MICHIGAN SUPREME COURT

September 16, 1999 PUBLIC HEARING

JUSTICE WEAVER: Good morning to you all. And what a joy it is to be here in Grand Rapids. The last time I was here right in this position was when I was on the Court of Appeals and it's hard to believe that was almost five years ago. We are very pleased on behalf of all the Members of the Court to tell you that we are in fact very happy to be here and to hold these administrative hearings here in Grand Rapids and at the same time as the State Bar is meeting. I would like to recognize Mr. Michael Walton who is, is he present, and who is president of the Grand Rapids Bar and I think he would like to address us for a moment.

MR. WALTON: Good morning and welcome to Grand Rapids. I'm here to welcome you on behalf of the Grand Rapids Bar Association. We are a 1,600 member organization. We maintain a continuing legal education program and a number of community-oriented pro bono programs. Our current project is an access to justice program which I think you are all familiar with, at least I hope you are. We hope it will become the model for access to justice in the State of Michigan. We are very proud of our organization and we are very proud to have you here in Grand Rapids for these important hearings I also have with me Mr. Bruce Nickers who I think would like to take a moment and say good morning as well. Thank you very much and have a good one today.

JUSTICE WEAVER: Thank you. Mr. Neckers, you are here not only as a Grand Rapids Bar member, but also as a State Bar member.

MR. NECKERS: That's true, and all I wanted to do this morning was to thank you for holding these hearings in Grand Rapids. I've practiced in Grand Rapids for 30 years. It's a great place to practice law. It's a wonderful bar. You can see that when you hold administrative hearings here what happens. There's a distinguished group of lawyers who practice here and lots of them show up for your administrative hearings. So come back again. And as a member of the State Bar of Michigan hosting this convention in Grand Rapids at the same time that you're here for these administrative hearings is a great thing and we hope you'll do it from year to year in the city where the State Bar meeting is. Thank you very much.

JUSTICE WEAVER: Thank you both for your kind welcoming remarks and thank you for their preciseness and substance and brevity. Something that we hope will continue as we go through the hearing. As you know, we have a full agenda, 13 items, and we have a number of people who have asked to speak and because of certain other notice problems we have opened it up if there is anyone else I don't have on my list. We have to limit it to three minutes unless there's a reason to do otherwise, and so with that, and also one other thing I want you to know, this is the first of a number of administrative hearings we will be having this year. We will be going to Berrien County, Gaylord, Marquette, etc. So we will be going around the state and you should know that and you're always all welcome. With that, let us start with item

number one. 98-34 MCLE issue. And I have Mr. Bernard J. McEnanly. Is he here? He indicated he wished to speak. Okay, he's not here. The second person listed is Mr. Allan Falk. Mr. Falk. I believe that you'll (inaudible) is that correct?

Item 1 98-34 MCLE

MR. FALK: There are enough people willing to cut my throat before I get the sign anyway, I suspect. Good morning. I want to say a little off the topic, that it's great to see the Supreme Court having this little road show. I think it's a very good thing to get out among the people. I would respectfully suggest that because it's an administrative hearing that in the future you might consider not wearing your robes and convening it like a court session because what you're doing here is really not judicial, it's more in the sense of legislative and the formality of the proceedings perhaps puts off some particularly non-lawyers who might feel uncomfortable addressing the Supreme Court as a court but would feel perfectly comfortable making their views known as citizens to one third of their government. I spoke before on MCLE at the hearings in Lansing. I used less than my three minutes and while the State Bar used about 30, and in those 30 minutes the State Bar really came up with no justification for this proposal other than well, gee, education is a good thing and therefore we should make everyone get more of it, with no effort to demonstrate an empirical justification that in fact it would improve the quality of lawyering, the quality of practice of law, civility among the members of the profession or in fact that people who would attend these mandatory seminars would actually learn anything because the only requirement is that you attend, not that you demonstrate any acquired knowledge. I happen to be co-counsel in a case with a lawyer from Ohio who apr po of absolutely nothing mentioned to me that he was quite frustrated since he couldn't meet with me on a certain date since he had to go to his mandatory continuing legal education which he thought was a complete disaster. Said it was very expensive, cost him over $500 a year, a lot different than the figure we're hearing from the State Bar. Wasted a few days of his time and he's a good lawyer and he feels that in the matters in which he feels particularly competent, the people in the seminars have nothing to teach him, even though he would like to learn more about his specialties. So he has to attend things about which he knows nothing and in which he has no interest, and he quickly forgets, assuming he's able to stay awake through the seminar. I would therefore encourage the Court to reject this proposal. It has no value other than to give the appearance that we're trying to improve the practice of law. There are a lot better ways to do that, more efficient and more rationale, both economically and in terms of the needs and welfare of the profession. Thank you.

JUSTICE WEAVER: Thank you, Mr. Falk. Everyone should know with respect to items one and two, the Court will not be making any decisions on these in immediacy. The Court will have these on our agenda at all the hearings that we'll be having around the state, and we have had requests from the State Bar to be able to make representations at later hearings, and they certainly will be able to. So be informed that this issue that has just been addressed, and issue second concerning certification will certainly not be decided after this hearing and will be on the agenda at all of our hearings that we'll be having around the state. Now, is there

anyone else on item number one? Then let's proceed to item number two, which is 95-20, which is lawyer certification issue. Mr. Falk, you're the only one listed here.

Item 2 95-20 Lawyer Certification

MR. FALK: Good morning again. I don't want to repeat what I put into my written message to the Court particularly. I would just like to belabor a little bit the point that the medical profession for over 100 years has had a quite excellent specialty certification program run entirely by the doctors. There is no governmental involvement in that program. For the first time as far as anyone is aware, the Michigan Legislature has only tangentially recognized the validity of certification by its requirements for qualifications of expert witnesses in medical malpractice cases, in RJ §2169, the constitutionality of which this Court recently upheld. I see no reason why if the Legislature having chosen not to regulate specialty among lawyers or most other professions, why the government, through the Supreme Court, needs to be involved in that.

JUSTICE CORRIGAN: Can you make your point clear because your letter was a little bit inconsistent. On the one hand you say we don't have the authority to do it, it's a legislative function. On the other hand you say it's private business, ergo, the State Bar has no role in it at all. If a group of lawyers wanted to have certification occur, how would it happen in the state of Michigan in your view?

MR. FALK: I think they would do what the doctors do, and what was upheld in, I think it was the Peel case, v Illinois Board of Registration, which is, you form a private group to certify lawyers in a particular specialty and you let the public judge whether that group is a specialty certification group. You get enough lawyers in a specialty involved, the group will probably be legitimate. If you have a few lawyers who just want to make themselves seem like they have some specialty that others lack, the public will probably see through that. And the market will judge the validity of it. That's what the doctors have done. There are some competing medical certification boards, particularly among the podiatrists, I understand. And yet they get along fine without the government having to step in and say, oh no, you guys are the legitimate specialty certification group and you guys aren't legitimate and therefore you guys get to aggrandize your income producing potential at the expense of these other people. It's a very anti-competitive process but if it's done privately, it seems that the anti-competitive nature sort of disappears because everybody gets involved, at least everybody with an interest in that sort of thing. And we've got radiologists and cardiologists and 20 kinds of surgeons, thoracic surgeons, cardiovascular surgeons, hand surgeons--all these specialties--and there's no government involvement in that. So I don't think I was being inconsistent. I was saying if the Legislature wanted to do that I suppose they could. I don't know why the Court ought to go out of its way to get to government involvement in something like that. The Legislature has not seen the wisdom of such a move, in this field or most others. And doctors (sic) at least don't kill people when they make mistakes. That was all I had to say on this.

JUSTICE WEAVER: Any further questions? Thank you again, Mr. Falk. Any further comment on item 2, lawyer certification? All right, we'll then proceed to item 3, and that would be 99-19, the LAWPAC issue. First person here is Timothy Knowlton, or John Pirich.

Item 3 99-19 LAWPAC

MR. PIRICH: Good morning Chief Justice, Justices. John Pirich on behalf of the Honigman lawyers, as referred to in the petition which has been filed with the Court. I take great pride in being here on behalf of the Honigman lawyers.

JUSTICE YOUNG: Is that your firm?

MR. PIRICH: Well, I would only suggest that I have not been told, or countermanded, so I assume they must. I think our writing, to supplement our earlier writing, focuses on exactly what the Chief Justice's letter after the initial hearing concerned, and that was, does §57 apply to the activity. And I think if you looked at the transcript of the May hearing which we attach, the State Bar has admitted, number one, that it is a public body. Number 2, it has admitted that this is a valuable service. And if you look at the straight interpretation of the section §57, take out the first clause "a public body" and insert "the State Bar", the State Bar shall not use or authorize use of funds, personnel, and the rest of it, in regard to a contribution or expenditure or providing volunteer services that are excluded from the definition of contribution. If you look at the State Bar's response, I think it's quite interesting because the State Bar responds by saying, we'll we're reimbursing, and I think the Cahill interpretive statement that we attached and the most recent decision by the Department of State, that rendered to Lake Superior State College, shows the inconsistency of the position that the State Bar is taking. If the University of Michigan, a public body, can't engage in this conduct, and if Lake Superior State College, a public body, can't engage in this conduct, then why can the State Bar engage in the conduct. And I think it's interesting to point out one other thing, and I'd like to, if I could briefly, in our attachments we've always provided or attempted to show the State Bar notice. Perhaps it's fortuitous, but I haven't gotten my notice for membership invoice yet this year, but Mr. Knowlton got his and I have copies in case the Court hasn't seen them. You may even have gotten yours or you may not have, but two or three things are very interesting. This is a complicated form. I'm almost reminded that it takes a Philadelphia lawyer to go through one of these forms because of the complicated nature. But the fact of the matter is you have to see the figure that's suggested as the recommended contribution and then you have to take the steps to remove it from the dues. Four of our 16 lawyers in our office yesterday when polled had not understood that and had we not talked to them, they would have inadvertently thought that they weren't paying for the fee, but the fee would have been charged or assessed.

JUSTICE YOUNG: Are you suggesting Honigman lawyers aren't Philadelphia lawyers?

MR. PIRICH: I'm suggesting, Your Honor, that in the busy schedule of lawyers, when you get a form that is as complicated as this form is, and if you had the time and effort to be able to read the fine print, and even my reading glasses are now making that difficult, it shows the complexity that's associated with this. Number 2, the State Bar has admitted they are the only non-bar activity that is permitted to solicit. And it's interesting because we point out in our response, in other licensure situations what is to prevent the Natural Resources Commission from putting on deer license applications a request to contribute to the NRA. Where will this line be drawn? I think the Legislature quite clearly and candidly drew the line without any equivocation. It said a public body shall not engage in this conduct. And to permit the Bar to engage in this conduct will, I think, open Pandora's Box to the point that where will we stop it. School districts will then be able to engage in this type of conduct. Any public agency will be able to engage in this conduct. And I think that's why §57 was enacted by the Legislature in the format that it was. Lastly, I would like to make just a generic comment because I think we've shown the reimbursement issue is just absolutely inapplicable to the situation that is presented here. The State Bar responds, don't worry, public officials are going to get into trouble. Section 57 has exemptions that take on all of the issues. I appeared before this Court, I believe it was in 1976 to argue the constitutionality of the then-enacted Political Reform Act. I stood before this Court and took a very unpopular position in front of the public norm of the day post-Watergate which said that there are certain things that the Legislature can and can't do, but they have to be done the right way. And this Court declared the Political Reform Act of 1975 unconstitutional and the Legislature was forced to go back and enact it the right way. I take another unpopular position with the State Bar on this particular issue. And it is not one that I take lightly or that we take lightly as lawyers within our firm or within our profession. But the fact of the matter is that there are substantial constitutional and statutory issues that we believe demand that this Court stop this practice and end it officially so that we don't go through this issue on an ongoing basis. I think our writings speak to all of the issues. I know the time is limited. If there are questions I would be more than glad to respond to them.

JUSTICE WEAVER: Any question, Justices? Thank you. Peter Ellsworth.

MR. ELLSWORTH: Madam Chief Justice and Members of the Court, I am here today on behalf of the State Bar of Michigan. The State Bar has filed a letter last Wednesday, September 8, and I won't because of the limited time that we have this morning, I won't go through what we've said in that letter, but I tried in that letter to summarize the position of the State Bar. Responding some to Mr. Pirich I would first like to point out, and in Mr. Pirich's letter he made a number of comments to the effect that the State Bar has admitted to violating §57 of the Campaign Finance Act, admitting that to the Department of State or here, but that's not so. The State Bar has never been of that mind. Moreover, the Department of State when it considered the complaint from the State Chamber of Commerce regarding LAWPAC made no finding of any violation of the Campaign Finance Act. It found a probable violation of §55 which is the PAC section of that statute. It found no such probable violation with respect to §57, the section that Mr. Pirich and his clients are complaining about. It has never been that a value for value transaction has been considered a contribution. And you need to consider the

language of §57. It says you can't use public resources to make a contribution. What the State Bar has done is essentially sell a service to LAWPAC.

JUSTICE YOUNG: An exclusive service. A unique service.

MR. ELLSWORTH: Yes, that's correct.

JUSTICE YOUNG: The value of which is not determinable currently in the marketplace.

MR. ELLSWORTH: Well, I would disagree with that, Justice Young, and whether you feel that the value that has been assigned to this service by the State Bar is correct or not, it's the test employed by the Department of State and under the Campaign Finance Act is a fair market value test, and there are professional fundraisers out there that do this sort of thing and so--

JUSTICE YOUNG: You say that an exclusive reverse dues checkoff is the equivalent of hiring a professional fundraiser? I certainly would like to have a reverse dues checkoff in the coming election.

MR. ELLSWORTH: Number one, it's not a reverse checkoff, and Mr. Pirich, I think--

JUSTICE YOUNG: It's not a reverse checkoff?

