State of
11 Michigan and that you will faithfully discharge the
12 duties and responsibilities of the office of Chair of
13 the Representative Assembly of the State Bar of
14 Michigan to the best of your ability, so help you God?

15 VICE CLERK GARDELLA: I do, so help me God.

16 JUSTICE CAVANAGH: Congratulations.

17 (Applause.)

18 JUSTICE CAVANAGH: It's your very own gavel.

19 CHAIRPERSON GARDELLA: Thank you very much.

20 Thank you so much for being here.

21 JUSTICE CAVANAGH: My pleasure.

22 (Applause.)

23 CHAIRPERSON GARDELLA: Well, now as the new

24 Chair of the Assembly, and it is a great honor to

25 serve as the Chair of the Assembly. I have been

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1 working on this great body since 1999, and it has
2 truly been a pleasure. The people that I have been
3 able to meet and work with and develop friendships
4 with will last a lifetime, and I thank you for all of
5 your hard work.

6 Even though I am becoming the officer and the
7 chair of this great body, the officers can't do what's
8 required. All of you have to do your part. We are
9 truly a team here, and we are going to have various
10 committee chairs, we are going to have committee
11 member positions, liaisons to various other Bar
12 sections and standing committees, and I encourage you
13 to get involved. We need you, and the power of the

14 Assembly is based on your involvement and your
15 volunteer work.

16 So when we send you the preference sheet as
17 to which part of the organization you would like to be
18 involved in, what liaison positions, I would highly,
19 highly urge you to get those back to me. If you have
20 any with you, please drop them off here at the front
21 table before you leave or before you leave the 35th
22 anniversary reception, because we want to start
23 working and get things rolling and keep our good
24 program going here.

25 I would also add that it's a pleasure to

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1 announce that for the upcoming 2008 year we have 100
2 percent commitment. We have no vacancies, and we have
3 worked hard at that.

4 (Applause.)

5 CHAIRPERSON GARDELLA: We have worked hard at
6 that, and I think that is a testimony to all of the
7 hard work that you have done. We have some positions
8 where people are competing for the positions, and
9 that's healthy for our organization, and the people
10 who don't get the positions, hopefully they will want
11 to come back when vacancies do occur. So that's a
12 good sign and shows that we are very, very healthy.

13 It will be very difficult to fill the shoes
14 of Ed Haroutunian. He has done a wonderful job, and
15 it has been a pleasure to work with him. His insight,
16 his energy and good judgment has really, really,
17 really helped us advance in a lot of different ways,
18 and I will try to carry on, but I know I will be

19 calling him for advice here and there. So he has been
20 a great person to work with and a great friend. So I
21 would applaud Ed for all his work.

22 (Applause.)

23 CHAIRPERSON GARDELLA: I know this has been
24 especially difficult for Ed this past year. His
25 mother passed away right when his duties were

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1 starting, and he was putting a lot of time in to help
2 his mother, and I know that was difficult for him,
3 and despite that he still put in a hundred percent
4 effort and kept things rolling, and I commend him for
5 that. It was very difficult for him to get through
6 that.

7 I would also like to state the officers that
8 we have, Kathy Kakish and Elizabeth Johnson, they are
9 wonderful people. They have been so involved, and we
10 should have a great team. It will be a lot of fun to
11 work with them, and also Janet Welch and Anne Smith
12 and the staff at the Bar, they have done a wonderful
13 job.

14 I would also like to commend and applaud
15 Judge Cynthia Stephens. I was just in her court on
16 Monday, and the air conditioner wasn't working there
17 either like it was at the attorney discipline meetings
18 today, and I am thinking maybe they are starting the
19 cutbacks already.

20 She has not only been a member of our
21 Assembly, she has been a former Board of Commissioner
22 member. She still serves on the Board of
23 Commissioners Policy Committee and is totally

24 committed to the Bar, and we would be lost without her
25 insight, and as our parliamentarian this year she has

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1 just done a wonderful job, and she is always there for
2 us whenever we need her help, and so I would applaud
3 Judge Stephens.

4 (Applause.)