MR. ELLSWORTH: No, it's not a reverse checkoff at all. There are two boxes that appear on the State Bar dues statement. One if you want to make a LAWPAC contribution, another if you don't want to make a LAWPAC contribution. It takes an affirmative--

JUSTICE YOUNG: Well, let me just put it this way. When I got this, I had to make a determination whether to cross out an increase in the amount of dues that I pay by either accepting what was already included for LAWPAC, or striking it. Now whether you call that a reverse dues checkoff there must be a mandatory affirmative act or I automatically am billed for LAWPAC, correct?

MR. ELLSWORTH: On the current bar statement, there are two sets of boxes. The calculations are all done. If you want to make a LAWPAC contribution, you check box one, and that comes out to $35.00 more than if you check box two, makes the difference between $335 and $300.

JUSTICE YOUNG: What do I have to do if I check box 2.

MR. ELLSWORTH: You simply check it and the calculation is completed for you.

JUSTICE YOUNG: So I don't have to strike anything on that form other than to check that alternative.

MR. ELLSWORTH: That's correct, and if you like, I have a copy of my own dues statement if you'd like to take a look at it. Let me move because of the limited time--

JUSTICE CORRIGAN: Can I ask a question and you help me with this because I'm going this is *deja vu* all over again from the last--but I'd like you to help me walk through this. On the exact language of §57 as I understand it, a public body can't use postage in this setting. You cannot donate postage, a public body can't permit that. And I think that the amount of reimbursement that existed for this charge was far less than the actual cost of postage. I don't still understand, unless LAWPAC was charged the exact amount it cost to deliver postage for 35,000 members of the State Bar why it isn't making a contribution of postage under the language of §57.

MR. ELLSWORTH: The dues statement collects money for a number of institutions. LAWPAC is one. The total cost of mailing and printing the dues statement is around $25,000. The LAWPAC contribution last year was about somewhere between $85 and 9,000 (sic).

JUSTICE CORRIGAN: Walk through this with me. If they're subsidizing postage, LAWPAC on its own would have to pay postage. So if they're not charging fair market value for postage, aren't they in violation of §57?

MR. ELLSWORTH: Well if they were not charging fair market value for this service then there would be a violation of §57, yes. But the dues statement collects money for all of these different functions. All of the State Bar sections, the State Bar itself, the grievance program, all of these things. LAWPAC is only one of those items. It doesn't take up much space on the dues notice. As a matter of fact it's negligible what it takes up on the dues notice. The State Bar is going to have to pay that money for postage no matter what, even if LAWPAC comes off.

JUSTICE CORRIGAN: I understand, but you're missing the point of my question. I understand the State Bar will have to pay money. The question is whether or not they're making a contribution to LAWPAC by subsidizing postage, in violation of §57. And that's, candidly, one of my problems.

MR. ELLSWORTH: I go back to--let me give you an example. If a city clerk sells a list of registered voters to a candidate committee, there is no contribution being made, there is no violation of §57 because the city is being compensated for the cost of those copies, the

cost of that service. I think the analogy is the same here to the State Bar. The State Bar is providing a service, it's receiving money back for that service. It's like any other value for value transaction. When a candidate committee buys a service, rents a telephone. As long as the telephone company is getting compensated at a fair market rate for the service that it's providing there is no contribution coming back from the telephone company.

JUSTICE YOUNG: Isn't this more akin though to the clerk stuffing a municipal mailing with the candidate's literature?

MR. ELLSWORTH: I don't think it is. I think that the Bar is--well, and I guess, Justice Young, you have to go back to the precise words in §57. There are other laws, and a number of Attorney General rulings that deal with things like a school board or a city clerk doing a mailing on a millage or things like that. §57 is not the only provision that is directed at that kind of activity. What §57 does in the parlance of the Campaign Finance Act is to prohibit the use of public property to make a contribution to a committee. That's what the section does. Let me also--

JUSTICE TAYLOR: Can I just ask you a brief question. Justice Corrigan asked you this question. Is your answer to that that you should prorate the postage cost among the various groups that are benefitting from the mailing, that is the various sections of the Bar.

MR. ELLSWORTH: Exactly.

JUSTICE TAYLOR: So you would say there should be a proration.

MR. ELLSWORTH: There should be a proration and if you do it on that basis--

JUSTICE TAYLOR: Has the Bar ever done those kinds of calculations, saying well the negligence section or the family law section is responsible for this much?

MR. ELLSWORTH: Yes, the finance director has done those calculations in a number of different ways.

JUSTICE TAYLOR: Have they been billed for that?

MR. ELLSWORTH: No, they have not been billed for that and the Bar has not charged the sections for that service.

JUSTICE TAYLOR: Is there meaning to that. I don't know what that means. Is that important, do you think, that they haven't billed them?

MR. ELLSWORTH: Well, I don't think so. I think the sections are part of the Bar. They certainly could charge the sections. And if they opened up the dues statement for other organizations they could certainly charge. Those calculations, incidentally, that the finance director has made, every way he has figured them out, LAWPAC's contribution to this cost, it's overcompensating the Bar if you do it on a prorated basis.

JUSTICE TAYLOR: Does a PAC by its very nature have an ideological component?

MR. ELLSWORTH: Well, I think some do.

JUSTICE TAYLOR: In other words, let's just make this real simple. You're going to give this to Republicans or Democrats as the Bar might feel (inaudible). Isn't that by it's very nature, although we don't know which ideological entity is going to get this, one of them is, doesn't that make it then the sum total ideological.

MR. ELLSWORTH: No, and Elizabeth Hardy will be addressing the Court in a few minutes to explain the LAWPAC philosophy and what kinds of contributions LAWPAC makes.

JUSTICE YOUNG: So it is a non-ideological, non-political activity.

MR. ELLSWORTH: It is certainly not a non-political activity. LAWPAC is a committee that contributes to candidates that are sensitive and interested in the kinds of issues that lawyers are concerned about and that doesn't get into things like tort reform. It's the kind of issues that would be addressed in the Supreme Court's administrative order on--

JUSTICE YOUNG: So it would not be supporting a candidate that supported interests--I'm sorry, I'm having a little difficulty when you say that you contribute to political candidates that support the interests of lawyers and the conclusion therefore is that that is a non-ideological, non First Amendment kind of question.

MR. ELLSWORTH: Well, I'm not going to say that it's a non-ideological situation because you are contributing to candidates. The candidates who are receiving these contributions, however, are candidates who have shown an interest in lawyer type issues. I think that the important issue here is that no State Bar mandatory dues money are being used to make these contributions.

JUSTICE TAYLOR: Well, I think this is a different point. This is a Keller violation point.

MR. ELLSWORTH: That's right.

JUSTICE TAYLOR: And I just am curious about that because let's take the ultimate lawyer issue. Let's say somebody introduced a bill in the Legislature to say if you have a high school equivalency you can be admitted to the Bar if you produce your GED, that would probably cause the Bar to be very interested and opposed to that and they would probably contribute to candidates who were in opposition to that, I would think. Would that not, even though it isn't a hot button ideological like one would think of say as your position on protection or free trade or something, it is ideological though, isn't it?

MR. ELLSWORTH: Yes, it is, and I think, Justice Taylor that that example, that's something that it would be permissible for the Bar to use it's own funds for under your Administrative Order 1993-5, that particular example. Now if I might just make one more point, and I've suggested this in the letter. Mr. Pirich has acknowledged in his latest letter to the Court that in fact he is representing the State Chamber of Commerce in this matter before the Court, which is fine. The State Chamber of Commerce filed an administrative complaint with the Secretary of State. That complaint resulted in a conciliation agreement in which the State Bar and LAWPAC agreed to do certain things. The Campaign Finance Act says that the conciliation complaint is a bar with respect to that issue, at least the past conduct, that the conciliation agreement is a bar to any future action. The Campaign Finance Act also has a very strong provision in it which I've cited in our letter that explains that the processes under that act are the exclusive means of redressing violations of that act. Now I don't mean to suggest to this Court that you don't have the authority to police the State Bar because I think you do. But I think with respect to a complaint which has been filed by the State Chamber of Commerce and dealt with by the Secretary of State, that respect for the legislatively established process suggests that the Court defer to the Department of State with respect to these violations that have been alleged.

JUSTICE TAYLOR: Would we be handling this, Mr. Ellsworth, in your view, under our authority under the Constitution to handle matters concerning practice and procedure.

MR. ELLSWORTH: Yes, I think you've got the authority--

JUSTICE TAYLOR: So we would have a separate basis for jurisdiction other than the Secretary of State. In other words we would not necessarily be keying on the (inaudible) right?

MR. ELLSWORTH: Well I agree that you have separate authority and you can address this issue under your authority as a court. My suggestion is that the Legislature has made it very clear that in its judgment for violations of this act which it established, that the processes outlined in that statute are the ones that should be exclusive. I'd be happy to answer--

JUSTICE TAYLOR: If you are proceeding under the statute. (tape ended)

MR. ELLSWORTH: Yes.

JUSTICE TAYLOR: But if you're proceeding under the Constitution, that would be an irrelevant.

MR. ELLSWORTH: I think this Court has independent authority to police the State Bar, yes. I'll leave it at that.

JUSTICE WEAVER: Any other question, Justices? Thank you. J. Thomas Lenga. I don't see him. Okay. Mr. Allan Falk.

MR. FALK: Hello, again. As I listed to Mr. Ellsworth I was passed a copy of the Bar dues notice which I didn't think to bring with me and of course his representation of what's on it is simply not true. It's one thing for him to fudge the law, it's another thing for him to fudge the facts. Well, first of all, I suppose in 30 or 40 years we might have pieces of paper where if you cross something out at the top, the bottom of it will take that into account automatically, but we don't have that yet. So in fact, if you don't want to give to LAWPAC, LAWPAC has already written in $35.00 and your total is shown. Then if you want to subtract LAWPAC you have to go down here and write that in, so Justice Young, you were of course correct.

JUSTICE YOUNG: I'm a Philadelphia lawyer.

MR. FALK: I did say of course correct. A few other things Mr. Ellsworth said are just very strange at best. I don't think you have to rely on the Constitution for your authority to tell the State Bar it can't mess around with LAWPAC. You've got RJ 904 says that everything the State Bar does is under the control of the Supreme Court. When the Legislature created the State Bar it gave you that authority. Nobody has challenged your possession of that authority and since it's in the act that created the State Bar, if there's something wrong with that authority then possibly there's something wrong with the State Bar even existing so I think they'll have to take the bitter with the sweet as the U.S. Supreme Court once said in Arnette v Kennedy. And whether you should defer to the Secretary of State, the Secretary of State is administering the Campaign Finance Act. It has certain considerations including political and administrative concerns so the Secretary of State entered into a conciliation agreement. It doesn't mean that this Court shouldn't look and say gee the State Bar admitted it was doing the wrong thing for three of the 20 years it's been doing the same things. They keep assuring us that they're a law abiding bunch. There are 32,000 lawyers, that's what this organization is made from, and they can't seem to follow a simple legal requirement about not mixing public agencies with political activity. If they can't do it for 20 years, why should we trust them to do it now. I don't know the answer to that question and so I guess if I were in your position I wouldn't--

JUSTICE CORRIGAN: Just as a point of fact, Mr. Falk, the statute itself that we're talking about, §57, is only three years old, isn't that true.

MR. FALK: Yes, but when we think about Keller and about the State Bar's undertaking in Falk v State Bar, now we're talking about 20 years, that was 1978 that they made that solemn promise to this Court--they took off the table the issue of using the mailing lists for commercial purposes because they knew they were going to lose that on First Amendment grounds. They took it off the table and said we won't do that anymore. Anybody who doesn't want to be solicited for commercial purposes, we'll take them off the list. Well, we've got people who are still on all kinds of commercial mailing lists. Fortunately their Antarctica trip wasn't a reverse dues checkoff where we'll send you to Antarctica unless you send in this form and tell us you don't want to pay the $3,500. So I won't fret at them for that.

JUSTICE YOUNG: How about the Administrative Order 93-5. As I'm sitting here looking at it it looks like the Supreme Court created an internal dispute resolution process, at least an administrative procedure, as at least a precondition for challenging ideological activity. What do you think about that as a precondition for us acting on this. Has the Bar to your knowledge, has this procedure been invoked since the Bar has had an opportunity to--

MR. FALK: I invoked it.

JUSTICE YOUNG: In relation to LAWPAC.

MR. FALK: No, because at the time I believed what the State Bar was telling me which is oh, gosh, LAWPAC pays its own way, we're not contributing anything. Of course when I asked well gee, can I get FALKPAC on the dues form as a reverse checkoff, you know, this would be the Allan Falk Political Action Committee for the abolition of the State Bar, we would give money to people running for the Legislature who would vote to deunify the State Bar. But they wouldn't sell me that like, so I don't know what the commercial value of it is.

JUSTICE YOUNG: Did you get that in writing by the way? (inaudible) represented that no such request had been received by the Bar for alternative PAC checkoffs.

MR. FALK: Well, you'll see it in the transcripts of Falk v State Bar which are in your archives somewhere. I suggest that you look them up.

JUSTICE YOUNG: Is this a necessary precondition before we can reach this issue.

MR. FALK: I don't see why it is. You have plenary control over the Bar. You established this for objecting when the Bar takes a position on some particular piece of legislation. This is not something that would probably even be covered by that administrative order. But whether it is or not you're not bound to limit yourselves to that procedure. That procedure was for people to get some of their dues back. All the people here objecting to LAWPAC presumably are smart enough to cross it off so we're not actually paying anything for it but we're seeing the State Bar using subsidy from other aspects of our mandatory dues to fund

the printing and mailing and so forth of this form. Mr. Pirich said well this is just like buying a mailing list from the city clerk, or a list of registered voters or something like that. Well it's not. It's more like when they send out your tax bill if they also said oh, and, here's $25 for LAWPAC. You can take it off your tax bill but you have to fill out this line, follow your way down the form and recalculate your tax. I can't imagine why anyone would think a city could do that or any taxing authority could do that. When you're doing official things with the government you expect the government to be doing only government business with you, not twisting your arm to make contributions to this, that or the other political organization. And I think Justice Taylor was right on when he said he would love the opportunity to do that in the next election cycle.