5 CHAIRPERSON GARDELLA: There are some other
6 people that I would like to acknowledge that are here,
7 my family and friends, and I am very, very
8 appreciative of them for coming here. My wife was
9 previously introduced, but I would also like to point
10 out my parents, Bob, Sr. and Maryann Gardella. They
11 are in the back row,

12 (Applause.)

13 CHAIRPERSON GARDELLA: And also my Grand
14 Rapids family, my father-in-law Tom Roney, if you
15 could stand Tom.

16 (Applause.)

17 CHAIRPERSON GARDELLA: And then also Tom
18 Roney, Jr. and Kari Roney, my brother-in-law and
19 sister-in-law. They are also seated in the back
20 there.

21 (Applause.)

22 CHAIRPERSON GARDELLA: And then some other
23 people, my Brighton people, Judge Burress. I used to
24 be his law clerk, and he has been a friend for many,
25 many years. If you could stand, Judge, and he is a

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1 former member of the Assembly.

2 (Applause.)

3 CHAIRPERSON GARDELLA: Mike Panny, I don't
4 know if Mike is back there. Mike -- I don't have a
5 brother, but Mike is my real in life brother. He has
6 been a friend, best man at my wedding, and he is
7 always there for me, and I am honored that he is here
8 to share in this swearing in today.

9 And then also I would point out one other
10 person, Nkrumah Johnson-Wynn. She is a former chair
11 of the Assembly and one of my neighbors in Brighton.
12 I see her husband in the back. There she is right
13 there.

14 (Applause.)

15 CHAIRPERSON GARDELLA: Our kids play soccer
16 together, so we usually see each other at the soccer
17 field.

18 I want to stress to you that this will be an
19 active year, and it will be a positive, positive year,
20 but the proposals that we have, of course, we don't
21 know what those will be, but the Supreme Court may ask
22 us to consider various resolutions. We may have other
23 proposals, and I ask that you keep working hard, just
24 like you did this year, and we will be able to keep
25 our good reputation going.

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1 I would turn the floor over to Ed.

2 PAST CHAIRPERSON HAROUTUNIAN: Let me just

3 make a few more comments. I want to publicly thank
4 the State Bar staff for all of their help over this
5 past year. Marge Bossenbery, Naseem Stecker, Nancy
6 Brown, Kari Brandel, most especially Anne Smith, who
7 has done yeoman duty to be able to deal with Bob,
8 Kathy, and myself, and all the people who worked on
9 the projects who I had not named. It was most
10 appreciated.

11 Special thanks to Janet Welch for all of her
12 good judgment which she brings to the table for the
13 Representative Assembly officers, all of our R.A.
14 committees who were involved this year, some more than
15 others, based upon the work that was before us.
16 However, everyone, everyone demonstrated a willingness
17 to participate.

18 Liz Johnson, chair of the Nominations and
19 Awards Committee; John Reiser, chair of Drafting;
20 Sheila Garin, chair of the Calendar Committee; Steve
21 Gobbo, chair of the Special Issues; Rob Buchanan,
22 chair of the Hearings Committee; and Victoria Radke,
23 chair of the Assembly Review. I want to thank all
24 these chairs for not only the work they have done but
25 their willingness to be a part even when a particular

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1 committee might not be too terribly involved at any
2 given moment.

3 A big thank you to Bob Gardella and Kathy
4 Kakish for all of their hard work. I could not have
5 asked for a better vice chair and a better clerk. As
6 Bob indicated I thank our parliamentarian, Judge
7 Cynthia Stephens of the Wayne circuit bench, for

8 allowing me to proceed even though friendly amendments
9 are not her cup of tea.

10 And I want to thank our court reporter,
11 Connie Coon, for all of her attempts at and successes
12 in getting all of our words in that transcript.

13 Thank you to two other members of the
14 Representative Assembly without whom I would not have
15 been able to handle the past 12 months, my wife Susan
16 out of the Wayne judicial circuit and my daughter
17 Krista out of the 6th. So I thank the two of you who
18 are sitting back over there.

19 (Applause.)