JUSTICE TAYLOR: That was Justice Young.

MR. FALK: Justice Young, yes. Everybody else blames you for these sorts of things, I may as well join the group.

JUSTICE YOUNG: And I wouldn't have to hire a consultant to do it.

MR. FALK: It would be much more efficient. I also don't know how the State Bar can say that it thinks it's paying the market rate for this unique service. I'll bet West Publishing would like to buy a line on here that says here's $500, we'll send you West's Michigan law on CD-ROM. It's a negative checkoff. But I'm sure they would be happy to do that. They might even given us a bargain rate. And the funny thing is, Mr. Pirich refers to §57. When §57 does allow the use of a public facility, it says "public facilities owned or leased by or on behalf of a public body if any candidate or committee has an equal opportunity to use the facility". Well, the State Bar has admitted that they won't sell the service to anyone else, so they're not giving equal rights, they're only giving it to LAWPAC. No other PACs, no Allan Falks, no Robert Young re-election committees. Just LAWPAC. And irrespective of what §57 says, they're violating their solemn undertaking to this Court in litigation, made a stipulation. They argued later in a federal suit that what this Court decided in Falk v State Bar was *res judicata*. They won on that basis in federal court. So it seems to me that if it's *res judicata* they can't get out of their stipulation particular by unilateral conduct. I suppose this Court could give relief from their stipulation. Courts can generally do this. But they've shown no good cause for relief from that stipulation so irrespective of the Campaign Finance Act or anything else, the State Bar is simply in violation of its solemn promise and stipulation to this Court that it wouldn't do this sort of thing.

JUSTICE TAYLOR: And your understanding of that stipulation, Mr. Falk, is what.

MR. FALK: They said they wouldn't set out any kind of commercial mailings to any member of the State Bar who objected. So at the time I objected and for a year I was off the commercial mailing lists. I'm back on the commercial mailing lists. Every year I've objected to

LAWPAC. I write on the form. So if the State Bar wants to pull out my forms for the last 20 years they can show them to you. I say I object to this being on this form. I object to receiving this solicitation.

JUSTICE YOUNG: (inaudible) to LAWPAC, it goes to inclusion on a commercial mailing, correct.

MR. FALK: Well, giving what LAWPAC is, it has nothing to do with the State Bar's direct function of anything to do with regulating lawyers or keeping track of lawyers, helping with lawyer discipline, funding --

JUSTICE TAYLOR: You're saying it's a commercial use, and the nature of the stipulation would be that anyone who ever objected would just simply be taken off the list, but under that stipulation they would be able to send it out to you objected, is that the idea?

MR. FALK: Well they can't take me off this list because I have to get my dues notice, otherwise I'll lose my license to practice.

JUSTICE TAYLOR: But I mean there could be arguably under that stipulation a separate list of people who have objected who don't have the (inaudible)

MR. FALK: Well, I suppose they could do that. Even then you'd have a problem with the uniqueness of the service they're offering and it seems to me that any commercial entity or any other PAC or lots of other activities ought to be given the same opportunity for the same really bargain price to get a negative dues checkoff. I would like to make one correction to what Mr. Pirich said. Everything else I agreed with but he said he was taking an unpopular position. I think if you polled the Bar on this it would be a very popular position because it turns out that only 10% of lawyers actually contribute to LAWPAC.

JUSTICE YOUNG: So there are a lot of Philadelphia lawyers out there.

MR. FALK: I don't think you have to be a Philadelphia lawyer to be opposed to LAWPAC. That's a no-brainer. Thank you.

JUSTICE WEAVER: Any other questions Justices? Thank you. Mr. Al Butzbaugh.

MR. BUTZBAUGH: Good morning, Chief Justice and Justices. Tomorrow at noon I'm going to be privileged to have Justice Brickley install me as president of the State Bar and I just want to let you know that it's clear to me that the Bar needs to have a process and a policy and procedure set forth as to what happens about the dues statement, how things get on, and all these issues that are being addressed today. Friday afternoon the Board of Commissioners will have a meeting and I want to inform you that I will seek at that time that the

Board authorize me to appoint a special committee for the purpose of researching these issues, getting them clear, getting a clear policy, getting a clear statement as to exactly what the Board's position and the position of the Bar will be in the future.

JUSTICE CORRIGAN: Mr. Butzbaugh, are there any time limits on what you're suggesting?

MR. BUTZBAUGH: I will do that as quickly as we can. I don't have a time limit in mind, but I would certainly abide by whatever time limit the Court would suggest.

JUSTICE TAYLOR: You would want to have it done before the next mailing of dues, right?

MR. BUTZBAUGH: No question about that. We will do this quickly.

JUSTICE CORRIGAN: Well, we've had this, apparently it's been in the courts since sometime in March. So,

JUSTICE WEAVER: Is 60-90 days a sufficient time for you to accomplish that.

MR. BUTZBAUGH: Certainly.

JUSTICE YOUNG: I certainly would favor the Bar having a good internal discussion about the propriety and legality of this and other issues that are on the Bar dues. If we don't have to do heavy lifting, I don't mind letting the Bar do its own lifting.

MR. BUTZBAUGH: We want to do our own lifting.

JUSTICE WEAVER: Would it be helpful for the average Bar member to have a place where it's calculated what they have to pay, period, and then leave another space where they could add whatever else they want to pay as opposed to adding and subtracting and all that that's being talked about.

MR. BUTZBAUGH: Right. I think we're going to try to find a way to simplify the dues statement as much as we can--

JUSTICE CORRIGAN: Mr. Butzbaugh, in my mind I just want to be clear with you though sir, that there's still a problem as far as I'm concerned if you're subsidizing postage for them under the language of the statute. I think that has to be addressed.

MR. BUTZBAUGH: Okay, we will address that. We plan to address all the issues that the Court has raised.

JUSTICE WEAVER: Any questions, any comments, Justices?

JUSTICE YOUNG: I certainly welcome (inaudible).

JUSTICE TAYLOR: Don't neglect to deal with that stipulation issue. That is quite intriguing.

MR. BUTZBAUGH: I will do that. And thank you too, Justice Young.

JUSTICE WEAVER: We thank you very much for coming, Mr. Butzbaugh. Elizabeth Hardy.

MS. HARDY: Good morning. Madam Chief Justice and Members of this Court. My name is Elizabeth Hardy and I'm appearing this morning on behalf of LAWPAC. I'm a member of the Board of LAWPAC and I've been a member for approximately 3 or 4 years. And I wanted to just address with the Court the purpose and the function of LAWPAC. There are some questions that arose during the May hearing that indicated that this Court may have some questions about how we function and what we view our purpose as being, and I'm here to address those issues and to respond to any questions you may have. We are a board of four. We have members of our board which are chosen to represent different regions as well as the plaintiffs' bar, the defense bar, some people who are active in the Republican party such as myself, others who are active in the Democratic party and some who have no party affiliation at all. We do not have any ideological bent in terms of the overall view of our board and how we make decisions in terms of contributions we will make.

JUSTICE YOUNG: You mean that you have no ideological or you have no partisan?

MS. HARDY: We certainly do not have a partisan bent. And although monies are contributed to members of the Legislature who we hope will take an interest in some ideological issues that we have upon our profession, we do not advocate any particular ideological position as a group. We are simply interested in contributing to members who serve in public positions who take an interest in and share concerns about our profession and are people that we can have a dialogue with about the profession when there are issues that arise in the legislative context or issues that arise in any public context in which we want to be able to discuss positions and decisions and approaches that we feel would be constructive.

JUSTICE YOUNG: So the PAC expends funds without any anticipation of influencing legislative activity for or against the Bar.

MS. HARDY: No. We certainly hope to have influence. That is the very purpose of a PAC. Of course we do. But the point is--

JUSTICE YOUNG: Isn't that the nature of ideological First Amendment activity.

MS. HARDY: Of course it is. And I think the distinction here is that we want to have an influence on those ideological issues which post Keller the Bar can't have an influence on. A limited number of issues. We want to be able to have a dialogue with members about those particular issues.

JUSTICE YOUNG: Mr. Ellsworth said that the Bar could expend those funds directly under Keller. What differentiates the PAC, if Keller sets the outer limits of what the Bar may engage in that is non-ideological, what does the PAC do that's different.

MS. HARDY: The PAC very simply does nothing more than contribute monies to public officials, candidates for public office who we feel share an interest in the profession. Bother to take an interest in the profession.

JUSTICE TAYLOR: You would be a positive interest, would it not. You wouldn't just be an interest. It would have to be an interest which you think is salubrious to lawyer interests.

JUSTICE YOUNG: I take it you would not support a representative Falk.

MS. HARDY: Well, I've been confronted with that question.

JUSTICE TAYLOR: It's terrifying to think of isn't it.

MS. HARDY: I think it's fair to say that our primary purpose would be to identify people who we think would share an interest in our profession in a positive sense. But there's members in leadership. People who are moving into leadership in the House and the Senate who maybe haven't previously expressed much of an interest in the profession or in policy that impacts our profession. We would certainly want to have a dialogue with those members to develop some understanding and in an educational way have some impact on their thinking down the road. So I don't think it's fair to say we exclusively contribute to people who we determine are --

JUSTICE TAYLOR: They either are a neutral or a pro.

MS. HARDY: Well, we contribute to both, neutrals or pros.

JUSTICE TAYLOR: But no negatives.

MS. HARDY: Well, not necessarily. If someone who has been previously negative is moving into a position of leadership--

JUSTICE TAYLOR: Well, they're moving towards neutral. I'm not trying to be difficult but in other words, I think this is clear. You wouldn't support with LAWPAC money people who are negative.

MS. HARDY: We would not support somebody who was negative who we did not view as at least open-minded enough to have an opportunity to

JUSTICE TAYLOR: The most you would do is a negative who might be moving, but a negative negative who's never going to change, you're not going to--

MS. HARDY: Right, a negative negative who's never going to change is someone we probably would not spend our money on, or I would not suggest we do.

JUSTICE TAYLOR: Okay, that being the case, why isn't that in its nature ideological?

MS. HARDY: Well, I'm not taking the position that it's not for the advancement of ideological positions ultimately. It's that the board itself in its decision making process does not approach the issue with any kind of litmus test in terms of what this member's position might be or

JUSTICE TAYLOR: (inaudible) any goal is an ideological goal, whichever way, we don't know precisely which ideological goal it is, but it's always going to be ideological.

MS. HARDY: Of course it will be in terms of those issues that the Bar can lobby on.

JUSTICE YOUNG: Well let me ask the question starkly. Mr. Falk has made rather a substantial career of trying to get the Bar disunified and a voluntary Bar. I take it that a politician who holds those views would probably not get LAWPAC funds, correct?

MS. HARDY: I can't answer that actually.

JUSTICE YOUNG: All right. Well, why should Mr. Falk who is a member of the Bar by virtue of statutory requirement, not be unhappy with this process. That the Bar is tied to an ideological entity like LAWPAC.

MS. HARDY: Because the only monies that LAWPAC spends are voluntary monies that certain members choose to contribute to LAWPAC for this purpose. Mr. Falk does not choose to make that contribution. He is not contributing toward any of the monies that

LAWPAC expends. Along with 90% of the other members of the Bar who elect not to contribute.

JUSTICE CORRIGAN: Except to the extent that there's a subsidy going, whatever the extent of that subsidy is.

MS. HARDY: That would be correct if there was a subsidy. And I believe that's what the Bar has worked very hard in recent months to resolve to insure that there isn't a subsidy because that is their obligation under the law.

JUSTICE YOUNG: Why do you want so desperately to maintain your position on this dues notice which requires me to strike the $35 if I choose not to make the contribution.

MS. HARDY: Because it is one vehicle, assuming there is an appropriate fair market value determined for what the value of that service is, to collect money and to communicate with members of the bar and to determine if they are interested in contributing to LAWPAC.

JUSTICE YOUNG: And how have you determined, this is a unique vehicle for collecting LAWPAC funds, correct?

MS. HARDY: Unique as in?

JUSTICE YOUNG: Unique as in the alternative are that you have to send out letters to members of the Bar or the public at large requesting that they contribute money, whereas now you are a rider on a dues notice that must go out to every bar member and every bar member must then take some affirmative action in order not to make the contribution. That's unique, is it not? Do you know of any other fundraising activity in the political arena where that is the case. You must take action so as not to make a contribution to a PAC?

MS. HARDY: Well it certainly happens in the union setting.

JUSTICE YOUNG: Yes, yes, and there are a few Supreme Court cases--

JUSTICE TAYLOR: Didn't the Legislature legalize that, though?

MS. HARDY: I do not think, and I'm not--

JUSTICE TAYLOR: Something went through recently in the Legislature in the last couple years about negative checkoffs.

MS. HARDY: Well perhaps on negative checkoffs. There still is checkoff provisions related to union dues. But you know, I guess in this context on this issue of is this or

is this not a negative checkoff, my personal view would be it doesn't really matter. It is very clear how someone goes about contributing or not contributing. Ninety percent of our membership elects not to contribute. I don't think we have a real issue that people are confused by this form and unable to exercise--they're lawyers after all--

JUSTICE YOUNG: Other than at Honigman, I think that probably is the case.

MS. HARDY: I thought I might offer the assistance of our secretarial staff to (inaudible). They handle filling out these forms on our behalf.

JUSTICE WEAVER: Let's move right along here.

MS. HARDY: But my purpose, just in closing, is to indicate that the LAWPAC function is to just identify people in public office or people who are interested in serving in public office who share an interest in our profession. And to have people there who are receptive to issues that impact us, people with whom we can have a dialogue. We don't contribute to people because of any particular ideological bent that they have. Any particular partisan affiliation that they have. We have intentionally constructed our board in such a way so that the decision making represents various view of people within the Bar and is not in any way tailored toward any particular party or any particular ideological bent.

JUSTICE WEAVER: Any other questions, Justices? Thank you Ms. Hardy for coming. Any one else for item 3. We will now turn to item 4, which is Canon 7 and 8. And we'll start with the Honorable Richard Bandstra.

Item 4 Canon 7, 8

JUSTICE WEAVER: Judge Bandstra, we're happy to be in your quarters today. But I would suggest that you get a few light bulbs up here.

JUDGE BANDSTRA: Yes, it looks a little dark. On behalf of the Court of Appeals I want to welcome most of you back to this bench. We of course on our bench usually sit on panels of three so compared to most people in this position this is more than twice as good or bad depending on how you look at it. But I am delighted to appear before you. My remarks today are not as chief judge of my court or on behalf of my colleagues but are on behalf of myself. We move from the world of LAWPAC into the world of judicial campaigns. And I want to talk today about Canon 7 and proposed new Canon 8 of the Code of Judicial Conduct. To begin with I generally believe that the proposed changes address real problems that have to be addressed. These are not cures in search of a disease. With that said, I will limit my remarks to specific portions of the proposed changes, the ones which have generated the most controversy in my view. The proposal would add a new subsection 4 to Canon 7a to deal with problems that arose last campaign cycle with judges forming associations and those associations taking positions regarding candidates for judicial office. As I see it the worst problem that can result

from this kind of campaign activity arises out of the fact that it is impossible for the general public to clearly understand which judges the association speaks for when it takes a position. I have heard stories and I think that you will hear stories from judges today who feel that their position as to candidates last year was misrepresented by associations of which they were really only nominal members. Section 4a of the proposed new language seeks to address this problem by requiring that an association list a name and title of each member within it whenever an association endorsement is made. I think this goes part of the way toward addressing the problem but it's not quite enough. The proposed listing of judges should be specific to those who support the endorsement being made, not merely those who are in the association. If that approach is followed the general electorate cannot be misled. They will understand exactly who is taking the position and be able to weigh properly the information as they go to the polls. To require less I think will inevitably result in confusion and open the possibility for deception. For example in the broad geographic area where I have to campaign, a few judges could ban together with some high sounding name like The South Central Michigan Judges College to oppose or support me or some other candidate for re-election or election. Voters in that area might be led to conclude that this college represented the best or all of the local trial judges in their region and vote consistently with what they perceived to be an informed endorsement of local people that they have elected. If the proposed new rule is adopted, the nature and extent of judicial authority behind an endorsement would be clearly observable and confusion or deception would be prevented. With respect to Section 4b of Canon 7a I would only note that this language replicates identical language that presently is in pace for individuals running for judicial office as found in CJC 7(B)(1)(d) and I see no reason to hold associations to any lesser standard with respect to false, fraudulent or deceptive campaign activities. Finally, with respect to the new section 4, these provisions do regulate the campaign activity of judges and I know that some might argue that this is in derogation of judges' rights to free speech and political expression. I disagree because the Code of Judicial Conduct already does this in many significant ways, for example by preventing us judges from making endorsements in non-judicial races. The question is not whether political activity of judges can be regulated. Instead the question is whether the proposed regulations are appropriate. As I see it, the gist of new section 4 is that judges must let voters know who they are when they make political endorsements and they also must be fair and honest. I think these regulations on judicial political activity are minimal and necessary to protect the integrity and public perception of our judiciary. The proposal would also change the present $100 solicitation limit for lawyers to $300. Considering how much inflation has occurred since the $100 limitation was put into place and the ever escalating cost of campaigns, I think some increased amount is appropriate. I don't pretend to know whether a tripling is appropriate or some other increase is appropriate and people with better math minds than mine can come up with that. My point is simply that the $100 amount was put into place long ago without complaint as I recall things and I see no reason for complaint if it is adjusted simply to reflect inflation that has occurred. Beyond that I have a concern that the present system does not provide any special protection for counsel who are regularly appointed by judges to represent indigent criminal defendants.

JUSTICE YOUNG: On that point, Judge Bandstra, would you support a rule that would preclude judges who make appointments, and it isn't just indigents, I gather that probate judges make quite a few appointments to administer trusts, etc., we received quite a few comments about the quid pro quo relationship between judicial fundraising as an extraction in exchange for these appointments. Would you support a rule that would--

JUDGE BANDSTRA: I certainly think that is a proposal that deserves your consideration. I haven't thought through it fully myself so that I can stand here and say that I support it. I see a huge problem if the public perception is that people are basically securing employment--

JUSTICE YOUNG: I think it's the lawyer's perception that if I don't contribute, I don't get an appointment.

JUDGE BANDSTRA: Yeah, right. But if the press gets into it and points out to the public how this system works I think there could be a real impact on the perception of the judiciary amongst the citizens of Michigan that I would hate to see and I guess my point today is simply that if we raise the $100 amount to $300, whatever problem that exists in this area is going to triple, so I think it's a good moment for the Court to consider that particular problem with respect to appointed counsel. Finally, I want to mention the only proposed change that I think is perhaps inappropriate or problematic, I think it is inappropriate to allow judicial candidates to accept contributions after the date of an election. This will entice candidates, I think, to incur large debts perhaps during their campaigns, and then if successful, to repay those costs through donations by people who want to be on the right side of this sitting successful judge. I can think of nothing that would present a greater appearance of impropriety and the resulting lack of public confidence in our judiciary. So I hope that this provision is not included when you--

JUSTICE CAVANAGH: Would there be a distinction in your mind between the day after the election and the 180 days preceding it for a sitting judge. I mean given the reality, we have an elective system and that in judicial campaigns, as you're aware, major expenditures come towards the end of the campaign, your campaign debts and finances don't come in until the end, it always has kind of intrigued me that judges over the years, an awful lot of judicial candidates have had to eat debts simply by virtue of the fact that they didn't get that money the day before the election. And I think the intent in an elective system is to minimize the appearance of an impropriety but I think that provision was simply thrown out to see what reaction it would produce and I think it has produced probably more than any of the others.

JUDGE BANDSTRA: I think that you could argue that people who want to make contributions, and I guess we're talking about lawyers here, can kind of predict who is going to win in advance, but if this is put into place and a successful candidate simply has money rolling in the door because he or she has won the election the day after, that is to me so unseemly looking that I'm not sure it's worth the change. I'm pretty sure it's not if that occurs.

JUSTICE CORRIGAN: One of the practical problems I just have to comment--we got a letter from a judge who said if you adopt this rule, as a practical matter why would anyone give to you before the election. Just wait until after and contribute to the winner.

JUDGE BANDSTRA: Maybe so you could know who your real friends are. I'm, as you know, I've been reading this and I will submit this in written form. Thank you.

JUSTICE WEAVER: Thank you. Now. Judge Paul Clulo.

JUDGE CLULO: Good morning Chief Justice and Justices. Thank you for the opportunity to speak to you this morning on this very important issue. May I take just one moment to thank you all for your leadership in that fine annual conference we had. That was the greatest conference I think that the judges in my association, and I think the probate judges would agree, have had in years and thank you. It was your leadership that brought that about.

JUSTICE WEAVER: Glad to hear we're doing something right.

JUDGE CLULO: You're doing something right. This issue came to our table at that conference, as a matter of fact. And I have to tell you that part of the problem of responding to it in our system, that is the Michigan Judges Association, was that it did not go through our regular committee procedure and we took it up as a committee of the whole and dealt with it in a fairly short time frame and that's one of the concerns I have to say to you. It seems to me that the points that are being made and the issues here are important enough that the fast track ought to be reconsidered. I'm not even comfortable with the letter--and by the way, I'm not sure that you have the draft letter that I sent on behalf of MJA as to our position, and it was because it was a draft, and that's simply because I didn't get back in vacation in time, quite frankly, to give you the final--you will have it this week. And I can briefly tell you what our positions are. But one thing I want to say about the letter you're going to receive. You will find as we go through these that the MJA executive board did oppose some of these positions. The opposition is simply a statement of our concern about the specific language, not the principle. The principle is one that we can't argue with and would not argue with.

JUSTICE YOUNG: Did you propose alternatives to deal with the underlying issues?

JUDGE CLULO: I would like to now, and because of time constraints we did not have the opportunity to get into it. And that's one of the issues, Justice Young, that I'm concerned about. There are alternatives and I can mention a few right now and I will.

JUSTICE YOUNG: Well, what you're essentially asking for is additional time to make some considered judgments about how to deal with the underlying problem.

JUDGE CLULO: Exactly. So as you read the letter that you will receive from me, don't take opposition as a statement of disagreement of the principles you are trying to address here, because there is no disagreement over that. The main concern that was expressed in our committee of the whole in dealing with this issue is the attempt to bring the Canons which are individualized, have always been designed at individual judges, and the process of the Judicial Tenure Commission and enforcement of them under the Constitution which itself specifically states that the Judicial Tenure Commission in Article VI, Section 30, is in place to enforce the Canons against individual judges. In fact I'm paraphrasing, but that is the concept of the constitutional provision. And taking that canon concept and engrafting it over the association model causes difficulties.

JUSTICE YOUNG: How about Chief Judge Bandstra's proposal that it simply require that judges who are making the endorsement ensure that their names are listed in support of the endorsement.

JUDGE CLULO: I can say this for our association. We don't endorse. Period. We're not going to, but obviously other associations have. I have no problem with that.

JUSTICE YOUNG: Simple disclosure. Every judge has an obligation--

JUDGE CLULO: My only concern is this, and perhaps it's a little bit off the wall. My concern about that would be that if it's a large enough association, by making that requirement you have effectively prevented any meaningful communication of an endorsement if you're going to require, for instance, an association of our size, just an the example of 240 judges, having to have their names on any kind of communication makes that communication just as a practical matter difficult to deal with. Other suggestions that have been made in that regard would be to have any list like that, whether it's a list of membership or a list of endorsers, in a public place somewhere, whether it's filed with the Court, the Supreme Court Administrator's Office, Secretary of State's office, I think that conversation could take place to get at that very issue, but I'm not sure that Judge Bandstra's proposal isn't a good one. I just worry about the practicality of it in terms of numbers of people involved in some of these associations. I do have trouble though when I think of enforcement, assume that a decision is made that an association has somehow violated the canons by some public pronouncement or whatever it may be and the enforcement of that, I don't know how you do it under our system. Do you enforce it against the individuals of the association

JUSTICE YOUNG: Who are listed as endorsers.

JUDGE CLULO: Just the endorsers, the officers?

JUSTICE YOUNG: If the ethical requirement is not to mislead the public, and that is what has occurred, the disclosure principle of the rule as suggested by Chief Judge

Bandstra requires that each judge ensure that he or she is listed in support of an endorsement made by an organization, then why isn't that an ethical obligation of each individual judge.

JUDGE CLULO: It is. Then why not leave the Canons as they are. If those people have made an endorsement that has some violation, they can be gone after.

JUSTICE YOUNG: But the question is, if it's the Judicial College of Central Michigan, no one knows who that is.

JUDGE CLULO: We are all in agreement that we are going to know who they are in some fashion or another.

JUSTICE YOUNG: So you're not concerned about the obligation to disclose which judges are participating in that associational endorsement, that's not the nature of your concern.

JUDGE CLULO: That's not the nature of my concern, no. The nature of my concern is just coming to grips with how enforcement would actually take place in the association model and if in fact we can use the association public announcement so that everybody knows who we're talking about, then I think we've taken away the problem, quite frankly, you probably are correct.

JUSTICE WEAVER: Do you have other points, Judge Clulo?

JUDGE CLULO: Just a few. Interestingly enough, as we talked about, and I think inflation is what we're talking about in the $100/$300, and if my math is correct on that, the $300 is very close to what CPI would tell you after the amount of years that's gone by. I didn't think that was going to be a controversial subject but as we talked about it, and this is a subject that is particularly unique for the judges from the major metropolitan areas. It isn't to say that the cost of judicial elections has not gone up all over the state, it has. But relatively, proportionately much greater in the larger metropolitan areas. And those judges to a person on our committee voted to oppose raising this $100 to $300. And the reason is that they are uncomfortable with the proposition at all, let alone raising the dollar amount, and they're uncomfortable with it for all the reasons that you've just discussed. The implication of money passing hands between lawyers and judges for any reason. The quid pro quo statements that you've made. And it was almost a statement of we don't like what we have, let alone raising the ante and putting more pressure on these attorneys.

JUSTICE YOUNG: But there is a problem with the First Amendment, is there not, in this area?

JUDGE CLULO: Well, I'm not impressed with that argument, quite frankly.

JUSTICE YOUNG: Well the Supreme Court was. So what's your preference.

JUDGE CLULO: Well the Supreme Court has not addressed this issue precisely.

JUSTICE YOUNG: They have addressed however ???? v Williams.

JUSTICE TAYLOR: I think Huckley? v Williams says that if you want to limit contributions, you have to have a compelling state interest and you have to adopt the means most narrowly adapted to this, and in Florida provisions very, very similar to these were declared unconstitutional in Zeller v The Florida Bar.

JUDGE CLULO: I'm not aware of that.

JUSTICE TAYLOR: Well, that's fine, but perhaps when your committee goes back to meet, they might look at these constitutional questions because these are central and very important.

JUDGE CLULO: That argument was made, by the way, and that's why I said I wasn't impressed by it. I wasn't aware there was a Supreme Court case on point and none of us were.

JUSTICE YOUNG: And a set of bar rules very similar to these declared unconstitutional. That's one of the concerns I have when members of the legal profession come before us and are unaware of the underlying legal and constitutional issues that might be implicated. I think that may well be another reason why your organization wants to look at this again.