20 PAST CHAIRPERSON HAROUTUNIAN: Finally, as I
21 mentioned to the Board of Commissioners meeting
22 yesterday, and I want to share this with all of you,
23 thank you for allowing me to be a part of this great
24 adventure, and it has been an adventure over the last
25 three years from clerk, vice chair, to chair. I have

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1 very much enjoyed it, and the people -- you know,
2 sometimes people say, well, what are you going to
3 miss? You are not going to miss the time spent. You
4 are going to miss the time you are with people and the
5 interaction with people. And, as I have said to Susan
6 many times, we have been very, very fortunate. We
7 have been fortunate to be able to know people in the
8 legal profession who are just great people, and to me
9 that means an awful lot, and, folks, you are that
10 great people.

11 So I want to thank you all, and I wish Bob
12 all of the very, very best, as well as Kathy.

13 CHAIRPERSON GARDELLA: We have something for
14 you. You can't leave the stand here without having
15 something presented to you.

16 As I said before, it's time to say good-bye
17 to Ed, and it's time to say a big, big thank you, and
18 he is ready to run I will tell you. He was smiling
19 earlier today knowing I don't have to do all these
20 conference calls anymore and everything else that goes
21 with it.

22 But Ed has done a fabulous job promoting the
23 mission of the Representative Assembly and in its
24 final policy-making function and to be the real pulse
25 on the reading of all of the 38,000 lawyers throughout

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1 the state of Michigan. He has been a gentleman, he
2 has been a very hard worker and very energetic and
3 enthusiastic about our work, which he has passed on to
4 the other officers and to the other staff at the
5 State Bar too, knowing that we enjoy what we are
6 doing, and also handling all of these cutting edge
7 issues that we debate on and analyze. He has done a
8 wonderful job as our traffic cop, if you will, getting
9 everything through and keeping us as a very vibrant
10 organization.

11 As a token of our appreciation we have two
12 things for Ed. We have this wonderful wall plaque.
13 It says, State Bar of Michigan honors Edward L.
14 Haroutunian, Representative Assembly Chairperson 2006
15 to 2007. Also previously serving as Vice Chair and
16 Clerk. In appreciation for distinguished service to
17 the Assembly of the State Bar and all Michigan

18 lawyers, September 27th, 2007, and I hope you will
19 proudly hang it on your office wall.

20 PAST CHAIRPERSON HAROUTUNIAN: I will. Thank
21 you.

22 (Applause.)

23 CHAIRPERSON GARDELLA: One more thing that we
24 have. Kathy and myself -- Kathy, come on over here.
25 Kathy and I wanted to get something for Ed. There are

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1 so many different things we could have gotten for him,
2 so what we did, we decided to get him gift
3 certificates to a number of his favorite, favorite
4 stores instead of just one so he can enjoy a lot of
5 different things all at once. Now that he is going to
6 have all this free time on his hands, he will be able
7 to do all kinds of shopping. So, Ed, I hope you enjoy
8 the gift, and thank you.

9 PAST CHAIRPERSON HAROUTUNIAN: Thank you.
10 (Applause.)

11 PAST CHAIRPERSON HAROUTUNIAN: Oh, my
12 goodness. This is -- I don't know if you will all
13 appreciate this. This is a gift certificate to the
14 Shirt Box, which is over on Northwestern Highway in
15 the other side of the state, and the other one is
16 to -- oh, my goodness -- to Scott Colburn. Scott
17 Colburn is also on the other side of the state, but it
18 deals with cowboy kinds of things, hats, boots, that
19 kind of thing, which some have said that I have worn
20 on occasion, and so I thank you very much. This will
21 be great. This will be great. Thank you.

22 (Applause.)

23 CHAIRPERSON GARDELLA: The last thing that we
24 have to do is to distribute our certificates or
25 plaques of recognition to our chairs.

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1 PAST CHAIRPERSON HAROUTUNIAN: If you read
2 them, I will give them out.

3 CHAIRPERSON GARDELLA: The first one Rob
4 Buchanan. Is Rob back? I know he had to leave, and
5 he said he was coming back, so I don't see him. This
6 is in appreciation to Robert J. Buchanan, who has been
7 our chairperson of the Hearings Committee for this
8 past year, and we will make sure that Rob gets that.
9 I think he is coming back for the reception here.