JUDGE CLULO: Absolutely. I couldn't put it better myself. That's right. You've stated it correctly. Quickly to address some of the other--in the other provisions, my letter to you will indicate that we are in agreement with the proposal. I want to offer this, that MJA stands ready to work on this issue in any way that the Court suggests to us. Whether it's a committee that's put together to discuss it with the (inaudible) associations--whatever fashion it is. And we want to take it up again too--

JUSTICE YOUNG: Would you also take up the issue that I raised with Chief Judge Bandstra that a proposal to preclude judges from soliciting from attorneys who have made appointments.

JUDGE CLULO: Sure. A topic that I can speak to personally, I can't for the association, but I can't agree more. That is a very sensitive issue. The implications of it, the implications of impropriety, the public perception, I couldn't agree with you more. Yes, we will.

JUSTICE WEAVER: Thank you Judge. Our next Judge is Judge Robert J. Danhof.

JUDGE DANHOF: Chief Justice Weaver, Justices of the Supreme Court and alumni of the Court of Appeals. And if I was still Chief Judge the bulbs would be working.

JUSTICE YOUNG: You might pass that along to the Chief sitting back there.

JUSTICE WEAVER: I see that Judge Bandstra made a note.

JUDGE DANHOF: Now when you retire you go from who's who to who's that. That's about where we are. Election of judges is at best a bad situation. Being shot at from ambush is even worse. And there really is no good system, I assume. We debated in the constitutional convention every conceivable system to select judges, and that's what we're doing, selecting. Whether we elect, whether we appoint, whether we anoint, whether we take them out of a bag, it's selecting somebody to be a judge or a Justice. We have the elective system in this state. Justice Brickley, you tried years ago to get petitions signed to change it and it just didn't work. They said it wouldn't work in New York but it did, surprised everybody. And their supreme court, court of highest jurisdiction, is now appointed through a so-called modified Missouri plan. I'm sorry that the Supreme Court considers it necessary to change Canon 7 due to what transpired apparently last fall, but it is something that is I think necessary. Without getting into whether all of the nomenclature is absolutely correct, certainly if a group of judges wants to form an association of whatever name and they are going to get into endorsing candidates as an organization as opposed to individuals, then they should be identified. I recall colleagues or friends of mine who were in Illinois when they had the Greystone investigation, or Greylord. And they're on a retention ballot, and they were worried. Not those who were involved, those who weren't. Because they have to get 60% plus one. And they were worried, they didn't have a named identifiable opponent. You're being shot at by the media, you can't fight that unless and until you get your own campaign funds and run your own ads. So the elective system, whether it's a live opponent or whether it's not, and you are the only group that under the current nominating system, is guaranteed an appointment, no judge on the Court of Appeals, no circuit judge is guaranteed an appointment, but you are through the current nominating system, which I would suggest that somebody again would take a look at the nominating system. And the best we could do at the constitutional convention was to allow an incumbent to file an affidavit as opposed to having going through what is now the party convention. And of course Justice Levin circumvented that by forming his own, and he got himself elected. Somebody should take a look at the current nominating. What you go to I don't know. Maybe it's the Court of Appeals. Maybe a nominating commission, etc. It's not going to eliminate partisanship in the election because one party or the other is going to choose a candidate and put their resources behind it. But we ought to look at it. I think you have to do with Section 4 of Canon 7 and deal with this anonymous types of associations. The $300 contribution, elections are expensive. The $100 is way historical past. Just remember, if you form a committee it says you should not solicit for more than $300 a lawyer. You don't have to solicit at all. Just say send a check for any amount

you deem fair and necessary and appropriate. The 45 days after, man I went through a few elections, I think I would have liked that. I never really had a huge debt, but I never had anything to give away back to the, because I only had one non-contested out of all that I had. But I think it's something that you've got to consider very carefully. I think Justice Young, you raised the power of judges to appoint certain lawyers. Not in the Court of Appeals. You've got nothing. There are no cookies to pass out. Probate judge, big, big difference, particularly in the larger counties, and I can relay a personal experience to that. A friend of mine who was a probate judge and came to the Court of Appeals. And when it came to throwing a fundraiser there was absolutely no comparison. He is not on the bench now so I can say that.

JUSTICE YOUNG: Not because of the fact that he came from the Court of Appeals.

JUDGE DANHOF: No, he left the bench because his salary was too low. With that, I'll conclude any remarks. If you've got any questions? I appreciate the opportunity to appear. I'm glad you appreciate this courtroom. Most of you sat here at one time or another. I started in the exhibitor's building. My predecessor designed this building but it was dedicated when I was the chief judge so I invited Judge Wosinski back because Senator Vanderlahn was very instrumental at that time in getting the facility built. Thank you very much.

JUSTICE CAVANAGH: We never could get the key from Judge Burns to the elevator.

JUDGE DANHOF: No, nor did we have the apartment building parking garage which my predecessor wanted. I said I'm not sleeping in any parking garage in the dark.

JUSTICE KELLY: Judge Danhof, is it your position that no lawyers association should be able to endorse judicial candidates?

JUDGE DANHOF: I was president of an association. I would never have asked that. If individuals groups of judges want to do it, I think they ought to sign up and do it. And I personally don't think--I think associations of judges, circuit judges, district judges, should exist for the purpose of working on rules, on legislation, of ironing out problems that exist in court administration, but when it comes to candidates I think it should be an individual judge and if a group of them want to get together as such and say okay we are supporting so and so, very dangerous position by the way.

JUSTICE KELLY: Why should they be treated any differently than any other association of common interest.

JUDGE DANHOF: Because judges are second class citizens the minute you walk on the bench. You are not as free, as a judge, to do what you want to do as you are as a practicing attorney. It's just very simple.

JUSTICE KELLY: Why should they not be as free with regard to the endorsement.

JUDGE DANHOF: Well, they are from an individual standpoint.

JUSTICE KELLY: Why should their associations not be as free.

JUDGE DANHOF: Because I think judicial elections are not necessarily on certain programs or policies and I just think that associations of judges should not take that stand in elections. That doesn't prevent me when I was on the bench of endorsing and helping my colleagues who were up for re-election and I did that. And I think individually a judge should be able to do it. Your canons allow that. But to form an association and then sort of hide behind it, as Judge Bandstra, whatever name you want to put, I think it's an inappropriate activity on the part of judges. That's my own opinion.

JUSTICE WEAVER: Any other questions? Thank you Judge Danhof. Always good to see you. Judge William Crane.

JUDGE CRANE: I appreciate the opportunity, Chief Justice and other Members, to address you. I understand and support, as I understand it, the provisions of Canons 7 and 8 subject to two needed fixes because I perceive that they support the concept of a non-partisan independent judicial branch of government. The background of my being here arose out of at least my and other fellow judges' concerns over some of the proposals that are part of the judicial reform that seem to jeopardize some of the traditional non-partisan relationship. As a result of some of this frustration, some of us joined the Northern Michigan Judges Association. Unfortunately the executive board strayed a bit from the purpose of the judicial reform concerns in proceeding to make an endorsement without consulting the members and without submitting their endorsement to the members and in my case over my objections for the reasons. The implication was that all of the northern judges supported these endorsements. Well that then moved me to become public in my opposition to their position which frankly I felt very comfortable undoing because I don't feel that it particularly is fulfilling our non-partisan independent role as judges in the system. The two fixes that I would urge are that as to Canon 7.2.a, I would add a recommendation adding the word "partisan" in front of the words "political gatherings". I've always understood judicial campaigns are political gatherings. I've also understood that non-partisan judges can take part in other individual non-partisan judicial campaigns with the exception that money cannot be solicited. The wording of the present 7.8.b.a (?) appears to prohibit attending an individual judge's fundraiser or by its definition of political gathering, under proposed (A)(2) would also prohibit the endorsement of that candidate. I assume that the goal of this proposal was to prohibit attending partisan political gatherings to raise funds for an individual judge's name and by adding the word "partisan" ahead of "political gathering" I think it would clarify that point. But otherwise if you read the literal wording it

appears that we can't even support other individual candidates. The concern over 7(A)(4), (a) arises from what Judge Bandstra alluded to earlier and that is--

JUSTICE TAYLOR: Judge Crane, I'm confused. This thing as I have it reads a judge may attend political gatherings.

JUDGE CRANE: Correct. And then it goes on--

JUSTICE TAYLOR: Doesn't that cover everything, whether they are political partisan, technically partisan or not.

JUDGE CRANE: The problem I have is when you get down to the word not on the second line, not the individual judge by name. In reading political gatherings including fundraisers, we may attend those but not if one is for an individual judge.

JUSTICE TAYLOR: Okay, okay, I get it.

JUDGE CRANE: And so every judicial gathering is a political--I think what you're after is prohibit us getting involved in partisan rallies for an individual judge. I've never seen one in our area but assuming that that's the problem, anyway that's my concern there. The other as Judge Bandstra alluded to is that by requiring the association to list all the names that even makes it worse because then our name is out there and although we weren't consulted and have no input into the executive board's decisions--

JUSTICE WEAVER: I think (inaudible) was only those people who would be endorsing.

JUDGE CRANE: I support that idea. I might say generally, as with lawyers endorsing judicial candidates, I've never felt that it did the candidate any particular favor, but aside from that I support your efforts to keep us in a non-partisan independent judicial mode here and I appreciate those efforts.

JUSTICE WEAVER: Any questions of Judge Crane? Thank you Judge. The next one is Judge Timothy Hicks.

JUDGE HICKS: Good morning Madam Chief Justice, Members of the Court. Thank you for listening to us here today. The difficulty speaking after so many others have so eloquently expressed their views is that the comments that I have so carefully scripted out on the this page of paper over the last two days are all pretty much irrelevant at this point. I tend to agree with what Judge Bandstra has said and I'd like to respond to some of the comments. I'd like to first share with you the personal experience that I had, which is perhaps a bit unique because I think it demonstrates the position of judges caught squarely in the crossfire. My late

colleague, Michael Cobbs who passed away in 1997 was a charter member and a very serious member of the Northern Michigan Judges Association. He invited me to attend some meetings--

JUSTICE WEAVER: Are you from Muskegon?

JUDGE HICKS: I'm sorry. I'm chief judge of the 14th Circuit Court in Muskegon.

JUSTICE WEAVER: (inaudible) in Northern Michigan then?

JUDGE HICKS: Well, so is Saginaw. I'm learning some of these things and I think one of the other judges is from Corunna or somewhere a little bit lower than that.

JUSTICE WEAVER: I guess there are a lot of us from Northern Michigan that (inaudible).

JUSTICE CAVANAGH: Anything north of Wayne County.

JUDGE HICKS: Well, I've had that happen before, Justice Cavanagh. I once started an MJI presentation by saying to my colleagues in Wayne County, haven't you ever stood at the Ambassador Bridge and wondered where the other end was of I-96 and the answer was no, we never did. And I said Muskegon is the other end. But I was thrust squarely into this (inaudible) last summer because I was supporting certain judicial candidates and I was on a mailing list for the Northern Michigan Judges Association and I think they presumed that I was pretty much with their efforts and suddenly the endorsements or the comments came along and am I in the Northern Michigan Judges Association or am I not, I didn't know. I worked for my candidates and I spent the next month or so at judicial conferences trying to dodge colleagues from Northern Michigan, most of whom I respect and who I may have offended and who I didn't know because I had only been a judge for two years. I see some problems. One, it creates a divided judiciary. Two, I think it even erodes confidentiality on individual benches. In my own circuit there are four of us and we generally saw the recent elections the same so we didn't have serious battles. I know Judge Cobbs (inaudible) he was a may of strongly held convictions and very vocal about it and it would have been pretty ugly. And we would have sparred in good faith I'm sure, but I think that it would have created problems for us, at least at the election time.

JUSTICE CORRIGAN: Judge Hicks, let's say the policy of organizing in that fashion is perhaps not wise. Does it make it something that is nonetheless illegal, or should be illegal?

JUDGE HICKS: Justice Corrigan, I think the question you ask is one that Justice Kelly's earlier question touched on which is this. I have encouraged the Court to look at the bigger view here, not so much what is legal, but the view of where the judiciary and the State Bar should be in Michigan political life, in American political life.

JUSTICE CORRIGAN: But over that, and I think as the other Justices have alluded to earlier is the fact that we are conducting free elections in this country and that there are First Amendment rights and certainly there are associational rights of individuals, including judges. Where do you draw that line. You have to guarantee impartiality. That's a constitutional guarantee as well, but how do you draw that line?

JUDGE HICKS: Well, as Judge Bandstra said already, I think some of those rights have already gone from us when we attain this office. There already are some restrictions on what we can and cannot do publicly. This I think is another one of those. It's one that I'm proud to accept but I think that comes with the position that we hold in American political life. Maybe I sound like Pollyanna here, but in my community judges are still held in a certain position of respect and one of the things that you're going to have to consider is whether we're going to take judicial races and essentially make them the same as other political races. This is a policy question I think. I think there's--

JUSTICE YOUNG: Well, there are associational issues here, are there not. The question asked by Justice Kelly was, I think one way of paraphrasing it is how far can we condition associational rights even of judges. And I guess you would favor, I gather from your comments, the absolute prohibition of judicial associations for the purpose of making political endorsements. Is that your position?

JUDGE HICKS: Essentially yes.

JUSTICE YOUNG: The proposal that is out there is very much narrower than that. There is nothing in the proposal at least as I see it that precludes any association of judges from making endorsements, but what it does focus on is an unremarkable foundational premise that no individual judge, and therefore no association, can make false or misleading endorsements. And further conditions an associational endorsement on the disclosure who is there. Why isn't that a very narrowly tailored approach even if you add Chief Judge Bandstra's proposal that this be a more individualized driven ethical obligation. Why isn't that a narrowly tailored principle that vindicates our interest in not having the judiciary involved in something that it might better not be but at least allows that and allows the public to understand who it is that are making these endorsements.

JUDGE HICKS: I agree. I think the principle is narrow and tailored. The concern that I have is this. If the Court were to accept Chief Judge Bandstra's suggestion then the ad would say in my hypothetical association would be, the Lakeshore Judges Association, for a guy in Muskegon it's perfect, it's wonderful with the Great Lakes we have. It could cover anybody, all the way around. The ad, Justice Young, would say "Lakeshore Judges Association" and then have the names of the particular judges who have made the endorsement. In that case I think the organizational name is superfluous and in fact creates the appearance that there are

other members of the Lakeshore Judges Association who haven't signed on. Justice Young, I have been--

JUSTICE WEAVER: And isn't that what the public should know?

JUDGE HICKS: Yes, that's what I believe. The concern I have is enforcement. And I'm going to say something now that is probably the scariest comment that I've made. I have been so presumptuous as to think that I could draft something that encompassed my objections. I'm prepared if you will give me permission to approach the bench, to present it to you unless you would rather just have me submit it in the file.

JUSTICE WEAVER: Submit it to us.

JUDGE HICKS: I will do that. And essentially, Justice Young, my suggestion would be to take the organization out of the mix and make it enforceable. The concern is this. Five years from now the Lakeshore Judges Association has stepped over the line so who is the Judicial Tenure Commission to sanction?

JUSTICE TAYLOR: What is the hypothetical where they step over the line Judge Hicks? I can't think of one. I mean, the only thing I can think of is they list somebody, a judge, as being one of the endorsing members who isn't.

JUDGE HICKS: Well, I meant the association may--the statements that stepped over the line, a statement that was false, deceptive, misleading or things like that. My concern, Justice Taylor, is five years down the road then, would the Judicial Tenure Commission sanction the organization?

JUSTICE TAYLOR: You're saying perhaps the Lakeshore Judges Association endorses for governor.

JUSTICE YOUNG: And it properly lists those who are making the endorsement.

JUDGE HICKS: Well, that wouldn't be sanctionable, I wouldn't think.

JUSTICE YOUNG: What wouldn't be sanctionable?

JUSTICE TAYLOR: Well I think that would be, because they can't make a partisan endorsement.

JUDGE HICKS: Oh, partisan, I'm sorry, I was focusing on the false or fraudulent.

JUSTICE TAYLOR: So wouldn't they then go after the endorsing judges? So you just have to be careful what you sign on to.

JUDGE HICKS: Correct. But again, the organization in my view becomes superfluous. It adds nothing to the advertisement.

JUSTICE TAYLOR: Well, that's a different problem. That's the ineffectuality of the presentation but in terms of who you would discipline, it would be if the endorsing judges endorsed the governor in that race, hypothetically five years from now--

JUDGE HICKS: Correct. And then you would discipline the endorsing judges.

JUSTICE TAYLOR: I'm just trying to address the problem of who gets disciplined.

JUSTICE YOUNG: What is that an enforcement difficulty?

JUDGE HICKS: Well if you've accepted that change, I think you've probably eradicated the enforcement problem.

JUSTICE WEAVER: Anything else, Judge Hicks?

JUDGE HICKS: No, ma'am, except to say that I think the 45 day situation after the election is one that my wife would like, having taken care of our finances after my election, but I do think that it creates the possibility of a real unseemly situation. Thank you very much.

MR. FALK: I'm practically the only non-judge here. I'm just a voter who believes in a good judiciary. Pretty much I think we have one and I'd like to see it remain that way. This is a very, very difficult problem for everyone. I think everyone can see that there's no right or wrong answer. This is a classic political question for the Court to wrestle with. But you're wrestling in a context of the First Amendment. If you make judges associations reveal their membership, you have to deal with NAACP v Button. That's a problem. If you go enforcing against, you know, if the Northern Judges Association has 200 members and 150 of them vote to do something that you think is a violation of rules, are you really going to go after 150 judges. It seems unlikely.

JUSTICE YOUNG: Are you suggesting that there can be no compelling state interest in the integrity of the judiciary such that the rule of NAACP v Button might be somewhat different in this context?

MR. FALK: I'm glad you asked me that. No, what I would suggest though is that to the extent you want to make these regulations and you see the First Amendment problem

or any other Amendment problem, you should accompany your regulation with a finding that establishes the necessary compelling state interest for possible treading along the First Amendment line. As in Buckley v Valio--

JUSTICE YOUNG: (inaudible) to the federal court we have at least a legislative finding.

MR. FALK: Something like that. In Buckley v Valio the thing that allows limits on post-campaign contributions is because it looks like bribery.

JUSTICE CORRIGAN: Articulate the compelling state interest that would prevent these organizations from existing, if you can.

MR. FALK: From existing? I wouldn't suggest that these organizations can't exist. I mean we all agree that judges associations are a good thing in general.

JUSTICE CORRIGAN: All right, from existing and endorsing candidates. Is that where you're going?

MR. FALK: No, I wasn't proposing that judicial associations shouldn't endorse candidates if they want to. Perhaps, however, you could go about it a different way. The Legislature periodically makes certain words off limits for use by other than a defined group of people. For example if you want to call yourself a psychologist you've got to be one. I can't call myself a psychologist. I haven't taken the licensing exam and I haven't passed it and I don't have any of the educational qualifications. I can't call myself one. I can call myself a lawyer because I passed that licensing process. So perhaps the Court wants to create a number of official judges associations. The Michigan Judges Association is for everyone. The District Judges Associations, the County Judges Associations or circuit--

JUSTICE YOUNG: Wouldn't that throw us into all kinds of political intrigues about whether we were going to endorse friendly organizations or unfriendly organizations.

MR. FALK: No, no, these would be official organizations so they would not be allowed to endorse candidates and you would put off limits the words judges associations. Judges can form associations, they just can't call them judges associations, or something that sounds like that. You prevent them from using those words and perhaps that's another way to solve the problem. I'm not saying that's the greatest solution, I'm just saying we need to start thinking outside of the box because we're too used to doing things one way and we tinker with things and we're not really solving the problems. Everyone else has spoken saying that contributions after the election are pretty much a bad idea. I would tend to agree but if you think from your own experiences running campaigns and looking at the bills that you have to pay on the one hand the day after the election and the money remaining in your campaign fund which is probably a lower number in the other, how do we deal with that. Well perhaps Chinese walls or

blind trusts would solve that problem. Certainly all the objections being made to letting winning judges collect money after the election doesn't apply to losing candidates, so perhaps we should let the losers collect. I think it's very clear that there can be no First Amendment limit on the time before election that you can start raising money. There are a number of cases cited in my memo to the Court that pretty much say that. There is no compelling interest in limiting the time before an election in which you can raise money. You might start raising money now for the 2020 election or something. To the extent that this timing--

JUSTICE YOUNG: You do not think consistent with the Constitution, the Court cannot set a time certain within which--a period certain for fundraising.

MR. FALK: No, I don't believe so.

JUSTICE CORRIGAN: I think that's the Zeller case in Florida, that was one of the holdings. That that was invalid under the First Amendment. But that being the case then, why should there be any rules with regard to judges having to dispose of all the campaign funds. Why can't you just keep permanent campaign funds going. Aren't those equally objectionable under First Amendment grounds.

MR. FALK: Well, I think they are and I think your existing rules and this proposed rule carry on some requirement that after the election if you have funds left over, you lucky person, you have to get rid of them in a particular way. My own suggestion would be that you have to get rid of them by returning them pro rata your contributors. I don't think people contributing to judicial candidates necessarily are endorsing the candidate saying okay I'll give it to the State Bar Foundation or something like that.

JUSTICE YOUNG: But you're making a policy argument, you're not making a constitutional--

MR. FALK: No, that's not a constitutional argument.

JUSTICE TAYLOR: What about having them be either back to their original distributors or to the much discussed FALKPAC.

JUSTICE YOUNG: Yeah, or by reverse checkoff.

MR. FALK: Earlier you recoiled in horror at the thought that I would be a candidate for office--

JUSTICE YOUNG: It did send chills down a lot of peoples' backs.

MR. FALK: That's what really offended me about Mr. Pirich saying that he was up here being unpopular. I said I have a monopoly on being unpopular.

JUSTICE YOUNG: So he's encroaching.

MR. FALK: I really resent him horning in on my territory.

JUSTICE WEAVER: Do you have anything else, Mr. Falk?

MR. FALK: Yeah, you also have to--some of this involves addressing the problems elsewhere. For example, if indeed judges, we all know that judges can affect lawyers' incomes in a variety of ways, but where they can do it directly through patronage, through handing out appointments for indigents of various kinds, perhaps we need something like the system we have for appellate indigent criminal defense. I was recently appointed by the Governor to the Appellate Defender Commission. The Michigan Judges Association at Justice Corrigan's instance have studied the operation of the Michigan assigned appellate counsel system. And there is some sentiment among the Judges Association to abolish MAACS and restore the appointment process more directly to the judges but if you do that then you are exacerbating the problem you have.

JUSTICE YOUNG: But what if you make it unethical for a judge to solicit from those who get appointments.

MR. FALK: Well, you could do that but then as the saying goes, if you did the process so it was perfectly honest, you say if I can affect your income you can't give to me, nobody will give to me.

JUSTICE YOUNG: A judge may not solicit or accept a contribution from a lawyer who has received an appointment. Why doesn't that get rid of this problem quid pro quo?

MR. FALK: Well, it gets rid of some of it, but only some because besides making appointments you could just rule in my favor, particularly in a discretionary situation. You know the saying is a good lawyer knows the law but a great lawyer knows the judges, and it's hard to get around that. And the blind trust isn't going to work because people are giving money for a reason. They want it known that they gave the money, for the most part.

JUSTICE TAYLOR: Are you suggesting the blind trust is something to make the 45 day thing viable.

MR. FALK: You would think so.

JUSTICE YOUNG: Are you suggesting it a bit more broadly?

MR. FALK: No, I think it would make a post-election contribution viable if you could make it a truly impenetrable process. You could either allow people to direct their contributions or require it to be just put into a pool but as long as it was administered by an organization of unimpeachable integrity and with a requirement that they not--

JUSTICE TAYLOR: Would you like to have the State Bar do that.

MR. FALK: I would suggest someone else. They're having enough problem trying to follow the state and narrow with LAWPAC.

JUSTICE WEAVER: Is there anything else?

MR. FALK: Well, this problem of before and after the election also, fortunately all the elections are on Tuesday, so you might tighten up your regulations of how you judge when a contribution is made before. The problem is everybody now has their own postage meter so I could meter a couple of envelopes on the Friday before the election and then write checks on Wednesday. There would have to be some way of tracking a check as being actually written and received the day of or the day before the election.

JUSTICE WEAVER: Well, if they had to be deposited on the day of the election, that would take care of the problem.

MR. FALK: Yeah, something like that. But these are very, very difficult problems. I would urge you to actually hold off and see where the Legislature is going with this because the Legislature is the primary body in our state government that is responsible for the period of elections.

JUSTICE YOUNG: So why don't we defer everything. I think Mr. LaBrant has suggested that we should get out of the business of setting limits. The Legislature has already done that in the Campaign Finance Act and--

MR. FALK: Well, unfortunately although that would be a great thing if it would work, I don't know that the Legislature has as much interest in the integrity of the judicial election process as you do. One of the problems for example, one of the members of this Court, I think, was ambushed in the last election, somebody saying look at my opposing candidate's list of contributors from that candidate's campaign finance report. The candidate thus attacked because the other candidate hadn't filed a campaign finance report.

JUSTICE YOUNG: Why don't we make it unethical to violate the Campaign Finance Act.

MR. FALK: Oh, I would endorse that and not only that, suggest that it be mandatory that if you made a serious campaign violation that you be removed from office by the

Judicial Tenure Commission. That's the only way to put teeth in it. The Tenure Commission is not a very toothful organization at the moment. It does little (inaudible). It just cut a deal with a judge who has been reprimanded before, now for a 60 day suspension. Dropping four or five counts. This makes the Free Press. I don't think this makes anybody look good. Thank you.

JUSTICE WEAVER: Thank you. Judge Root.

JUDGE ROOT: Good morning, Chief Justice, Associate Justices. I'd like to thank you--

JUSTICE WEAVER: We are all just Justices, there are no associates justices--

JUDGE ROOT: My apologies. I'm here to address Canon 7 and proposed 8 only in the context of the issue of judicial endorsements and the issue of judicial associations generally. I won't repeat all of what you've heard already. I'm a member of the MJA executive board and executive committee. I am also a nominal member of the Northern Michigan Judges Association. My circuit is the 49th. I cover Mecosta and Osceola counties. And the experience that I went through in the process that really has brought us to this point I think today is perhaps the greatest example of why I think we need to have some reform, although I do see some concerns with the reform we have on the table today. When the NMTJA, to use the alphabet soup, came up with its endorsements I got it in the mail. I was appalled and threw it away. I did not as requested disseminate that endorsement through the local media nor did I step back from it. The people in my area did not know about even the existence of the NMTJA. And I didn't want to highlight it and their activities by trying to distance myself from it. So it put me in that quandary. Obviously the activity of the NMTJA was controversial, is controversial and should be controversial. And we need to put in place some firewalls to make sure that sort of thing does not occur again.

JUSTICE YOUNG: What is it that was the problem? What are we trying to fix here?

JUDGE ROOT: We're trying to avoid, as I understand it, an organization of judges, or at least captioned as such, and I'll come back to that in a minute in terms of the language in the proposed order, coming out and saying that the membership makes this particular endorsement when in fact the decision was made by a small group within that organization, an executive committee or a committee established for that purpose. And one approach has been outlined in the proposed amendment to Canon 7(A)(4). I echo the comments of Judge Clulo who is the president of the MJA that as an association we have had difficulty in responding to this thoroughly because of the compressed time frame we are looking at and I would ask that the Court refer this back to whatever its organizational committee is to study this further and the MJA would love to work with you on this. For example, in looking at (2)(4) it says an organization consisting exclusively of judges. That could be circumvented by the ingenuous, including their secretaries, perhaps, as members. All of a sudden we have somebody who is not

under the purview of that rule, or their law clerks or whatever. Personally I think the better approach would be to simply indicate that under (A)(2) a listing of what judges may do, judges may endorse judicial candidates but must do so in their individual capacities and not as members of an organization, and that way we could do the classic endorsement ads, preserve the individual judges' rights of endorsement.