10 And our second person, Steve Gobbo, he also
11 had to leave, and he has been our Special Issues
12 Committee chair, so we will get that to him. But I
13 think we still have some people that are left here.

14 Victoria Radke. Victoria, come on up.
15 (Applause.)

16 CHAIRPERSON GARDELLA: Victoria has been a
17 long-time member of the Assembly. She has done a
18 wonderful job this year. Thank you for serving as a
19 committee chair and all your years of service.

20 Our next person is, who is your 2006/2007
21 chairperson of the Rules and Calendar Committee,
22 Sheila Garin. Come on up, Sheila.

23 (Applause.)

24 CHAIRPERSON GARDELLA: Sheila, thank you for
25 keeping everything so well run.

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1 MS. GARIN: Thanks for having me.

2 CHAIRPERSON GARDELLA: Our next chairperson
3 is the chairperson of the Drafting Committee, John
4 Reiser. John kept everything going and kept
5 everything rolling.

6 (Applause.)

7 CHAIRPERSON GARDELLA: Next, our 2006/2007
8 chairperson of the Nominating and Awards Committee,
9 Elizabeth Johnson, our new clerk. Thank you.

10 (Applause.)

11 CHAIRPERSON GARDELLA: And we also have
12 outgoing certificates for our members who are termed
13 out and they will not be returning. We wish they
14 would be able to, but maybe they can return after a
15 few years down the road when allowed. Gerard Andre,
16 is he here? I think he might have left. I think he
17 might have left earlier. We will get that to him.

18 Sheila Garin, thank you.

19 (Applause.)

20 CHAIRPERSON GARDELLA: Our next member, Scott
21 Garrison. Thank you for your years of service.

22 (Applause.)

23 CHAIRPERSON GARDELLA: Our next member,
24 Randall Miller. Thank you, Randall.

25 (Applause.)

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1 CHAIRPERSON GARDELLA: Our next member, Paul

2 Piatt. Thank you, Paul. Are you still here? We will
3 get that to Paul.

4 Our next member, Teresa Bingman. We will get
5 that to her.

6 Next is Matthew Serra. Thank you, Matthew.
7 Are you still here? No, we will get that to Matt.

8 And last but not least, Richard Trost, and I
9 know Richard couldn't be here today, so we will get
10 that to Richard.

11 Again for all of you, thank you for the years
12 of service and your commitment to the Assembly.

13 If any of you parked at the DeVos Place, see
14 Anne Smith. She has parking passes. Also, make sure
15 you do not leave until you have signed an attendance
16 sheet or you will not get credit for all this time
17 that you have put in today.

18 And then also I would ask if you have the
19 forms relating to the preferences for the committees,
20 bring those up, and the liaison positions, bring those
21 up, put them on the table over on this side of the
22 lectern here.

23 And then lastly, as it relates to your
24 photograph, if you are going to be a member of the
25 Assembly for the April 2008 meeting, I would like to

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1 have you have your picture taken. Marge Bossenbery is
2 right back there. She will take your photograph
3 outside. We would like to get those done, and that
4 way we have less work to do at the April meeting so we
5 can get our directory up and running, so make sure you
6 take the time to see Marge, and it will just take

7 about 30 seconds to do it.
8 And also please enjoy the 35th anniversary
9 reception. It's just right outside the doors. In
10 fact, I think you can go through the glass doors and
11 enjoy the river outside and come back in. And I would
12 entertain a motion to adjourn.
13 VOICE: So moved.
14 CHAIRPERSON GARDELLA: Do I hear support?
15 VOICE: Support.
16 CHAIRPERSON GARDELLA: Any discussion?
17 All in favor.
18 Any opposed
19 (Proceedings adjourned at 4:50 p.m.)
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1 STATE OF MICHIGAN)
2 COUNTY OF CLINTON)

3 I certify that this transcript, consisting
4 of 175 pages, is a complete, true, and correct transcript
5 of the proceedings held by the Representative Assembly on
6 Thursday, September 27, 2007.

7
8 October 16, 2007

Connie S. Coon, CSR-2709
831 North Washington Avenue
Lansing, Michigan 48906

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