JUSTICE CORRIGAN: But how does that (inaudible) earlier question. Judges have associational rights like other citizens don't they.

JUDGE ROOT: They do, and this does not impinge on their rights to form associations and be members of associations. My experience with the associational endorsement process is that that is one thing that we should take away from the associations by allowing judges to exercise their endorsement powers or rights individually.

JUSTICE CORRIGAN: Isn't that the preeminent exercise of First Amendment rights in the area of saying who should be elected. Isn't that at the core of the First Amendment?

JUDGE ROOT: Indeed. And comments have been made today as to judges losing areas of their First Amendment rights. I can't endorse governor, things of that nature. Partisan politicians. And when judges make endorsements regarding other judges that carries the weight with the public far beyond what would happen if a legislator or a lawyer or a John-Q citizen, some non-judge made the endorsement in a judicial election.

JUSTICE WEAVER: Well, what do you propose Judge?

JUDGE ROOT: I think that a viable approach, and I think we need to discuss all of those that have been mentioned today as well as this one would be--permit judges individually to exercise their endorsement rights. They may do it as part of a group endorsement. The classic endorsement ad, but they would not do so as a member of any particular judges association. The problem with a judges association saying our members endorse, here are those that endorse, and here is the geographic area we cover. Well the negative inference is drawn from that. For the astute they would look at that, see in their county if their judge is listed. And if their judge is not listed, they may draw a negative inference from that. That the person not in the endorsement then is not supporting the person whose name is identified in the ad. So whether that's true, or whether that's simply a logistical problem in getting that judge to sign on before the publication date deadline, we would never know. At least the person reading the ad in the newspaper would never know. So I think that by having the individual right of endorsement preserved, get away from all of the language that seems so problematic regarding associations and proceed that way would eliminate many of the problems we've been discussing and hearing discussed this morning. That would also touch I think also on even whether or not there is a need for Canon 8 because Canon 8 seems to at least in the context of the amendments to Canon 7 largely be driven by the question of endorsements. There

may be other reasons for it too that I'm not privy to and you've discussed in your administrative meetings.

JUSTICE WEAVER: Judge, would you mind telling me what the name of the association that made the controversial endorsement, did you say it was the Northern Michigan Trial Judges Association.

JUDGE ROOT: That's the formal name, yes. NMTJA.

JUSTICE WEAVER: That's the name of it. Now, are you an officer of that?

JUDGE ROOT: No I'm not.

JUSTICE WEAVER: Do you belong to it?

JUDGE ROOT: I'm a nominal member, I pay dues.

JUSTICE WEAVER: Could you tell me at the time of the endorsement were there any district judges or probate judges belonging to that group?

JUDGE ROOT: If I can recall correctly, yes. I think it's all the trial judges listed in the counties listed and I don't have the list with me.

JUSTICE WEAVER: Well, can you tell me the name of any particular probate or district judge who belonged to that group. My understanding is there were none.

JUDGE ROOT: I cannot say. I'm not an officer, I don't have access to the membership list, I honestly do not know.

JUSTICE WEAVER: Well, I did see them. So let's assume that--you're from Osceola and Mecosta counties, right, and we'll presume that's Northern Michigan. And I guess we'll presume that Muskegon is Northern Michigan and we'll presume that Saginaw is Northern Michigan and actually the list showed a member from Wayne County so I guess we'll presume that Detroit is in Northern Michigan, so let us presume that all of Michigan is Northern Michigan because it's certainly north of Ohio, but if that's the case, so maybe we'll say it is an inceptive name, but if there were no district or probate judges belonging to their organization, is the name Northern Michigan Trial Judges Association an accurate description of that group?

JUDGE ROOT: I think that's a problem that was referred to earlier in terms of when you pick a name you make certain implications and whether people are actually members or not becomes another issue. Whether they are eligible to become members is something else. Should a judges association be limited only to its membership?

JUSTICE WEAVER: So that is deceptive to the average voter as he sees an endorsement from the Northern Michigan Trial Judges Association.

JUDGE ROOT: I would think that that would be true.

JUSTICE WEAVER: (inaudible) problem we're trying to avoid.

JUDGE ROOT: Correct.

JUSTICE WEAVER: And that's what your proposal is, is to not have them endorsing at all.

JUDGE ROOT: Correct. The MJA does not endorse. I've been on the MJA executive board for 10 years. We've never done an endorsement. I've been around during the Northern Michigan Judges devicol(?) (inaudible) while I was also on the executive board of the MJA. It was discussed. We reaffirmed. It's more of a practice than a policy of not endorsing. I've talked to Barry Howard, for example, who could not be here today. He indicates that as incoming president he will not get involved in endorsements. Bill Kaprathy (sp), president when the Northern Judges did theirs would not get involved in the endorsement process. Judge Clulo, current president, has not, and that will continue for the indefinite future. Whether it is a matter of compulsion by an act of this body, or whether it is simply our tradition. That is not going to happen with the MJA. There are potentials for smaller groups of judges who may be of a particular partisan affiliation or ideological affiliation who would say organization X,Y,Z of judges or the judicial college or whatever, there is no limit on what they could call themselves. If they start getting involved in endorsements, the perception to people who don't know who the underlying organization really is is that this group really makes endorsements on behalf of all of their membership. If we require judges to make endorsements only in their individual capacity such as the old classic endorsement ad, getting away from organizational endorsements altogether, then I think we could eliminate the need for getting all the complicated language and analysis--

JUSTICE TAYLOR: Are you suggesting, Judge Root, that we would just simply add a provision that a judge can make an endorsement, but only in his own name.

JUDGE ROOT: Correct. And whether we need to go to further say he could collectively do so with other judges, all in their individual names, I don't know. That's something we need to sit down and talk about.

JUSTICE TAYLOR: Are you planning to work with Judge Clulo on this. I think this is a pretty good idea. If you guys came up with some language and proposed it to the Court.

JUDGE ROOT: I would be happy to do that.

JUSTICE WEAVER: Any further questions? Thank you Judge Root.

JUDGE ROOT: Thank you for your time.

JUSTICE WEAVER: Mr. David Kallman.

MR. KALLMAN: Good morning Chief Justice, Members of the Court. I appreciate the opportunity to speak regarding Canon 7. Specifically I just want to address the issue of the proposal to raise the solicitation level of contribution from attorneys to $300. Given encouragement from certain family members, I have considered in the past running for a judicial office and probably will do so in the future. And I think that this is a consideration that I have taken into account and will take into account because I think it is a very important one. I would ask the Court, and it has already been discussed, to really consider the First Amendment implications here. If a non-incumbent, and in trying to run for an office--

JUSTICE TAYLOR: You're talking about the solicitation limit, Mr. Kallman.

MR. KALLMAN: The solicitation limit specifically, yes, the raising it to $300. The Buckley case has already been mentioned and while in that case the contribution levels were upheld, still the First Amendment implications were clearly addressed. And I think at this point the $100 has been in place for an awful long time and I think in today's dollars, if you go back it's worth what $35 or something like that at this point. So at what point do the First Amendment implications for candidates come into play there in terms of soliciting. I think it's a very important issue.

JUSTICE YOUNG: Mr. Kallman why shouldn't we simply, the Legislature has very recently established the equivalent limitations as those that were involved in Buckley. Why shouldn't we simply defer to those limitations that are now embodied in the Campaign Finance Act.

MR. KALLMAN: I wouldn't see any reason not to do that. I think the $100 level though is the problem at this point because I think that is really (inaudible) for constitutional reasons. I just think that is such a low level at this point that it becomes prohibitive and is in fact an impingement on a candidate's First Amendment rights. In the Buckley case there were other aspects where the Court did throw it out, for example the restriction on personal finances. How much money you could put in personally into a campaign, which I'm sure Mr. Forbes is very happy was thrown out at this point in time. But I think the constitutional issues are very important. Finally I would just maybe offer one suggestion to the Canon because I think 10 years, 20 years from now we're going to have the same problem if there is some limit put on this. That maybe there should be some thought given to putting in an automatic mechanism to have an increase based on the CPI index. In fact there is some case law support for that. The 8th Circuit case of Russell v Burris which ties the CPI to expenditure increases

every year, so it's not something that you have to keep coming back and addressing time after time. So I would encourage at least giving some consideration to that.

JUSTICE CORRIGAN: Mr. Kallman, did you make a written submission?

MR. KALLMAN: No I did not.

JUSTICE CORRIGAN: Would you give us that case cite.

MR. KALLMAN: Yes, it's Russell v Burris, 146 F3d 563, 570 (8th Cir, 1998). Thank you, if there are any questions--

JUSTICE WEAVER: Would you mind submitting that in writing.

MR. KALLMAN: Absolutely, I would be happy to do that. Thank you very much.

JUSTICE TAYLOR: Mr. Kallman, are you acquainted with the Zeller case from Florida.

MR. KALLMAN: Not--I read Buckley before coming in today. I mean, I'm obviously familiar with the case but I'm not--

JUSTICE TAYLOR: Well, Zeller is fairly on point too where these limits were just simply tossed out.

MR. KALLMAN: Right. Thank you.

JUSTICE WEAVER: Thank you. Mr. James Mick Middaugh.

MR. MIDDAUGH: Chief Justice Weaver, Members of the Supreme Court, I'm James Mick Middaugh and I'm a member of the Judicial Tenure Commission and while my statements this morning are not necessarily those of the Judicial Tenure Commission, my experience as a member of the Commission, my 16 years as a member of the State Legislature, and nearly three decades in public service tells me to address this Court today. Although I will not address all of the proposed amendments to the Michigan Code of Judicial Conduct, there are three proposed amendments which will, in my opinion, assist the work of the Tenure Commission, and I urge the Court to adopt them.

JUSTICE CORRIGAN: Mr. Middaugh, just so I'm clear, the Tenure Commission submitted a letter. You're speaking on your own behalf, you're not representing the Commission in any way, and we should consider that letter independent.

MR. MIDDAUGH: Accurate, Justice Corrigan. These amendments consider lawyer solicitation, thank you notes and attendance at political party events. In reference to the proposed amendments to Canon 7(B)(2)(c) concerning lawyer solicitation, the proposed disclaimer is a sound solution to the recent attempts to use the Judicial Tenure Commission as a tool in high profile judicial elections. In the 1998 elections, attorneys received fundraising solicitations from judicial campaigns in excess of $100 because fundraising mailing lists do not distinguish between attorneys and non-attorneys. Shortly before the 1998 elections the Judicial Tenure Commission received a number of complaints coming from all sides, alleging these so-called egregious violations of the Michigan Code of Judicial Conduct. The Judicial Tenure Commission eventually dismissed all of these complaints because we recognized them as attempts to use the Judicial Tenure Commission in these high profile judicial races for purposes that in my opinion the Judicial Tenure Commission was simply not intended. The Judicial Tenure Commission is not and shall not be a group of fundraising solicitation referees in judicial elections. We are not playground monitors for this type of activity. The proposed disclaimer allows a judicial campaign to raise funds in excess of $100 while at the same time provides adequate notice to attorneys of their solicitation rights. The proposed disclaimer protects the goals of the Michigan Code of Judicial Conduct and helps prevent baseless complaints from being filed with the Judicial Tenure Commission. With respect to the proposal concerning thank you notes in Canon 7(B)(2)(a), I think that every judge writes thank you notes to contributors. But I understand that there are certain State Bar ethics opinions that could prohibit the practice. Therefore I perceive thank you notes as an unnecessary ethical trap for the unwary judge. Again, to avoid needless complaints with the Judicial Tenure Commission, I recommend that this Court adopt the proposed language allowing a judge to write a thank you note to a contributor. I believe that is a common courtesy. Finally, as long as judges are elected, they must be allowed to attend political gatherings. The proposed amendment to Canon 7(A)(2)(a) makes it clear that a judge or judicial candidate may attend political gatherings, including all types of fundraising events. There is no ambiguity in the proposed amendment. However, if the proposed amendment is not adopted and the Michigan Code of Judicial Conduct permits a judge to attend some types of fundraising events but not others, where is the line drawn. Our Lincoln Day dinners from one party, and Jefferson Jackson dinners permissible gatherings for a judge to attend? If the proposed amendment is not adopted then I am not sure of the answer to this question. But one thing is certain. The Michigan Code of Judicial Conduct is not clear on the point. Then this ambiguity exposes the Judicial Tenure Commission to future attempts to make it a pawn in the political process. So I urge this Court to adopt the proposed amendments concerning lawyer solicitation, thank you notes and attendance by judges at all types of political gatherings. This certainly is the process that will result and these sound amendments will provide tremendous assistance to the work of the Tenure Commission. And I would like to thank the Court for the opportunity to be here today. Thank you.

JUSTICE WEAVER: Thank you Mr. Middaugh. Any questions? Thank you. Francine Cullari. Not present. Wallace D. Riley. Oh, sorry. Mr. Riley would you mind waiting. I skipped over Mr. Robert LaBrant. Thank you.

MR. LaBRANT: Good morning, I believe, still. Chief Justice Weaver, members of the Michigan Supreme Court. I suppose that what I should do is just sit down and reserve my three minutes to Wally Riley, but I won't. What I did previously is I submitted some written comments on three issues back on September 8 dealing with thank you notes, lawyer solicitation limits and extending the fundraising season. And I would be happy to entertain any questions that you might have. What I would like to concentrate on in my three minutes is the lawyer solicitation limits. The Michigan Code of Judicial Conduct was promulgated in October of 1974. At the time we had no Michigan campaign finance law in effect. The Michigan campaign finance law was not enacted until December of 1976. It didn't take effect until June 1, 1977. At the time the Code of Judicial Conduct was promulgated there were no contribution limitations in the Michigan statutes for any political office including judicial office. And I think in some respects the Code of Judicial Conduct was an attempt to fill that kind of regulatory void and at least come up with solicitation limitations. Now when the Supreme Court adopted these particular roles they were well aware that in adopting solicitation limits they weren't at the same time imposing contribution limits. In fact the State Bar offered an amendment to the Supreme Court to add the word "acceptance" along with "solicitation". Now over the years with the exception of the Supreme Court there have been no contribution limitations at all for candidates for local office including district court judge, in those communities that have municipal court judges, circuit court judges and the only limitation in the law was that dealing with the Michigan Supreme Court. Now the Legislature in December of 1996 remedied that situation in passing amendments to the Michigan campaign finance law that imposed contribution limits on local candidates including judicial candidates if in fact there was a jurisdiction that has a population up to 85,000, the contribution limitation on individuals to that particular campaign, for instance like district court judge or circuit court judge would be $500. In a jurisdiction of 85,001 up to 250,000 the individual contribution limitation would be $1,000. And in those political jurisdictions at are over 250,000 like Ingham County or Oakland County or Wayne County, places like that, the contribution limitation to a circuit court judge or a probate judge would be the same as a statewide candidate, it would be $3,400, along with judges running for the Michigan Court of Appeals. I would suggest that instead of getting the Court involved in the indexing of solicitation limits via the means of the Consumer Price Index periodically or coming up with some sort of disclaimer which frankly I don't understand what this disclaimer says. Does it say that basically, using $300 as the proposal, that if you're a lawyer and you get this solicitation for a $1,000 fundraising event, because you happen to have a Bar card, you can come to that event and crash it and only pay $300. Or does that mean you've got to pay the $1,000 but this is kind of just a wink and a nod and we're saying that although this event is a $1,000 per person event, we're really only soliciting you for $300 but come with your $1,000 check. Now I think that this is not a very satisfactory approach to trying to deal with this. And I think the Michigan campaign finance law by imposing contribution limits on individuals, lawyers and non-lawyers alike, we ought to just live with that. And if judicial candidates have a $1,000 per person fundraising event, or $500 per person fundraising event, or $100 per person fundraising event, let the marketplace take care of that particular situation. If people are saying I'm not going to spend $1,000 to go to this event, well then they don't have to. But we don't get ourselves all embroiled with these kinds of technicalities of a disclaimer that really kind of gives

the equivalent of a judicial get out of jail card to the solicitation of something over $100 or something over $300. I'm going to try to do something remarkable and stop before three minutes and entertain any questions that you might have.

JUSTICE YOUNG: Do you think we should take the quid pro quo out of the system, and I've described (inaudible).

MR. LaBRANT: Take the quid pro quo out of solicitation.

JUSTICE YOUNG: By judges. By suggesting or making it unethical for a judge who appoints attorneys to solicit or accept from those attorneys.

MR. LaBRANT: Oh, I think that would be a meritorious suggestion. Madam Chief Justice, if there are no more questions, thank you very much.

JUSTICE WEAVER: Thank you very much, Mr. LaBrant. You get the prize for the shortest presentation. Mr. Wallace Riley.

MR. RILEY: Madam Chief Justice, Justices, almost good afternoon. I guess I'm the guy who started all this with my letter on Law Day May 1st to the Clerk of the Court in the form of a petition asking this Court to take a look at Canon 7. I suppose the Court might wonder why now. October 1, 1974 was when the Judicial Conduct Code was first adopted and there have been very few changes and as far as I know, no ongoing review of the Code. From 1982, December 9, until 1997, I didn't feel I was in any position to come to the Court to ask anything. After former Chief Justice Riley left the Court we were in an election year in '98. So this was really in the spring of '99 my first opportunity to say to the Bar and to the Court that you ought to take a look at Canon 7 and all of the problems that are involved with this, and frankly this morning as I've been sitting in the back, I've heard a lot more problems and questions and very few answers and solutions. So I may have inadvertently opened up a can of worms that would have better been left. But things have changed in '74. The cost of campaigning has skyrocketed as you all well know. And so if it was a good idea for lawyers in the integrated Bar, and that's all the lawyers, there were 10,000 in 1973, to have some interest in retaining good incumbents on all the benches, and supporting good candidates for judicial office by being able to make contributions and by being able to ask lawyers to make contributions, then that same thing is true today. So what I attempted to do in my letter was to raise some of the questions with respect to Canon 7 having to do with the role of judicial organizations, attendance of judges as political events, thank you notes or acknowledgements, which I don't consider as really much to do with ethics at all but more to do with good manners. And then the lawyer solicitation, particularly disclaimer, which seemed to be necessary because of the type of solicitations from mailing lists which do not indicate where the lawyers are, and frankly because the questions have been raised with the Judicial Tenure Commission when somebody sends out a mailing list that happens to hit some lawyers, as to whether there's a technical violation. And then of course to the amount. And if you recall in my letter, and people have talked about increases. I have not

suggested an increase. I've simply suggested that you ought to be able to solicit, if at all, for 1974 dollars. And a dollar in 1974 today, in 1998, because that's the last CPI figures we have, would be worth $330.83. So the solicitation for $300 is a solicitation for $100 in 1974 dollars. One of the things that I think I've accomplished in sitting here and listening and also in talking with the leadership of the State Bar, and particularly with the chair of the representative assembly, which this afternoon incidentally, will not consider the proposal, but instead will table it until they can study the matter further and have a special meeting of the representative assembly in November, so that they can come forward with a meaningful discussion. The ethics committee divided into two subcommittees, both as to the Code of Professional Responsibilities and to the Code of Judicial Conduct are meeting to review Canon 7 and the proposed amendments. Let me just, I'm not going to repeat the arguments that have been made, you've heard them all this morning on various things. Various people are interested in different things. I'm interested in having the question reviewed and I think that the letter that I wrote and the responding that you're now getting sort of indicates that. But one of the things that should be done is it should be noted as is often the case in Bar matters is that we tend to reinvent the wheel. The question tends to come back. In 1972 Michael Frank on behalf of the State Board of Bar Commissioners wrote a letter to Thomas Matthew Kavanagh about the new ABA Model Code of Judicial Conduct and that letter was sent to Thomas Matthew Kavanagh as well as to Justices Adams, Black, Brennan, Kavanagh, Swainson and Williams. Nothing happened until later in 1974 when another letter was sent to the Court and at that time only Justice Thomas Matthew Kavanagh and Thomas Giles Kavanagh were still in the Court. There were five different Justices. And at that time there was an Order of the Supreme Court in 1974 on the third day of May which said Order of the Court. Notice is hereby given. Pursuant to the General Court Rule 1963 933 the Supreme Court intends to adopt the following Code of Judicial Conduct with the commencement of one or more substantiated of the same. Interestingly enough was a Canon 7. And Canon 7 on the $100 matter said: "Such committees are prohibited from soliciting campaign contributions from lawyers in excess of $100 per lawyer but may solicit public support from lawyer. A candidate's committee may solicit for the campaign no earlier than 180 days before the primary election or a nominee commission and no later than 60 days from the date of the last election in which the candidate participates. So the idea that has been suggested now of contributions being accepted after the date of the election was also proposed back in 1974. The other thing that I think is somewhat significant in the history that's worth mentioning to the people who are here who are interested in this subject is that on August 27, 1974 Michael Frank again write a letter to Chief Justice Thomas Matthew Kavanagh in which he reported action of the Board of Commissioners on the Code just before it was adopted in October. And at that time Michael Frank in his letter said this. The Board firmly believes that the distinction between lawyers and laymen are both unconstitutional and undesirable. Limitations against political activity by lawyers not applicable to laymen deny lawyers equal protection of the law. And the evil growing from the apparent obligations real or imaginary of successful candidates for judicial office to those who contributed substantial funds to their campaign exists equally when such contributions flow from potential litigants and others directly interested in the judge's exercise of the office as when they flow from lawyers. Consequently the Board recommends that the limitation on campaign contributions apply to all individuals across the board. The Board also

notes that the section as presently proposed limits solicitation of funds but not the acceptance of funds, thereby establishing a glaring vehicle for evading the thrust of the restriction. The addition of the words "or accepting" which was the Bar's addition, is intended to remedy this situation. Finally the Board wishes to advise the Court that the issue of a limitation on campaign contributions by a lawyer which is subject to this provision has indirectly been considered by the representative assembly. At its mid-year March 1973 meeting, the assembly had before it a proposal to request the Court to amend the Code of Professional Responsibility, the lawyer's code, to bar all contributions by lawyers to candidates for judicial office. In the course of the debate an amendment was offered to limit such contributions to $100, that's where the $100 came from, this was in '73 just before the Court adopted. That amendment was defeated as was the proposal. So there is a history. Incidentally that Court at that time was Thomas Matthew Kavanagh, Thomas Giles Kavanagh, but by that time there were five different members. Swainson, Williams, Levin, Coleman and Fitzgerald. I'm glad that the Court has taken an interest in this. The time is right to review it. An ongoing review is appropriate and I would urge the Court as I have to the leaders of the Bar, and as Judge Danhof suggested, kind of look back and see what the wheel looks like before you reinvent it, because there is a lot of history starting with the constitutional convention and what has been considered before. And it's your charge I think, to update that to what the situation is today. Nobody when this Code was written in '74 ever in their wildest imagination envisioned a million dollar campaign for a justice of the Supreme Court. So you've got other problems. The fact is, in '74 when you were a candidate for judge the only place you could get your money was from lawyers. Maybe a few relatives and one client. But lawyers were the source of contributions. And the question was, should lawyers in the integrated bar, the 10,000, be able to be solicited to help retain good incumbents and encourage good candidates. It was true then, it's true now. Thank you for receiving my letter. Thank you for entertaining the questions. Thank you for giving me a little time this morning.

JUSTICE TAYLOR: Mr. Riley, you were president of the Bar in '74, right.

MR. RILEY: '72-'73, State Bar. I was followed by Carl Smith. I was present when it started, when it came from the ABA as the model code. It was presented to the Court, nothing happened. Two years later when Carl Smith was president, following me, it was adopted.

JUSTICE YOUNG: I guess one of the things I'd like you to do if you have not already done so, with the passing of Mike Frank, I think there is no historian in the Bar. Would you kindly share those historical records with your successor.

MR. RILEY: I can respond to that instantly. Because from what I was reading were the memos which were sent by the State Bar to the Court. Corbin Davis has them on file.

JUSTICE YOUNG: We have them. I'm suggesting you might want to share because no one currently in the Bar was there in '72 when you were there. Even though these

may be in someone's files, I'm questioning whether your successor, the president of the Bar, or will be tomorrow, has any indication of this history and so I'm just asking you to share that with your successor.

MR. RILEY: President-elect Butzbaugh. Will do.

JUSTICE WEAVER: Any other questions? Mr. Riley, your proposal you sent to the Court did not include this proposal to extend contributions beyond the election date. Do you have any (inaudible).

MR. RILEY: Yes, I didn't put that in. I'm troubled with that proposal, I'm troubled for two reasons. It's very, very hard I think to avoid the appearance of impropriety of a losing candidate or a losing incumbent collecting money to take care of a debt. And it's even more troubling that the winner does it. There's another reason why I think I would be against it. And all of you know this because you've all run campaigns. When the date begins to approach. You've got a month now and then you've got three weeks and then two weeks and then you panic. I don't care whether you've got a designation or whether you've won your last election by a million votes. You're always worried that you might not be re-elected. And so what you do is you do all sorts of things which in a calmer moment you wouldn't do. You buy another 5,000 bumper stickers. You write another letter, you do all sorts of things, a lot of which cost money. And so I think that if you know that you can recoup it'll be like giving a credit card to a freshman in college. You'll just overspend. You'll simply be compelled to overspend, knowing that you can bail yourself out. The other side of it is, if you're good intentioned and do overspend, shouldn't you be able to do something other than Justice Cavanagh says, eat it. But it's a balance question. I think you have to decide which is which. Being able to collect money after an election has a real public relations problem in terms of the appearance and so considering our friends of the press, you might want to avoid that.

JUSTICE KELLY: Well, it might be more than mere appearance, might it not.

MR. RILEY: It might well be more than mere appearance too. But that also happens on the front end, Justice Kelly. There are people who, knowing that they are going to have business, hold until the 10 days before the pre-general filing to make their contribution. They don't do that by accident. They do that by design because their contribution is worth something. Remember it's only solicit, not accept. If you want to put accept in, if you want something that's popular with the lawyers you take that early approach that lawyers can't be involved at all.

JUSTICE YOUNG: But that would be the approach of the Legislature, of the Campaign Finance Act. You can't solicit or accept more than the fixed amount in the statute. Do you have any thoughts about that. We should just get out of the business of setting limits and allow the legislative limits that are set to prevail.

MR. RILEY: In other words, the campaign limits of all state offices.

JUSTICE YOUNG: Yeah.

MR. RILEY: And the Court of Appeals and the Supreme Court are a state office.

JUSTICE YOUNG: Well, they are specifically denominated for the judicial offices in the Act.

MR. RILEY: Might be all right. I have no opinion on that. But my idea really wasn't to rewrite it. My idea simply was to get some attention to a matter which is bound to continue in every election to cause problems unless some group sits down, weighs the risks and figures out what the next best thing to do is.

JUSTICE YOUNG: Well, I thank you. You certainly have gotten a lot of attention.

JUSTICE WEAVER: Anything further? Thank you Mr. Riley. Does anyone else wish to comment on item 4? All right, we'll proceed to item 5. 99-33. Amendment to 6.610 and 7.103.